

PAPER – 4: CORPORATE AND ALLIED LAWS

PART – I: RELEVANT AMENDMENTS APPLICABLE FOR MAY 2018 EXAMINATION

(A) Applicability of Relevant Amendments/ Circulars/ Notifications/ Regulations etc.

For May 2018 examinations for Paper 4: Corporate and Allied Laws, the significant amendments made in the respective subject for the period 1st May 2017 to 31st October, 2017 are relevant and applicable for said examinations.

This RTP of May 2018 examination is very important to the students to update themselves with the relevant amendments pertaining to the Corporate and Allied Laws. This publication will help the students to know of the significant changes, so that students may bring into line the changes in the existing provisions.

Students are advised to refer the following publications -

1.	Study Material (Edition January 2016) containing Legislative amendments issued upto 31 st October 2015.
2.	Supplementary Material (Part I) on Corporate and Allied Laws (January 2017 edition) contains amendments from 1 st of November 2015 to 31 st October 2016. Sections in the Supplementary have been incorporated in the same order and under same heading as given in the Study Material so as to enable the students to identify the additions/deletions/modifications in the Study Material. Reference of page numbers given in the supplementary will aid the students to trace the relevant sections in the study material.
3.	Supplementary Material (Part II) on Corporate and Allied Laws (August 2017 edition) contains amendments from 1 st November 2016 to 30 th April, 2017. This reading material contains the notified sections related to Chapter 15: Compromises, Arrangements and Amalgamations, Chapter 18: Removal of names of companies from the register of companies, Chapter 20: Winding up, and Chapter 21-Part II: Winding up of unregistered companies of the Companies Act, 2013. Aforesaid chapters contained in the study material of the Final Course paper 4 : Corporate and Allied Laws (January 2016 edition) shall stand not applicable. In place, respective chapters contained in the Add on reading material may be read for the examination.
4.	Practice Manual (January 2017 edition), wherein the questions & answers have been modified/ adapted on the basis of the amendments uptill 31 st of October 2016. However with respect to further amendments (For the period of 1 st November 2016 to 30 th April, 2017) answers have to be adapted as per the amendments.
5.	RTP of May 2018 examination containing a gist of all the significant legislative amendments from 1 st May 2017 to 31 st October, 2017 along with the suggested sample questions and answers for understanding and practice.

* Mentioned publications are available on the website.

Relevant amendments: The given list of relevant amendments contains the gist of amendments, reference of the page nos. of the study material along with the earlier law to enable the students an addition/ deletion / modification in the principle law.

Relevant Legislative amendments from 1 st of May 2017 to 31 st of October 2017				
The Companies Act, 2013				
Sl. No.	Heading of Amendments	Details of Amendments	Page no. of the Study material / Supplementary study paper/RTP with reference to relevant provisions (Corporate and Allied Laws)	Earlier Law
1.	Exemptions to Government Companies Vide Notification G.S.R. 582(E) Dated 13 th June, 2017	The Central Government amends the Notification G.S.R. 463(E), dated 5th June 2015. Following are the amendments: (i) According to the amendment, section 152(6) & (7), shall not apply to – (a) a Government company, which is not a listed company, in which not less than fifty-one per cent. of paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments; (b) a subsidiary of a Government company, referred to in (a) above."	3.15	The Ministry of Corporate Affairs has clarified via Notification No. 463(E) dated 5th June, 2015, that section 152(6) and (7) of the Companies Act, 2013, shall not apply to: (i) A Government company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments; (ii) A subsidiary of a Government

				company, referred above, in which the entire paid up share capital is held by the Government company.
		(ii) The word "Tribunal" wherever it occurs in sections 230 to 232, the words "Central Government" shall be substituted.	Supplementary Study paper Part (II) https://resource.cdn.icai.org/46221bos36326.pdf	Usage of word "Tribunal" in the said sections.
	Insertion of Paragraph 2A in the principal notification G.S.R. 463(E), dated 5 th June 2015	The aforesaid exceptions, modifications and adaptations shall be applicable to a Government company which has not committed a default in filing of its financial statements under section 137 of the Companies Act or annual return under section 92 of the said Act with the Registrar.		
2.	Exemptions to Private Companies Vide Notification G.S.R. 583(E) Dated 13 th June, 2017	The Central Government amends the Notification G.S.R. 464(E), dated 5 th June 2015. Following are the amendments: (1) Section 143(3)(i) , shall not apply to a private company:- (i) which is a one person company or a small company; or (ii) which has turnover less than rupees fifty crore as per latest audited financial statement or which has aggregate borrowings from banks or financial institutions or anybody corporate at any point of time during the	2.42- 2.43	Section 143(3)(i)- whether the company has adequate internal financial controls system in place and the operating effectiveness of such controls;

		financial year less than rupees twenty five crore."		
		2) With respect to Section 173(5), the following sub-section shall be substituted: (5) A One Person Company, small company, dormant company and a private company (if such private company is a start-up) shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days: Provided that nothing contained in this subsection and in section 174 shall apply to One person Company in which there is only one director on its Board of Directors.	5.4	173(5)- A One Person Company, small company and dormant company shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days: Provided that nothing contained in this sub-section and in section 174 shall apply to One Person Company in which there is only one director on its Board of Directors
		(3) With respect to section 174(3)- It shall apply with the exception that the interested director may also be counted towards quorum in such meeting after disclosure of his interest pursuant to section 184.	5.6	174(3)- Where at any time the number of interested directors exceeds or is equal to two thirds of the total strength of the Board of Directors, the number of directors who are

				not interested directors and present at the meeting, being not less than two, shall be the quorum during such time. Explanation.—For the purposes of this sub-section, “interested director” means a director within the meaning of sub-section (2) of section 184.
	Insertion of Paragraph 2A in the principal notification G.S.R. 464(E), dated 5 th June 2015	The aforesaid exceptions, modifications and adaptations shall be applicable to a Private company which has not committed a default in filing of its financial statements under section 137 or annual return under section 92 of the said Act with the Registrar.		
3.	Corrigendum vide Notification S.O. 2218(E) dated 13 th July 2017 with respect to the Notification G.S.R. 583(E) Dated 13 th June, 2017	Ministry of Corporate Affairs vide corrigendum stated that for the words “statement or” to read as “statement and” under section 143(3)(i).	Referred in point no. 2 above	In Section 143(3)(i)(ii) there were the words “statement or” which have been replaced with the word “statement and” through this notification.
4.	Exemptions to Companies covered section 8 of the Companies Act, 2013 Vide Notification G.S.R. 584(E)	The Central Government amends the Notification G.S.R. 466(E), dated 5 th June 2015. Following are the amendments: (1) Section 149(1)(b) & first proviso shall not apply on section 8 companies .	3.1, 5.25	Earlier vide notification dated 5 th June 2015 it was said that Section 149 (1) and the first Proviso to Sub-section (1) shall not apply.

	Dated 13 TH June, 2017	(2) In section 186(7)-following proviso shall be inserted-Provided that nothing contained in this sub-section shall apply to a company in which twenty-six per cent. or more of the paid-up share capital is held by the Central Government or one or more State Governments or both, in respect of loans provided by such company for funding Industrial Research and Development projects in furtherance objects as stated in its memorandum of association."		
	Insertion of Paragraph 2A in the principal notification G.S.R. 466 (E), dated 5 th June 2015	The aforesaid exceptions, modifications and adaptations shall be applicable to a company covered under section 8 of the said Act which has not committed a default in filing of its financial statements under section 137 or annual return under section 92 of the said Act with the Registrar.		
5.	Enforcement of the Companies (Audit and Auditors) Second Amendment Rules, 2017 Vide Notification G.S.R. 621(E) dated 22 nd June 2017 in exercise of powers conferred by section 139.	The Central Government hereby amends the Companies (Audit and Auditors) Rules, 2014. Through this amendment rule, in Rule 5(b), for the word "twenty", the word "fifty" shall be substituted.	2.27	Earlier Rule 5(b) stated that -all private limited companies having paid up share capital of rupees 20 crore or more;

6.	Enforcement of the Companies (Removal of Difficulties) Orders, 2017 Vide Order S.O. 2042(E) dated 29 th June, 2017	In the Companies Act, 2013, in section 434, in sub-section (1), in clause (c),- (a) in the third proviso, for "Provided further that-", the following shall be substituted, namely:- "Provided also that-"; (b) after the third proviso, the following proviso shall be inserted, namely:- "Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959."	Supplementary study paper (I), page no. 58 read with RTP, November 2017, Page No. 186	Second proviso to section 434 (c) had start with the usage of the words "Provided further that". After this second proviso, the third proviso is introduced
7.	Enforcement of the Companies (Appointment and Qualification of Directors) Amendment Rules, 2017 Vide Notification G.S.R. 839(E)	The Central Government hereby makes the following rules further to amend the Companies (Appointment and Qualification of Directors) Rules, 2014. In the Companies (Appointment and	3.3 of the Study material	According to the Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of companies shall have at least 2 independent directors:

	dated 5 th July 2017	Qualification of Directors) Rules, 2014 , rule 4 shall be numbered as sub-rule (1) and after sub-rule (1) as so renumbered, the following sub-rule shall be inserted namely :- “(2) The following classes of unlisted public company shall not be covered under sub-rule (1), namely:- (a) a joint venture; (b) a wholly owned subsidiary; and (c) a dormant company as defined under section 455 of the Act.”	(1) the Public Companies having paid up share capital of 10crore rupees or more; or (2) the Public Companies having turnover of 100 crore rupees or more; or (3) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50crore rupees. However, in case a company covered as under the above rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it. Further, any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later. However, where a company ceases to fulfill any of three conditions laid down
--	---------------------------------	---	---

				above for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions. For the purpose of the above assessment, the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account. A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.
8.	Enforcement of the Companies (Meetings of Board and its Powers) Second Amendment Rules, 2017 vide Notification G.S.R. 880(E) Dated 13 TH July 2017	The Central Government hereby makes the following rules further to amend the Companies (Meetings of Board and its Powers) Rules, 2014. Following are the amendments:	5.3 of the Study material	Earlier Rule 3(e) stated - The director, who desires, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year.

		(1) In rule 3 for clause (e), the following shall be substituted, - “(e) Any director who intends to participate in the meeting through electronic mode may intimate about such participation at the beginning of the calendar year and such declaration shall be valid for one year: Provided that such declaration shall not debar him from participation in the meeting in person in which case he shall intimate the company sufficiently in advance of his intention to participate in person.”		
		(2) In the principal rules, for rule 6, the following rule shall be substituted, namely:- "6. Committees of the Board. - The Board of directors of every listed company and a company covered under rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 shall constitute an 'Audit Committee' and a 'Nomination and Remuneration Committee of the Board'.	5.8 of the Study material	Earlier Rule 6 prescribed that the Board of Directors of every listed companies and following class of companies shall constitute an Audit Committee and a Nomination and Remuneration Committee of the Board- (a) all public companies with a paid up capital of 10 crore rupees or more; (b) all public companies having

				turnover of 100 crore rupees or more; (c) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 50 crore rupees or more.
9.	Clarification regarding applicability of exemption given to certain private companies under section 143(3)(i) vide circular no. 08/2017 dated 25 th July 2017	Notification No. G.S.R. 583(E) dated 13th June, 2017 stated that requirements of reporting under section 143(3)(i) read Rule 10 A of the Companies(Audit and Auditors) Rules, 2014 of the Companies Act 2013 shall not apply to certain private companies. Through issue of this circular, it is hereby clarified that the exemption shall be applicable for those audit reports in respect of financial statements pertaining to financial year, commencing on or after 1st April, 2016, which are made on or after the date of the said notification.	Relevant to amendment given in point no. 2 (above)	For the purposes of clause (i) of sub-section (3) of section 143, for the financial years commencing on or after 1st April, 2015, the report of the auditor shall state about existence of adequate internal financial controls system and its operating effectiveness: Provided that auditor of a company may voluntarily include the statement referred to in this rule for the financial year commencing on or after 1st April, 2014 and ending on or before 31st March, 2015.
10.	Enforcement of Section 212(8), (9), & (10) vide Notification S.O. 2751(E) dated 24 th of August, 2017	The Central Government notified the provisions of sub-sections (8), (9) and sub-section (10) of section 212 of the Companies Act, 2013 with effect from 24th day of August, 2017.	Reference of Relevant provision 212 on page no. 6.7 of the Study material	Not notified

11.	Enforcement of the Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017 Vide Notification G.S.R. 1062(E) dated 24 th Of August 2017	In exercise of the powers conferred under sub-section (1) of section 469 read with section 212 of the Companies Act, 2013, Central Government enforced the Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017. According to the Rule where any person has been guilty of any offence punishable under section 212 of the Act, he may be arrested as per the respective rules. For details see http://www.mca.gov.in/Ministry/pdf/SFIORule_25082017.pdf	Reference of Relevant provision 212 on page no. 6.7 of the Study material	Earlier not notified
12.	Exemptions given to certain unlisted public companies under the Companies (Appointment and Qualification of Directors) Rules, 2014 from appointment of Independent Directors Vide notification of circular 09/2017 dated 5 th September 2017	Vide Notification number G.S.R. 839(E) dated 5 th July, 2017 an amendment was issued through the Companies (Appointment and Qualification of Directors) Amendment Rules, 2017 inter-alia amending rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014. The said amended Rule 4 provides that an unlisted public company which is a joint venture, a wholly owned subsidiary or a	Related to the amendment given in point no. 7 (Above)	Before amendment there was a single rule. It does not prescribe the nature of unlisted public company and the meaning of joint venture.

		dormant company will not be required to appoint Independent Directors. Through the issue of this circular, it is hereby clarified that a "joint venture,, would mean a joint arrangement, entered into in writing, whereby the parties that have joint control of the arrangement, have rights to the net assets of the arrangement. The usage of the term is similar to that under the Accounting Standards.		
13.	Vide notification S.O. 3086(E) dated 20 th September 2017	The Central Government hereby appoints the 20 th September' 2017 as the date on which proviso to clause (87) of section 2 of the said Act shall come into force.	Given in the initial pages containing the definition part of the Study material	Earlier not notified
14.	Enforcement of the Companies (Restriction on number of layers) Rules, 2017 in exercise of the powers conferred under proviso to clause (87) of section 2 Vide notification G.S.R. 1176(E), dated 20 th September 2017.	Restriction on number of layers for certain classes of holding companies- (1) On and from the date of commencement of these rules, no company, other than a company belonging to a class specified in sub-rule(2) , shall have more than two layers of subsidiaries: Provided that the provisions of this sub-rule shall not affect a company from acquiring a company	Given in the initial pages in the definition part of the Study material and reference given in section 186 on page no. 5.22	Earlier not notified

		incorporated outside India with subsidiaries beyond two layers as per the laws of such country: Provided further that for computing the number of layers under this rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account. (2) The provisions of this rule shall not apply to the following classes of companies, namely:— (a) a banking company as defined in the Banking Regulation Act, 1949 (b) a non-banking financial company as defined in the Reserve Bank of India Act, 1934 which is registered with the Reserve Bank of India and considered as systematically important non-banking financial company by the Reserve Bank of India; (c) an insurance company being a company which carries on the business of insurance in accordance with provisions of the Insurance Act, 1938 and the Insurance Regulatory Development Authority Act, 1999		
--	--	---	--	--

		(d) a Government company referred to in clause (45) of section 2 of the Companies Act. (3) The provisions of this rule shall not be in derogation of the proviso to sub-section (1) of section 186 of the Act. (4) Every company, other than a company referred to in sub-rule (2), existing on or before the commencement of these rules, which has number of layers of subsidiaries in excess of the layers specified in sub-rule (1) – (i) shall file, with the Registrar a return disclosing the details specified therein, within a period of one hundred and fifty days from the date of publication of these rules in the Official Gazette; (ii) shall not, after the date of commencement of these rules, have any additional layer of subsidiaries over and above the layers existing on such date; and (iii) shall not, in case one or more layers are reduced by it subsequent to the commencement of these rules, have the number of layers beyond the number of layers it has after such reduction or maximum layers allowed in sub rule (1), whichever is more.		
--	--	--	--	--

		(5) If any company contravenes any provision of these rules the company and every officer of the company who is in default shall be punishable with fine which may extend to ten thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.		
15.	Notification of Section 247 (related to registered valuers) vide Notification S.O. 3393(E) dated 18 th October 2017	The Central Government hereby appoints the 18th October, 2017 as the date on which the provisions of section 247 of the said Act shall come into force.	-	Earlier Not notified
16.	Notification of the Companies (Registered Valuers and Valuation) Rules, 2017 vide notification G.S.R 1316(E) dated 18 th October, 2017	In exercise of the powers conferred by section 247, the Central Government hereby enforced the Companies (Registered Valuers and Valuation) Rules, 2017. Respective rule contains 6 chapters. For detailed rule click the following link http://www.mca.gov.in/Ministry/pdf/RegisteredValuers_19102017.pdf	-	Earlier Not notified
17.	Notification of the Companies (Removal of Difficulties)	In section 247(1), for the word “a person having such qualifications and experience and registered	-	Earlier section 247(1) stated as follows: Where a valuation is required to be made in

	Second Order, 2017 Vide Order S.O. 3400(E) dated 23 rd October 2017	as a valuer in such manner, on such terms and conditions as may be prescribed", the words "a person having such qualifications and experience, registered as a valuer and being a member of an organisation recognised, in such manner, on such terms and conditions as may be prescribed" shall be substituted.		respect of any property, stocks, shares, debentures, securities or goodwill or any other assets (herein referred to as the assets) or net worth of a company or its liabilities under the provision of this Act, it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed and appointed by the audit committee or in its absence by the Board of Directors of that company.
The Insolvency and Bankruptcy Code, 2016				
18.	Enforcement of clause (a) to clause(d) of section 2 of the Code Vide notification S.O. 1570(E), dated 15 th May, 2017	The Central Government hereby appoints the 1st April, 2017 as the date on which the provisions of clause (a) to clause (d) of section 2 of the Code relating to voluntary liquidation or bankruptcy shall come into force.	Page no. 8 in the Reading material on an overview of Insolvency and Bankruptcy Code, 2016 provided at the following link https://resource.cdn.icai.org/45558bos35644.pdf	Earlier it was not notified
19.	Issue of clarification regarding approval of resolution plans under section 30 and 31 of Insolvency and	Ministry of Corporate Affairs issued a clarification in view of the requirement under section 30(2)(e) of the	Reference of the relevant sections in page no. 27 & 28 of the	-

	Bankruptcy Code, 2016 vide general circular IBC/01/2017 dated 25th October 2017	Code for the resolution professional to confirm that each resolution plan received by him does not contravene any of the provisions of the law for the time being in force. Accordingly clarification was sought whether approval of shareholders/ members of the corporate debtor/ company is required for a resolution plan at any stage during the process for its consideration and approval as laid down under section 30 & 31 of the Insolvency and Bankruptcy Code and after approval during its implementation, for any actions contained in the resolution plan which would normally require specific approval of shareholders/ members under provisions of Companies Act, 2013 or any other law. Through the issue of this circular, it has been clarified that the approval of shareholders / members of the corporate debtor/company for a particular action required in the resolution plan for its implementation, which would have been required under the Companies Act, 2013 or	reading material provided at the following link https://resource.cdn.icai.org/45558bos35644.pdf	
--	---	--	---	--

		any other law if the resolution plan of the company was not being considered under the Code, is deemed to have been given on its approval by the Adjudicating Authority.		
Allied Laws				
20.	The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2017 vide Notification dated 31st May, 2017	(a) in regulation 2, in sub-regulation (1), - i. in clause (zd), after sub-clause (xii), the following new sub-clause shall be inserted, namely, - “(xiii) systemically important non -banking financial companies.” ii. after clause (zl), the following new clause shall be inserted, namely, - “(zla) “systemically important non -banking financial company” means a non-banking financial company registered with the Reserve Bank of India and having a net - worth of more than five hundred crore rupees as per the last audited financial statements. (b) in regulation 16, - i. in sub-regulation (1), - a. after the words “If the issue size” and before the word “exceeds”, the	19.27, 19.28, 19.38, 19.68	New definitions introduced. Before amendment rule 16 was- 16. (1) If the issue size exceeds five hundred crore rupees, the issuer shall make

		symbol and words “, excluding the size of offer for sale by selling shareholders,” shall be added; b. the words “five hundred” shall be substituted by the words “one hundred”; c. in the proviso , the words “an offer for sale or” shall be omitted. ii. the existing sub-regulation (2) shall be substituted with the following, namely, “(2) The monitoring agency shall submit its report to the issuer in the format specified in Schedule IX on a quarterly basis, till at least ninety five percent of the proceeds of the issue, excluding the proceeds under offer for sale and amount raised for general corporate purposes, have been utilised.” iii. after sub-regulation (2), the following new sub-regulations shall be inserted – “(3) The Board of Directors and the management of the company shall provide their comments on the findings of the monitoring agency as specified in Schedule IX.		arrangements for the use of proceeds of the issue to be monitored by a public financial institution or by one of the scheduled commercial banks named in the offer document as bankers of the issuer: Provided that nothing contained in this clause shall apply to an offer for sale or an issue of specified securities made by a bank or public financial institution or an insurance company. (2) The monitoring agency shall submit its report to the issuer in the format specified in Schedule IX on a half yearly basis, till the proceeds of the issue have been fully utilised.
--	--	---	--	--

		(4) The issuer shall, within forty five days from the end of each quarter, publically disseminate the report of the monitoring agency by uploading the same on its website as well as submitting the same to the stock exchange(s) on which its equity shares are listed.” (c) in regulation 70, in sub -regulation (4), after the words “Insurance Regulatory and Development Authority” and before the symbol “.”, the following words and figures shall be inserted, namely, - “of India or a Scheduled Bank listed under the Second Schedule of the Reserve Bank of India Act, 1934 or a Public Financial Institution as defined in clause 72 of section 2 of the Companies Act, 2013.”		
21.	The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fourth Amendment) Regulations, 2017	In regulation 70- (i) in sub- regulation (1), in clause (c), after the words and figure “ Sick Industrial Companies (Special Provisions) Act, 1985 or” and before the words “ the Tribunal ”, the words “ the resolution plan approved by ” shall be inserted.	19.68- 19.69	In Sub-regulation (1) , in clause (c) following was the provisions: “ in terms of the rehabilitation scheme approved by the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special

	notified vide Notification dated 14th August, 2017	(ii) existing sub-regulation (5) shall be substituted by the following new sub – regulation: (a) the guidelines for determining the conversion price have been specified by the Reserve Bank of India in accordance with which the conversion price shall be determined and which shall be in compliance with the applicable provisions of the Companies Act, 2013 (b) The conversion price shall be certified by two independent qualified valuers, and for this purpose 'valuer' shall be a person who is registered under section 247 of the Companies Act, 2013 and the relevant Rules framed thereunder. (c) specified securities so allotted shall be locked -in for a period of one year from the date of their allotment: Provided that for the purpose of transferring the control, the lenders may transfer the specified securities	Provisions) Act, 1985” . Further sub-regulation 5 & 6 are replaced with the following : [(5) Conversion of debt into equity under strategic debt restructuring scheme - The provisions of this Chapter shall not apply where the preferential issue of equity shares is made to the consortium of banks and financial institutions pursuant to conversion of their debt, as part of the strategic debt restructuring scheme in accordance with the guidelines specified by the Reserve Bank of India, subject to the following conditions: (a) conversion price shall be determined in accordance with the guidelines specified by the Reserve Bank of India for strategic debt restructuring scheme, which shall not be less than the face value of the equity shares; (b) conversion price shall be certified by two independent qualified valuers, and for this purpose 'valuer' shall have the same meaning
--	--	---	---

		allotted to them before completion of the lock-in period subject to continuation of the lock-in on such securities for the remaining period ,with the transferee; (d) the lock-in of equity shares allotted pursuant to conversion of convertible securities issued on preferential basis shall be reduced to the extent the convertible securities have already been locked -in; (e) the applicable provisions of the Companies Act, 2013 are complied with, including the requirement of special resolution.” (iii) existing sub - regulation (6) shall be substituted by the following new sub-regulation, namely- “ (6) The provisions of this Chapter shall not apply where the preferential issue, if any, of specified securities is made to person(s) at the time of lenders selling their holding of specified securities or enforcing change in ownership in favour of such person(s) pursuant to a debt restructuring scheme implemented in		as assigned to it under clause (r) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Issue of Sweat Equity) Regulations, 2002; (c) equity shares so allotted shall be locked-in for a period of one year from the date of trading approval: Provided that for the purposes of transferring the control, the consortium of banks and financial institutions may transfer their shareholding to an entity before completion of the lock-in period subject to continuation of the lock-in on such shares for the remaining period with the transferee; (d) applicable provisions of Companies Act, 2013 are complied with, including the requirement of special resolution. (6) The provisions of this Chapter shall not apply when any other secured lenders opt to join the strategic debt restructuring scheme in accordance with the guidelines specified by
--	--	---	--	--

		accordance with the guidelines specified by the Reserve Bank of India, subject to the following conditions: (a) the guidelines for determining the issue price have been specified by the Reserve Bank of India in accordance with which the issue price shall be determined and which shall be in compliance with the applicable provisions of the Companies Act, 2013; (b) the issue price shall be certified by two independent qualified valuers, and for this purpose 'valuer' shall be a person who is registered under section 247 of the Companies Act, 2013 and the relevant Rules framed thereunder: Provided that till such date on which section 247 of the Companies Act, 2013 and the relevant Rules come into force, valuer shall mean an independent merchant banker registered with the Board or an independent chartered accountant in practice having a minimum experience of ten years;		the Reserve Bank of India and convert their debt into equity share in accordance with sub regulation (5)
--	--	---	--	---

		(c) the specified securities so allotted shall be locked-in for a period of at least three years from the date of their allotment; (d) the lock-in of equity shares allotted pursuant to conversion of convertible securities issued on preferential basis shall be reduced to the extent the convertible securities have already been locked-in; (e) a special resolution has been passed by shareholders of the issuer before the preferential issue; (f) the issuer shall, in addition to the disclosures required under the Companies Act, 2013 or any other applicable law, disclose the following information pertaining to the proposed allottee(s) in the explanatory statement to the notice for the general meeting proposed for passing the special resolution as stipulated at clause (e) of this sub-regulation: a. the identity including that of the natural persons who are the ultimate beneficial owners		
--	--	--	--	--

		of the shares proposed to be allotted and/ or who ultimately control the proposed allottee(s); b. the business model; c. a statement on growth of business over the period of time; d. summary of audited financials of previous three financial years; e. track record in turning around companies, if any; f. the proposed roadmap for effecting turnaround of the issuer. (g) the applicable provisions of the Companies Act, 2013 are complied with.		
22.	Exemption from giving notice in section 6(2) under the Competition Act, 2002 vide notification S.O. 2039(E) dated 29 th June 2017	In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government, in public interest, hereby exempts every person or enterprise who is a party to a combination as referred to in section 5 of the said Act from giving notice within thirty days	22.15	Section does not prescribe the period for the exemption from giving notice.

		mentioned in sub-section (2) of section 6 of the said Act, subject to the provisions of sub-section (2A) of section 6 and section 43A of the said Act, for a period of five years from the date of publication of this notification in the Official Gazette.		
23.	Exemption to Regional Rural Banks from application of provisions of sections 5 & 6 of the Competition Act, 2002 vide notification S.O. 2561(E) dated 10 th August, 2017	In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government, in public interest, hereby exempts the Regional Rural Banks in respect of which the Central Government has issued a notification under sub-section (1) of section 23A of the Regional Rural Banks Act, 1976, from the application of provisions of sections 5 and 6 of the Competition Act, 2002 for a period of five years from the date of publication of this notification in the Official Gazette.	22.12- 22.16	Section does not prescribe the period for the exemption from application of section 5 and 6 of the Competition Act, 2002.
24.	Exemption to the Vessels Sharing Agreements of Liner Shipping Industry from the provisions of section 3 of the said Competition Act, 2002 Vide Notification S.O.	In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government, in public interest, hereby exempts the Vessels Sharing Agreements of Liner Shipping Industry from the provisions of	22.9	Earlier no such exemptions was there as to the Vessels Sharing Agreements of Liner Shipping Industry from the provisions of section 3 of the Competition Act, 2002.

	1933(E) 16 th June 2017	section 3 of the said Act, for a period of one year with effect from the 20th June, 2017, in respect of carriers of all nationalities operating ships of any nationality from any Indian port provided such agreements do not include concerted practices involving fixing of prices, limitation of capacity or sales and the allocation of markets or customers. During the said period of one year, the Director General, Shipping, Ministry of Shipping, Government of India shall monitor such agreements and for which, the persons responsible for operations of such ships in India shall file copies of existing Vessels Sharing Agreements or Vessels Sharing Agreements to be entered into with applicability during the said period along with other relevant documents within thirty days of the publication of this notification in the Official Gazette or within ten days of signing of such agreements, whichever is later, with the Director General, Shipping.		
--	------------------------------------	---	--	--

25.	Exemptions to all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, from the application of provisions of Sections 5 and 6 of the Competition Act, 2002, Vide Notification S.O. 2828(E) dated 30 th August, 2017	In exercise of the powers conferred by clause (a) of Section 54 of the Competition Act, 2002, the Central Government in the public interest hereby exempts, all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, from the application of provisions of Sections 5 and 6 of the Competition Act, 2002 for a period of ten years from the date of publication of this notification in the Official Gazette.	22.12- 22.16	Earlier no exemptions was there on reconstitution, transfer and amalgamation of nationalized banks from application of sections 5 and 6 of the Competition Act, 2002.
26.	The Banking Regulation (Amendment) Act, 2017 Vide Notification dated 25 th August, 2017 w.e.f 4 th May 2017	Following are the relevant amendments- Insertion of new sections 35AA and 35AB- In the Banking Regulation Act, 1949 (hereinafter referred to as the principal Act), after section 35A, the following sections shall be inserted, namely:— ‘35AA. Power of Central Government to authorise Reserve	23.8 of the Study material	These are the new insertions.

		Bank for issuing directions to banking companies to initiate insolvency resolution process: The Central Government may, by order, authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016. Explanation.—For the purposes of this section, “default” has the same meaning assigned to it in clause (12) of section 3 of the Insolvency and Bankruptcy Code, 2016. 35AB. Power of Reserve Bank to issue directions in respect of stressed assets: (1) Without prejudice to the provisions of section 35A, the Reserve Bank may, from time to time, issue directions to any banking company or banking companies for resolution of stressed assets. (2) The Reserve Bank may specify one or more authorities or committees with such members as the Reserve Bank may appoint or approve for appointment		
--	--	--	--	--

		to advise any banking company or banking companies on resolution of stressed assets.'		
--	--	---	--	--

(B) Non-Applicability of the following chapter of the Study material / Practice Manual

S.No.	Subject Matter
1.	Chapter 7 of the study material (January 2016 edition) and respective chapter of Practice Manual which deals with Compromises, Arrangements and Amalgamation. See the relevant chapter based on the Companies Act, 2013 from the Supplementary study paper (Part II) [August 2017]
2.	Chapter 8 of the study material (January 2016 edition) deals with Prevention, Oppression and Mismanagement. See the relevant chapter based on the Companies Act, 2013 from the supplementary study paper (Part I)[January 2017]
3.	Chapter 9 of the study material (January 2016 edition) covering provisions relating to Revival and Rehabilitation of Sick-Industrial Companies, is omitted by the Ministry of Corporate Affairs.
4.	Chapter 10 of the study material (January 2016 edition) and respective chapter of Practice Manual which deals with Winding Up. See the relevant chapter based on the Companies Act, 2013 from the Supplementary study paper (Part II) [August 2017].

PART – II: QUESTIONS AND ANSWERS**QUESTIONS****CORPORATE LAWS****SECTION A: COMPANY LAW AND INSOLVENCY AND BANKRUPTCY CODE****Declaration and payment of Dividend**

1. You are required to examine with reference to the provisions of the Companies Act, 2013 the following issues pertaining to declaration and payment of dividend:
 - (i) Brix Limited has earned a profit of ₹ 1,000 crore for the financial year 2016-17. It has proposed a dividend @ 8.75%. However, it does not intend to transfer any amount to the reserves of the company out of the profits earned. Can Brix Limited do so?
 - (ii) Wilson Limited is facing loss in business during the current financial year 2016-17. In the immediate preceding three financial years, the company had declared dividend at the rate of 8%, 10% and 12% respectively. To maintain the goodwill of the company, the Board of Directors has decided to declare 12% interim dividend for the current financial year. Is the act of Board of Directors valid?

- (iii) The Director of Som Limited proposed dividend at 12% on equity shares for the financial year 2016-17. The same was approved in the Annual General Meeting of the company held on 20th September, 2017. The Directors declared the approved dividends.

Mr. Ninja was the holder of 1,000 equity shares on 31st March, 2017, but he has transferred the shares to Mr. Raj, whose name has been registered on 20th May, 2017. Who will be entitled to the above dividend.

- (iv) Mr. Alok, holding equity shares of face value of ₹ 10 lakh has not paid an amount of ₹ 1 lakh towards call money on shares. Can the same be adjusted against the dividend amount payable to him?

Accounts and audit

2. Examine the validity and advice on the following matters with reference to the provisions of the Companies Act, 2013:
- (i) Prakash Carriers Limited appointed Mr. Rahul as its auditor in the Annual General Meeting held on 30th September, 2017. Initially, he accepted the appointment but he resigned from his office on 31st October, 2017 due to personal reasons. The Board of directors seeks advice for filling up the vacancy by appointment of Mr. Samuel as auditor.
 - (ii) The Board of Directors of ABC Ltd. wants to circulate unaudited accounts before the shareholders of the Company at the Annual General Meeting. Whether such an act of ABC Ltd. is tenable?
 - (iii) Managing Director of PQR Ltd. himself wants to appoint Mr. Raj, a practicing Chartered Accountant, as first auditor of the company. Comment on the proposed action of the Managing Director.
 - (iv) "Mr. P" is a practicing Chartered Accountant and "Mr. Q", the relative of "Mr. P", is holding securities of "ABC Ltd." having face value of ₹ 90,000/-. Whether "Mr. P" is Qualified from being appointed as an Auditor of "ABC Ltd."?
 - (v) XYZ Ltd. is a listed company having turnover of ₹ 1200 crore during the financial year 2016-17. The CSR committee of the Board formulated and recommended a CSR project which was approved by the Board. Company finalised the project under its CSR initiatives which require funds @ 5 % of average net profit of the company for last three financial years. Will such excess expense be counted in subsequent financial years as a part of CSR expenditure? Advise.

Appointment and Qualifications of Directors

3. (i) The composition of the Board of Directors of a listed company as on 31-03-2017 comprised of (i) Mr. A, Director, (ii) Mr. B, Director (iii) Mr. C, Director (iv) Mr. D,

Director, (v) Mrs. E, Independent Director, (vi) Mr. F, Independent Director and (vii) Mr. G, Independent Director.

Mr. D & Mrs. E vacated their office of Director on 15-04-2017.

You are required to examine with reference to the provisions of the Companies Act, 2013 and what course of action would you suggest which can be taken up by the Company in this regard?

- (ii) Examine the following with reference to the provisions of the Companies Act, 2013:
- (a) Mr. Arthav, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the Registrar of Companies (RoC) within the prescribed time. What would be the status of Mr. Arthav if the company fails to intimate about the resignation of Mr. Arthav to RoC?
 - (b) The Board of Directors of Superwood Limited decides to appoint on its Board, Mr. Ramakant as a nominee director upon the request of a bank which has extended a long term financial assistance to the company. The Articles of Association of the company do not confer upon the Board any such power. Also, there is no formal agreement between the company and the bank for any such nomination.

Appointment and remuneration of Managerial Personnel

4. There are four directors in Shine Paper Limited. Mr. Madhav, being the director in station, has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Whether as per provisions of the Companies Act, 2013, he will be treated as managing director of the company? Also narrate the procedure of appointment of a managing director in a company.

Meetings of Board and its powers

5. Examine the following with reference to the provisions of the Companies Act, 2013:
- (i) The Chairman of Greenhouse Limited convened a board meeting and two weeks' notice was served on all directors of the company. Two of the independent directors on the board objected on the grounds that no proper agenda for the meeting was circulated.
 - (ii) Purple Florence Limited proposes to hold its board meeting at a shorter notice through video conferencing.

Inspection, inquiry and Investigation

6. (i) During investigations conducted on the affairs of a company in the public interest, the inspector observed that the Directors of the company had been acting on the instructions of the holding company and he proceeded to investigate the holding

company. Is Inspector permitted to do under the provisions of the Companies Act, 2013?

- (ii) Decent Marbles Limited has been incurring business losses for past couple of years. The company, therefore, passed a special resolution for voluntary winding up. Meanwhile, complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public. In this situation advise whether investigation may be initiated against the company under the provisions of the Companies Act, 2013.

Compromises, Arrangements and Amalgamations

- 7. A meeting of members of Evergreen Limited was convened under the orders of the Court for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 300 members holding 9,00,000 shares. 120 members holding 7,00,000 shares in the aggregate voted for the scheme. 140 members holding 2,00,000 shares in aggregate voted against the scheme. 40 members holding 1,00,000 shares abstained from voting. Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme was approved by the requisite majority?

Prevention of Oppression and Mismanagement

- 8. The issued and paid up capital of Crown Jewels Limited is ₹ 5 crore consisting of 5,00,000 equity shares of ₹ 100 each. The said company has 500 members. A petition was submitted before the Tribunal signed by 80 members holding 10,000 equity shares of the company for the purpose of relief against oppression and mismanagement by the majority shareholders. Examining the provisions of the Companies Act, 2013, decide whether the said petition is maintainable. Also explain the impact on the maintainability of the above petition, if subsequently 40 members, who had signed the petition, withdrew their consent.

Winding Up

- 9. Winding up proceedings has been commenced by the Tribunal against Paramount Limited, a government company (Central Government is a member). Even after completion of one year from the date of commencement of winding up proceedings, it has not possible to conclude the same. The liquidator is of the opinion that the statement shall be filed with tribunal and registrar only.
 - (i) Validate the opinion made by the liquidator and penalty can be imposed on the liquidator for contravention of the provision as per the Companies Act, 2013.
 - (ii) What will be your answer if the Paramount Limited is a non-government company?

Producer Companies

- 10. PQR Producer Company Ltd. seeks your advise on the following aspects of the working of a Producer company under the Companies Act, 1956:-

- (i) Criteria for appointment of Secretary and also the legal position, if its financial position is unsatisfactory.
- (ii) Can the Board of Directors of the company direct its member to surrender his shares to the company, if so, under what circumstances?
- (iii) Provisions relating to donation to any institution, and also to a political party.
- (iv) Provisions relating to investment of general reserves, and also investment in the shares of a company, other than a Producer company.

Companies incorporated outside India

- 11. (i) As per provisions of the Companies Act, 2013, what is the status of Hillways Ltd., a Company incorporated in London, which has a share transfer office at Mumbai?
- (ii) LMP Paper Ltd. is a company registered in Thailand. Although, it has no place of business established in India, yet it is doing online business through telemarketing in India. Whether it will be treated as a Foreign Company under the Companies Act, 2013? Explain.
- (iii) In case, a foreign company does not deliver its documents to the Registrar of Companies as required under section 380 of the Companies Act, 2013, state the penalties prescribed under the said Act, which can be levied.

Offences and Penalties, E-governance, National Company Law Tribunal and Appellate Tribunal and Special Courts

- 12. (i) Mr. D was appointed as a Technical Member of the National Company Law Tribunal (NCLT) on 1st July, 2012 for a period of 5 years. He will be completing 62 years on 30th June, 2017. Whether he can be re-appointed on the NCLT on completion of his tenure in 2017?
- (ii) What are the powers of the Central Government under the Companies Act, 2013 regarding:
 - (a) To appoint company prosecutors
 - (b) To Appeal against acquittal

Miscellaneous Provisions

- 13. (i) An officer of a company was allotted one room for two years in a guest house owned by the Company at some other city where he used to stay while on tour. It came to notice of the company that he had not vacated the said room after the expiry of two years and is holding the unauthorized possession of that room and has been permitting to stay outsiders in the said room, at a rent of ` 500 per day. The record shows that he had permitted the outsider for 45 days and collected ` 22,500 and retained the said amount with him. As per the letter of allotment, there was no such clause which can be invoked against him for making any recovery on account of such

wrongful occupation. The Manager of the company seeks your advice as to whether the recovery can be made from him under any of the provisions of his employment or Companies Act.

- (ii) Mr. Z, a director of Southern Highway Tolls Private Limited, is duly authorized by the Board of directors to prepare and file returns, report or other documents to the Registrar of Companies on behalf of the company. Though he filed all the required documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar. State the penal provision under the Companies Act, 2013?

Corporate Secretarial Practice–Drafting of Resolution, Minutes, Notices and Reports

- 14. (i) Mr. Shukla is working as General Manager (Finance and Accounts) in Target Limited. The Board of directors of the said company propose to entrust him with the duty of ensuring compliance with the provisions of the Companies Act, 2013 so that the books of accounts, balance sheet, statement of profit and loss and the cash flow statements can be prepared and maintained in accordance with law. Draft a Board Resolution for the said purpose.
- (ii) Mr. N is appointed as an additional Director by the Board of Directors of MNR Limited at its meeting held on 1st October, 2017 for a period as permitted by law. The Articles of Association has conferred the power to appoint the additional director on the Board of Directors of MNR Limited. Draft a Board resolution for the said purpose.

The Insolvency and Bankruptcy Code, 2016

- 15. (i) Wisdom Ltd. commits a default against the debts taken from the financial creditors. Mr. F, a financial creditor initiated the corporate insolvency resolution process against the Wisdom Ltd. Mr. X, another financial creditor, thereof files an application for initiating corporate insolvency resolution process with an Adjudicating Authority. State the validity as to the filing of an application by Mr. X for initiation of corporate insolvency resolution process?
- (ii) Standard International Ltd. who is a foreign trade creditor having its office in Hong Kong wanted to file a petition under insolvency and bankruptcy code 2016 on default of the debtor in India. It moved a petition under section 9 of the code seeking commencement of insolvency process. The foreign company was not having any office or bank account in India. Because of this, it couldn't submit a "certificate from financial institution" as required under the code. Whether the petition is permissible under the Insolvency & Bankruptcy Code, 2016? Decide.

SECTION B: ALLIED LAWS**The Securities and Exchange Board of India Act, 1992, Rules, Regulations and Guidelines issued thereunder.**

16. (i) On completion of 60 years of age as on 31st March 2014, Mr. Jain retired as Professor from a university. From 1st April 2014, he was appointed as Chairman of the Securities and Exchange Board of India for a period of three years. Under the provisions of the Securities and Exchange Board of India Act, 1992, decide whether he can be re-appointed on the same post after expiry of the original tenure? Also state whether it could be possible for him to relinquish the office before expiry of his tenure?
- (ii) XYZ Ltd. wants to make an initial offer of its securities. Advise the company on the following issues under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009:-
- (1) Extent of promoters contribution;
 - (2) Lock in period of securities held by promoters;
 - (3) Lock in period of securities held by persons other than promoters;
 - (4) Lock in period of securities allotted to employees of the company under Employee stock option.

Securities Contracts (Regulation) Act, 1956

17. (i) Mr. Vivaan is having 400 shares of Travel Everywhere Limited and the current price of these shares in the market is ₹ 100. Vivaan's goal is to sell these shares in 6 months' time. However, he is worried that the price of these shares could fall considerably, by then. At the same time, Vivaan doesn't want to sell off these shares today, as he conjectured that the share price might appreciate in the near future. How should Mr. Vivaan protect his security and reduce the risk of loss on the share price under the Securities Contract (Regulation) Act, 1956?
- (ii) RPS Ltd. got its shares listed with a Stock Exchange. It has been regularly paying the listing fees. Certain information about share holding pattern etc. was asked by the Stock Exchange, which the company could not supply in the prescribed time. It was then given a further opportunity to furnish the desired information along with supporting document, but in vain, as the company did not maintain any record. What are the penalties leviable against the company under the Securities Contracts (Regulation) Act, 1956 for the failure to furnish the information?

The Foreign Exchange Management Act, 1999

18. Ms. Ashima daughter of Mr. Mittal (an exporter), is residing in Australia since long. She wants to buy a flat in Australia. Since she is unmarried, she wants to make her father Mr. Mittal a joint holder in that flat, for which entire proceeds are to be paid by her.

- (i) What are the provisions of FEMA governing such type of transaction?
- (ii) Can Mr. Mittal join her daughter in acquiring such a flat in Australia?
- (iii) Mr. Mittal, wants to receive advance payments against his exports from a buyer outside India. What are the relevant provisions?

The Competition Act, 2002

19. (i) X a member of the Competition Commission of India was removed by the Central Government on the grounds that he had acquired financial interest likely to affect prejudicially his functions as a member. X challenged his removal by the Central Government claiming that the Central Government had no authority to pass order for removal. Clarify whether X's contention is right as per the provisions under the Competition Act, 2002.
- (ii) The mango producers in Lucknow have entered into an arrangement among them whereby they have decided not to sell the mango below certain price. This arrangement has been made in writing but not intended to be enforced by any legal proceedings. Referring to the provisions of the Competition Act, 2002, examine whether the said arrangement shall fall within the jurisdiction of the term "agreement" within the meaning of the said Act.

The Banking Regulation Act, 1949, The Insurance Act, 1938. The Insurance Regulatory and Development Authority Act, 1999. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

20. (i) Popular Limited defaulted in the repayment of term loan taken from a Bank against security created as a first charge on some of its assets. The bank issued notice pursuant to Section 13 of the SARFAESI Act, 2002 to the Company to discharge its liabilities within a period of 60 days from the date of the notice. The company failed to discharge its liabilities within the time limit specified.
- Explain the measures to be taken by the Bank to enforce its security interest under the said Act.
- (ii) As per the provisions of the Banking Regulation Act, 1949, a Banking Company, in addition to the business of Banking, may carry on some General Utility Services as listed in Section 6. List out any four of the General Utility Services, that a bank may carry on.

The Prevention of Money Laundering Act, 2002 and Interpretation of Statutes, Deeds and Documents.

21. (i) The Adjudicating Authority appointed under the Prevention of Money Laundering Act, 2002 issued an order attaching certain properties of XYZ Limited alleged to be involved in money laundering for a specified period. The company aggrieved by the order of the Adjudicating Authority seeks your advice about the remedy that is

available under the Act. Advise explaining the relevant provisions of the Prevention of Money Laundering Act, 2002.

- (ii) Many a time a proviso is added to a Section of the enactment. Explain the function of such a proviso while carrying out the interpretation?

SUGGESTED ANSWER/HINTS

1. (i) The amount to be transferred to reserves out of profits for a financial year has been left at the discretion of the company acting vide its Board of Directors. The company is free to transfer any part of its profits to reserves as it deems fit. There is no restriction to transfer any specific amount (i.e. even no amount can be transferred) to the reserves before declaration of dividend.
- (ii) Interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years [i.e. $(8+10+12)/3 = 30/3 = 10\%$]. Therefore, decision of Board of Directors to declare 12% interim dividend for the current financial year is not tenable. They can declare a maximum 10% interim dividend.
- (iii) According to section 123(5) of the Companies Act, 2013, dividend shall be payable only to the registered shareholder of the share or to his order or to his banker. Facts in the given case state that Mr. Ninja, the holder of equity shares transferred the shares to Mr. Raj whose name has been registered on 20th May 2017. Since, he became the registered shareholder before the declaration of the dividend in the Annual general meeting of the company held on 20th September 2017, so, Mr. Raj will be entitled to the dividend.
- (iv) Yes, as per law, where the dividend is declared by a company and there remains calls in arrears and any other sum due from a member, in such case the dividend can be lawfully adjusted by the company against any sum due to it from the shareholder.
Thus, company can adjust sum of ₹ 1 lakh due towards call money on shares against the dividend amount payable to Mr. Alok.
2. (i) In the present case, as the auditor Mr. Rahul has resigned, the casual vacancy so created can be filled up by the Board appointing Mr. Samuel. However, the appointment of Mr. Samuel must be approved by the company by passing of an ordinary resolution at a general meeting of the company which must be convened by the Board within 3 months of the recommendation of the Board. Mr. Samuel will be entitled to hold office till the conclusion of the next Annual General Meeting.
- (ii) Section 129(2) of the Companies Act, 2013 provides that at every annual general meeting of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year. Further section 134(7) provides

that signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy each of:

- (a) any notes annexed to or forming part of such financial statement;
- (b) the auditor's report; and
- (c) the Board's report.

It, therefore, follows that unaudited accounts cannot be sent to members or unaudited accounts cannot be filed with the Registrar of Companies. So such an act of ABC Ltd. is not tenable.

- (iii) Section 139(6) of the Companies Act, 2013 lays down that "the first auditor or auditors of a company shall be appointed by the Board of directors within 30 days from the date of registration of the company". In the instant case, the appointment of Mr. Raj, a practicing Chartered Accountant as first auditors by the Managing Director of PQR Ltd by himself is in violation of Section 139(6) of the Companies Act, 2013, which authorizes the Board of Directors to appoint the first auditor of the company.

In view of the above, the Managing Director of PQR Ltd should be advised not to appoint the first auditor of the company.

- (iv) As per section 141 (3)(d)(i) of the Companies Act, 2013, an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company. Further as per proviso to this Section, the relative of the auditor may hold the securities or interest in the company of face value not exceeding of ₹ 1,00,000.

In the present case, Mr. Q. (relative of Mr. P, an auditor), is having securities of ₹ 90,000 face Value in the ABC Ltd., which is as per requirement of proviso to section 141 (3)(d)(i), Therefore, Mr. P will not be disqualified to be appointed as an auditor of ABC Ltd.

- (v) In terms of Section 135(5) of the Companies Act, 2013, the Board of every company to which section 135 is applicable, shall ensure that the company spends, in every Financial year at least 2 per cent of average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR policy. There is no provision for carry forward of excess expenditure to the next year(s). The words used in the section are 'at least'. Therefore, any expenditure over 2% would be considered as voluntary higher spending.
3. (i) The second proviso to sub-section 1 of section 149 provides that such class or classes of companies as may be prescribed, shall have atleast one women director. Rule 3 of *Companies (Appointment and Qualification of Directors) Rules, 2014* provides that the following class of companies shall appoint at least one women director –

- (1) every listed company;
- (2) every other public company having-
 - paid-up share capital of one hundred crore rupees or more; or
 - turnover of three hundred crore rupees or more.

It further provides that any intermittent vacancy of a women director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

In this case the Company is a listed and under the provisions of the Companies Act, 2013, it is required to have at least 1 Women Director on its Board.

The provision of section 149(4) provides that every listed company shall have at least $\frac{1}{3}$ rd of the total number of Directors as Independent Directors.

As per the facts stated in the question, composition of board of directors of listed company as on 31-3-2017 comprised of total 7 directors. Out of which 4 were directors and 3 were independent directors. Later Mr. D (Director) and Mrs. E (Independent Director) vacated their offices of director on 15-4-2017.

So accordingly, listed company as stated above, shall have at least one women director and one-third of the total number of directors as independent directors in the Board. However, on 15-4-2017, total number of directors left were 5 due to vacation of Mr. D and Mrs. E. Further, Rule 3 of the *Companies (Appointment and Qualification of Directors) Rules, 2014*, provides that if there is an intermittent vacancy of a women director, it shall be filled up by the Board at the earliest but not later than immediate next board meeting or three months from the date of such vacancy whichever is later.

As per the requirement of the above sections, there is compliance of section 149(4) as $\frac{1}{3}$ rd of the total number of directors comprises of $(\frac{1}{3} \times 5)$ 1.6 rounded off as 2, which complies with the minimum requirement of 2 independent directors in the board, however, pertaining to women director, Board have to fill up the intermittent vacancy at the earliest but not later than immediate next board meeting or three months from the date of such vacancy whichever is later.

(ii) (a) Resignation of Director (Section 168 of the Companies Act, 2013)

A director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same. The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in *Form DIR -12* and post the information on its website, if any.

Such director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in *FORM DIR-11* along with the prescribed fee. The resignation of a

director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

In the present case, Mr. Arthav, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the RoC within the prescribed time.

If the company fails to intimate about the resignation of Mr. Arthav to RoC, even then the resignation of Mr. Arthav shall take effect from the date on which the notice is received by the company or the date, if any, specified by Mr. Arthav in the notice, whichever is later.

- (b) According to section 161 (3) of the Companies Act, 2013, subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

In the given case, the Articles of Association of Superwood Limited do not confer upon the Board of Directors any such power. Hence, the Board cannot appoint Mr. Ramakant as a nominee director even on the request of a bank which has extended a long term financial assistance to the company.

4. **Managing Director [Section 2(54)]:** Section 2(54) of the Companies Act, 2013 defines a “Managing Director” as a director who is entrusted with substantial powers of management of the affairs of the company by:

- (i) virtue of articles of a company or
- (ii) an agreement with the company or
- (iii) a resolution passed in its general meeting, or by its Board of Directors, and includes a director occupying the position of the managing director, by whatever name called.

Explanation to Section 2 (54) clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:

- (i) the power to affix the common seal of the company to any document or
- (ii) to draw and endorse any cheque on the account of the company in any bank or
- (iii) to draw and endorse any negotiable instrument or
- (iv) to sign any certificate of share or
- (v) to direct registration of transfer of any share.

In the instant case, Mr. Madhav, a director in Shine Paper Limited has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc.

Hence, according to explanation to section 2(54), Mr. Madhav will not be treated as Managing Director of the company as he is authorized to do administrative acts of a routine nature.

Procedure of appointment of a Managing Director [Section 196(4)]

- (1) Subject to the provisions of section 197 and Schedule V, a managing director shall be appointed, and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting.
 - (2) The terms and conditions and remuneration approved by Board of Directors as above shall be subject to the approval of shareholders by a resolution at the next general meeting of the company.
 - (3) In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the Central Government.
 - (4) The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.
 - (5) A return in the prescribed form (Form No. MR.1) along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.
5. (i) According to section 173 (3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

According to the question, two of the independent directors on the Board has objected on the grounds that no proper agenda for the meeting was circulated.

The Companies Act, 2013 does not specifically provide for sending agenda along with the notice of the meeting. However, generally as a good secretarial practice, the notice is accompanied with the agenda of the meeting. Thus, the contention of the independent directors objecting on the grounds that no agenda for the meeting was circulated, does not hold good.

Further, the Chairman of Greenhouse Limited has convened the Board meeting by serving a two weeks' notice (i.e. more than 7 days). Hence, the meeting shall be valid.

- (ii) According to section 173 of the Companies Act, 2013,
- (a) The directors can participate in a meeting of the Board may be either in person

or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Further, Central Government may provide for matters which cannot be dealt in a meeting through video conferencing or other audio visual means.

- (b) A meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company.

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, in case the independent directors are not present at such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Hence, Purple Florence Limited can hold a board meeting at a shorter notice through video conferencing, for transacting urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, if the independent directors are absent from the meeting of the Board, decision taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

6. (i) **Investigation into affairs of related companies:** Section 219 of the Companies Act, 2013, provides for power of Inspector to conduct investigation into the affairs of related companies etc., if an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of:-
- (a) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company;
 - (b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;
 - (c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or
 - (d) any person who is or has at any relevant time been the company's managing director or manager of employee, he shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of

the company for which he is appointed.

Therefore, the inspector shall subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the Managing Director or Manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the Company for which he is appointed. In view of above, the Inspector is permitted to investigate the holding company.

- (ii) According to section 226 of the Companies Act, 2013, an investigation may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that—
- (a) an application has been made under section 241;
 - (b) the company has passed a special resolution for voluntary winding up; or
 - (c) any other proceeding for the winding up of the company is pending before the Tribunal.

In the instant case, Decent Marbles Limited has been incurring business losses for past couple of years. The company passed a special resolution for voluntary winding up. Meanwhile complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public.

As, the company has passed a special resolution for voluntary winding up of the company, then also the investigation may be initiated against the company under section 226 of the Companies Act, 2013.

7. As per section 230 (6) of the Companies Act, 2013 where majority of persons at a meeting held **representing 3/4th in value**, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order. The majority of person representing 3/4th Value shall be counted of the following:
- ✓ the creditors, or
 - ✓ class of creditors or
 - ✓ members or
 - ✓ class of members, as the case may be,

The majority is dual, in number and in value. A simple majority of those voting is sufficient. Whereas the 'three-fourths' requirement relates to value. The three-fourths value is to be computed with reference to paid-up capital held by members present and voting at the meeting.

In this case, 300 members attended the meeting, but only 260 members voted at the meeting. As 120 members voted in favor of the scheme the requirement relating to majority in number (i.e. 131) is not satisfied.

260 members who participated in the meeting held 9,00,000 shares, three-fourth of which works out to 6,75,000 while 120 members who voted for the scheme held 7,00,000 shares. The majority representing three-fourths in value is satisfied.

Thus, in the instant case, the scheme of compromise and arrangement of Evergreen Limited is not approved as though the value of shares voting in favor is significantly more, the number of members voting in favor do not exceed the number of members voting against.

- 8. Right to apply for oppression and mismanagement:** As per the provisions of Section 244 of the Companies Act, 2013, in the case of a company having share capital, members eligible to apply for oppression and mismanagement shall be lowest of the following:

100 members; or

1/10th of the total number of members; or

Members holding not less than 1/10th of the issued share capital of the company.

The share holding pattern of Crown Jewels Limited is given as follows:

₹ 5,00,00,000 equity share capital held by 500 members

The petition alleging oppression and mismanagement has been made by some members as follows:

(i) No. of members making the petition – 80

(ii) Amount of share capital held by members making the petition – ₹ 10,00,000

The petition shall be valid if it has been made by the lowest of the following:

100 members; or

50 members (being 1/10th of 500); or

Members holding ₹ 50,00,000 share capital (being 1/10th of ₹ 5,00,00,000)

As it is evident, the petition made by 80 members meets the eligibility criteria specified under section 244 of the Companies Act, 2013 as it exceeds the minimum requirement of 50 members in this case. Therefore, the petition is maintainable.

The consent to be given by a shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by any shareholder during the course of proceedings shall not affect the maintainability of the petition [*Rajamundhry Electric Corporation Vs. V. Nageswar Rao A.I.R. (1956) Sc. 2013.*].

9. Section 348 of the Companies Act, 2013 states that, if the winding up of a company is not concluded within one year after its commencement then the Company Liquidator shall file a statement in such form containing such particulars as may be prescribed. Such statement shall be filled within two months of the expiry of such year and it shall be filled continuously thereafter until the winding up is concluded, at intervals of not more than one year or at such shorter intervals as may be prescribed. The statement shall be duly audited, by a person qualified to act as auditor of the company and position of with respect to the proceedings in the liquidation.

The statement shall be filled with the tribunal in the case of a winding up by the Tribunal. A copy shall simultaneously be filed with the Registrar and shall be kept by him along with the other records of the company.

Where a statement relates to a Government company in liquidation, the Company Liquidator shall forward a copy thereof,

- to the Central Government, if that Government is a member of the Government company;
- to any State Government, if that Government is a member of the Government company; or
- to the Central Government and any State Government, if both the Governments are members of the Government company.

Paramount Limited is a Government Company

In the current scenario, we can understand that the Paramount Limited is a government company in which Central Government is a member and hence statement is also required to file to the Central Government along with the Tribunal and Registrar. So, the opinion by the Company Liquidator is not tenable in the eyes of the law and he is liable for penal action under the Act.

The company liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the failure continues.

Paramount Limited is a Non-Government Company

In the current scenario, the Paramount Limited is a non-government company hence statement is only required to file with the Tribunal and Registrar only. So, the opinion by the Company Liquidator is tenable in the eyes of the law and he is not liable for any penal action under the Act.

10. (i) **Secretary of a producer company (Section 581X of the Companies Act, 1956):**
Every producer company having an average annual turnover exceeding five crore rupees in each of three consecutive financial years shall have a whole-time secretary, who possesses membership of the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980. If a producer company fails to comply with this, the company and every officer of the company who is in default shall

be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

In any proceedings against a person in respect of an offence, under this section, it shall be a defence to prove that all reasonable efforts to comply with the provisions of section were taken or that the financial position of the company was such that it was beyond its capacity to engage a whole-time secretary.

(ii) **Surrender of shares [Section 581ZD (5) of the Companies Act, 1956]:** Where the Board of a producer company is satisfied that—

- (a) any member has ceased to be a primary producer; or
- (b) any member has failed to retain his qualifications to be a member as specified in articles, the Board shall direct the surrender of shares together with special rights, if any, to the producer company at par value or such other value as may be determined by the Board.

Provided that the Board shall not direct such surrender of shares unless the member has been served with a written notice and given an opportunity of being heard.

(iii) **Donations or subscription by producer company (Section 581ZH of the Companies Act, 1956):** A producer company may, by special resolution, make donation or subscription to any institution or individual for the purposes of—

- (a) promoting the social and economic welfare of producer member or producers or general public; or
- (b) promoting the mutual assistance principles.

Provided that the aggregate amount of all such donation and subscription in any financial year shall not exceed three per cent of the net profit of the producer company in the financial year immediately preceding the financial year in which the donation or subscription was made.

Further, no producer company shall make directly or indirectly to any political party or for any political purpose to any person any contribution or subscription or make available any facilities including personnel or material.

(iv) **Investment in other companies, formation of subsidiaries, etc. (Section 581ZL):** The producer company has to follow the following provisions under this section.

- (1) The general reserves of any producer company shall be invested to secure the highest returns available from approved securities, fixed deposits, units, bonds issued by the Government or co-operative or scheduled bank or in such other mode as may be prescribed.
- (2) Any producer company may, for promotion of its objectives acquire the shares of another producer company.
- (3) Any producer company may subscribe to the share capital of, or enter into any

agreement or other arrangement, whether by way of formation of its subsidiary company, joint venture or in any other manner with any body corporate, for the purpose of promoting the objects of the producer company by special resolution in this behalf.

11. (i) In terms of the definition of a foreign company under section 2 (42) of the Companies Act, 2013 a "foreign company" means any company or body corporate incorporated outside India which:

- (a) Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) Conducts any business activity in India in any other manner.

According to section 386 of the Companies Act, 2013, for the purposes of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), "Place of business" includes a share transfer or registration office.

From the above definition, the status of Hillways Ltd. will be that of a foreign company as it is incorporated outside India, has a place of business in India and it may be presumed that it carries on a business activity in India.

- (ii) According to section 2(42) of the Companies Act, 2013, "foreign company" means any company or body corporate incorporated outside India which –

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) conducts any business activity in India in any other manner.

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

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

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

- (iii) The Companies Act, 2013 lays down the governing provisions for foreign companies in Chapter XXII which is comprised of sections 379 to 393. The penalties for non filing or for contravention of any provision for this chapter including for non filing of documents with the Registrar as required by section 380 and other sections in this chapter are laid down in section 392 of the Act which provides that if a foreign company contravenes the provisions of this Chapter, the foreign company shall be punishable with a fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 3,00,000 and in the case of a continuing offence, with an additional fine which may extend to ₹ 50,000 for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 5,00,000, or with both.
12. (i) According to Section 413(1) of the Companies Act, 2013, the President and every other Member of the Tribunal shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re appointment for another term of five years.

Under section 413 (2), a Member of the Tribunal shall hold office as such until he attains, -

- (a) in the case of the President, the age of sixty-seven years;
- (b) in the case of any other Member, the age of Sixty-five years.

In the instant case, Mr. D was appointed as a technical Member of the NCLT on 1st July, 2012 for a period of 5 years. He will be completing 62 years on 30th June, 2017. He can also be re-appointed after his initial term of five years is over. But since he shall be attaining the age of 65 years as on 30th June, 2020, he will have to step down from the post on his attaining the age of 65 years i.e. on 30th June, 2020.

- (ii) (a) **Power of Central Government to appoint company prosecutors:** This section lays down the provisions seeking to provide that the Central Government may appoint company prosecutors with the same powers as given under the Cr. PC on Public Prosecutors.
 - (1) **Appointment of company prosecutors:** The Central Government may appoint (generally, or for any case, or in any case, or for any specified class of cases in any local area) one or more persons, as company prosecutors for the conduct of prosecutions arising out of this Act; and
 - (2) **Powers and Privileges:** The persons so appointed as company prosecutors shall have all the powers and privileges conferred on Public Prosecutors appointed under section 24 of the Cr. PC.

- (b) **Appeal against acquittal:** According to section 444 of the Companies Act, 2013, the Central Government may, in any case arising under this Act, direct –
- (1) any company prosecutor, or
 - (2) authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any court, other than a High Court.

Appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the Appellate Court.

13. (i) **Penalty for wrongful withholding of property:** Section 452 of the Companies Act, 2013 provides for Penalty for wrongful withholding of property. According to the section:

- (1) If any officer or employee of a company -
 - (a) Wrongfully obtains possession of any property, including cash of the company; or
 - (b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorized by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.
- (2) The Court trying an offence may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to 2 years.

Hence, as per the provisions of the Companies Act, 2013 and not giving any emphasis on the terms of employment, the manager of the company can recover possession of the room and the cash wrongfully obtained and the benefits that have been derived from such property or cash.

- (ii) **Penalty for false statements (Section 448 of the Companies Act, 2013)**

According to section 448 of the Companies Act, 2013, save as otherwise provided in this Act, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made there under, any person who makes a statement, -

- (a) which is false in any material particulars, knowing it to be false; or
- (b) which omits any material fact, knowing it to be material,

he shall be liable under section 447.

In the present case, Mr. Z, a director of Southern Highway Tolls Private Limited filed returns, report or other documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar.

Hence, Mr. Z shall be liable under section 447 for false statements.

Penal Provisions: As per Section 447, any person who is found to be guilty under this section shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud, provided that, where the fraud involves public interest, the term of imprisonment shall not be less than 3 years.

Hence, Mr. Z a director of Southern Highway Tolls Private Limited shall be punishable with imprisonment and fine prescribed as aforesaid.

14. (i) Board Resolution

Resolution passed at the meeting of Board of Directors of Target Limited held at its registered office situated at on(date) at (Time).

“Resolved that pursuant to section 128(6) and 129 of the Companies Act, 2013, Mr. Shukla, who is already the General Manager (Finance and Accounts) of the company, be and is hereby entrusted with additional duties of ensuring compliance with the provisions of the Companies Act, 2013 so that the books of accounts, balance sheet, statement of profit and loss and the cash flow statements are maintained in accordance with the provisions of law.”

“Further Resolved that the said Mr. Shukla be and is hereby entrusted with the authority to do such acts things or deeds as may be necessary or expedient for the purpose of discharging his above referred duties.”

Sd/

Board of Directors

Target Limited

(ii) Board Resolution for appointment of Additional Director:

“Resolved that pursuant to the Articles of Association of the company and section 161(1) of the Companies Act, 2013, Mr. N is appointed as an Additional Director of the MNR Company Limited with effect from 1st October, 2017 to hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

Resolved further that Mr. N will enjoy the same powers and rights as other directors.

Resolved further that Mr. _____ Secretary of MNR Company Limited be and is hereby authorised to electronically file necessary returns with the Registrar of Companies and to do all other necessary things required under the Act."

15. (i) In the given problem, on commission of default by the Wisdom Ltd., Mr. F filed an application for initiating corporate insolvency resolution process before adjudicating authority. Further, Mr. X another financial creditor moved an application for initiation of insolvency resolution process against the Wisdom Ltd.

According to the section 6 of the Code, where any corporate debtor commits a default, a financial creditor, Operational creditor or the Corporate debtor itself may initiate insolvency resolution process against such corporate debtor.

But as per Section 13 of the Code, once an application is admitted by the Adjudicating authority, it shall by an order declare a moratorium for the purposes referred to in section 14. Then causes a public announcement of the initiation of CIRP by IRP and call for the submission of claims under section 15 and appoint an IRP in the manner as laid down in section 16 of the Code. Public announcement lays down all the relevant information related to the CIRP. So that the all creditors entitled under the law can raise their claim in this case.

So, no further application for initiation of CIRP against the same debtor (i.e, Wisdom Ltd.) can be initiated. So, Mr. X, cannot file an application on initiation of CIRP, however, is entitled under the law to raise his claim in this case against the Wisdom Ltd.

- (ii) Section 1 of the Insolvency and Bankruptcy Code, 2016 specifies of the extent, commencement and applicability of the Code. According to this, it extends to the whole of India and shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of any company incorporated under the Companies Act, 2013 or under any previous law.

In view of this, the IBC Code, 2016 applies to the corporate debtor incorporated under the Companies Act, 2013 or under any previous laws.

As per the definition of the Creditor given in section 3(10) of the Insolvency and Bankruptcy Code, 2016, it means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree holder. So, Standard International Ltd. is a creditor under the purview of the Code.

As per the facts given in question, Standard International Ltd., is a foreign trade creditor. He wanted to file a petition under the under Section 9 of the Insolvency and Bankruptcy Code, 2016 for commencement of Insolvency process against the defaulter in India. Standard International Ltd. was not having any office or bank account in India.

As per the requirement of section 9 of the Code, along with application certain documents were needed to be furnished by the creditor to the Adjudicating authority.

Being a foreign trade creditor, Standard International Ltd was also required to provide a copy of certificate from the financial institutions maintaining accounts of the creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Since, Standard International Ltd. was not having any office or bank account in India, it cannot furnish certificate from financial institution as defined under the section 3(14) of the code. So, Petition under section 9 of the Code is not permissible.

16. (i) **Appointment of Chairman:** As per **Section 5** of the SEBI Act, 1992 and the rules prescribed under the SEBI Act, 1992, the Chairman may hold office for a period of three years subject to the maximum age limit of 65 years and can be re-appointed by the Central Government.

Also, as per **Section 4(5)** of the Act, the Chairman shall be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities market or have special knowledge or experience of law; finance; economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board.

In the instant case, Mr. Jain retired as professor from a university on completion of 60 years of age as on 31st March, 2014 appointed as Chairman of SEBI from 1st April, 2014 for a period of 3 years.

This appointment is valid as on the date of appointment, he is of 60 years of age and he, as a retired professor, is a person of ability, integrity and standing and have special knowledge or experience of law; finance; economics, accountancy, administration or in any other discipline.

If Mr. Jain is reappointed as a chairman after expiry of the original tenure of 3 years, he can be re-appointed but only upto 65 years of age i.e. upto 31st March, 2019 (i.e. only for two years).

Right to Relinquish the office: The Chairman shall equally have the right to relinquish office at any time before the expiry of their tenure by giving a notice of three months in writing or salary and allowances in lieu thereof to the Central Government.

- (ii) (1) **Extent of promoters contribution-** As per the regulation 32 of the *SEBI (ICDR) Regulations, 2009*, the promoters of the issuer shall contribute in the case of an initial public offer, not less than twenty per cent of the post issue capital.

Provided that in case the post issue shareholding of the promoters is less than twenty per cent, alternative investment funds may contribute for the purpose of meeting the shortfall in minimum contribution as specified for promoters, subject to a maximum of ten per cent of the post issue capital.

- (2) **Lock-in period of specified securities held by promoters-** As per the regulation 36 of the *SEBI (ICDR) Regulations, 2009*, in an initial public offer, the specified securities held by promoters shall be locked-in for the period as stipulated hereunder:

- (a) minimum promoters' contribution including contribution made by alternative investment funds shall be locked-in for a period of three years from the date of commencement of commercial production or date of allotment in the public issue, whichever is later;
- (b) promoters' holding in excess of minimum promoters' contribution shall be locked-in for a period of one year:

The expression "date of commencement of commercial production" means the last date of the month in which commercial production in a manufacturing company is expected to commence as stated in the offer document.

- (3) **Lock-in period of specified securities held by persons other than promoters-** As per the regulation 37 of the *SEBI (ICDR) Regulations, 2009*, in case of an initial public offer, the entire pre-issue capital held by persons other than promoters shall be locked-in for a period of one year.
- (4) **Lock in period of securities allotted to employees of the company under employees stock option-** As per the regulation 37 of the *SEBI (ICDR) Regulations, 2009*, in case of an initial public offer, the entire pre-issue capital held by persons other than promoters shall be locked-in for a period of one year:

Provided that nothing contained in this regulation shall apply to equity shares allotted to employees under an employee stock option or employee stock purchase scheme of the issuer prior to the initial public offer, if the issuer has made full disclosures with respect to such options or scheme in accordance with Part A of Schedule VIII.

17. (i) In this case, Mr. Vivaan may opt for 'Option' derivative contract, which is an agreement to buy or sell a set of assets at a specified time in the future for a specified amount. However, it is not obligatory for him to hold the terms of the agreement, since he has an 'option' to exercise the contract. For example, if the current market price of the share is ₹ 100 and he buy an option to sell the shares to Mr. X at ₹ 200 after three-month, so Vivaan bought a put option.

Now, if after three months, the current price of the shares is ₹ 210, Mr. Vivaan may opt not to sell the shares to Mr. X and instead sell them in the market, thus making a profit of ₹ 110. Had the market price of the shares after three months would have been ₹ 90, Mr. Vivaan would have obliged the option contract and sold those shares to Mr. X, thus making a profit, even though the current market price was below the contracted price. Thus, here, the shares of Travel Everywhere Limited is an underlying asset and the option contract is a form of derivative.

- (ii) According to section 23 A of the Securities Contracts (Regulation) Act, 1956, any person who is required under this Act or any rules made thereunder;
 - (a) to furnish any information, document, books, returns or report to a recognized stock exchange, fails to furnish the same within the time specified therefore in the listing agreement or conditions or bye-laws of the recognized stock

exchange, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less for each such failure;

- (b) to maintain books of account or records, as per the listing agreement or conditions, or bye-laws of a recognised stock exchange and if there is failure to maintain the same, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees whichever is less.

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

18. (i) The provisions governing the acquisition and transfer of immovable property outside India.

- (1) A person resident in India may acquire immovable property outside India:
 - (a) By way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the FEMA or referred to in clause (b) of regulation 4 acquired by a person resident in India on or before 8th July, 1947 and continued to be held by him with the permission of Reserve Bank.
 - (b) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the foreign exchange management (Foreign Currency accounts by a person resident in India) Regulations 2015.
 - (c) Jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India.
- (2) A person resident in India may acquire immovable property outside India, by way of Inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provision in force at the time of such acquisition.
- (3) A Company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

- (ii) In the light of above discussions in 1(c), it is quite clear that Mr. Mittal, a resident in India, can join his daughter who is a resident outside India, in acquiring a Flat at Australia.

(iii) Advance payment against export:

The following are the provisions governing the advance payments against exports :

- (1) Where an exporter receives advance payments (with or without interest) from a buyer/ third party named in the export declaration made by the Exporter, outside India, the exporter shall be under the obligation to ensure that:

- (i) The shipment of goods is made within one year from the date of receipt of advance payment.
- (ii) The rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
- (iii) The documents covering the shipment are routed through the authorised dealer through whom advance payment is received.

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment or towards, no remittance towards refund of un-utilised portions of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve bank of India.

- (2) Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

19. (i) Removal of Member of Competition Commission of India (Section 11 of the Competition Act, 2002):

Provisions of section 11(2) of the Competition Act, 2002 empowers the Central Government to remove, by an order, a member of the Competition Commission of India from his office if such member has acquired such financial interest as is likely to affect prejudicially his functions as a Member of the Competition Commission.

However, provisions of section 11(3) of the said Act put some restrictions on such powers of the Central Government. According to this section, in case as stated in the question, the Central Government wants to remove a member of the Competition Commission from his office, it has to make a reference to the Supreme Court. The Supreme Court shall hold an enquiry in accordance with the procedure formulated by it and then report that the member in question ought to be removed from his office.

Thus, the Central Government can remove a member of Competition Commission from his office by following the above procedure. So, contention of X is incorrect with respect to his removal by the Central Government.

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

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

20. (i) Sub-section (4) of section 13 of SARFAESI Act, 2002, provides that if the borrower fails to discharge his liability in full within the 60 days, the secured creditor may take recourse to one or more of the following measures to recover his secured debt:

- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset.

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt.

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

- (c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
- (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

In the instant case, the Bank may take the above mentioned procedure to enforce its security interest in case Popular Limited has failed to discharge its liabilities within the time limit specified.

- (ii) Section 6 of the Banking Regulation Act, 1949 provides a list of activities which a banking company may engage in addition to the business of banking.

From among them, General Utility Services, which can be provided by a bank are as follows:

- (1) Providing safe-custody facility to its customers for keeping their valuables;
- (2) Providing the facility of Safe Deposit Vault (Locker) under lease agreement to its customers for keeping their valuables;
- (3) Technology based general utility services like Tele-banking, Phone-banking, On-line banking, Home banking, Single window banking, Demat services for security trading, ATM services, Credit Card services etc.,
- (4) Consultancy services;

- (5) ECS services for payment of different dues of the people;
- (6) Payment of pension;
- (7) Payment of salaries of employees of schools etc.;
- (8) Payment of salaries etc.;
- (9) Many other services.

21. (i) Section 25 of the Prevention of Money Laundering Act, 2002 empowers the Central Government to establish an Appellate Tribunal to hear appeal against order of the Adjudicating Authority and other authorities under the Act.

Section 26 deals with the right and time frame to make an appeal to the Appellate Tribunal. Any person aggrieved by an order made by the Adjudicating Authority may prefer an appeal to the Appellate Tribunal within a period of 45 days from the date on which a copy of the order is received by him. The appeal shall be in such form and be accompanied by such fee as may be prescribed. The Appellate Tribunal may extend the period if it is satisfied that there was sufficient cause for not filing it within the period of 45 days.

The Appellate Tribunal may after giving the parties to the appeal an opportunity of being heard, pass such order as it thinks fit, confirming, modifying or setting aside the order appealed against.

The Act also provides further appeal. According to Section 42 any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the order of the Appellate Tribunal.

In the light of the provisions of the Act explained above the company is advised to prefer an appeal to Appellate Tribunal in the first instance.

- (ii) The normal function of a proviso is to except something out of the enactment or to qualify something stated in the enactment which would be within its purview if the proviso were not there. The effect of the proviso is to qualify the preceding enactment which is expressed in terms which are too general. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment ordinarily a proviso is not interpreted as it stating a general rule.

It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the provision to which it has been enacted as a proviso and not to the other. (*Ram Narain Sons Ltd. Vs. Assistant Commissioner of Sales Tax*, A.I.R, 1995 SC 765).

An explanation is at times appended to a section to explain the meaning of the text of the section. An explanation may be added to include something within the Section or to exclude something from it. An explanation should normally be so read as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section.

ANNEXURE

**RELEVANT AMENDMENTS FROM
1ST NOVEMBER, 2015 TO
30TH APRIL, 2017**

SECTION A: COMPANY LAW AND INSOLVENCY AND BANKRUPTCY CODE, 2016

DECLARATION AND PAYMENT OF DIVIDEND

Notification of Section 124

The Ministry of Corporate Affairs vide Notification S.O. 2866 (E) dated 5th September, 2016 appointed 7th September, 2016 as the effective date on which the provisions of section 124 of the Companies Act, 2013 shall come into enforcement.

Section 124 of the Companies Act, 2013 deals with the provisions related to management of the unpaid dividend account.

Unpaid Dividend Account

124. (1) Declared dividend not paid or claimed to be transferred to the special account: Where a dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the declaration to any shareholder entitled to the payment of the dividend,

- the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.

(2) Preparing of statement of particulars of the unpaid dividend: The company shall, within a period of ninety days of making any transfer of an amount under sub-section (1) to the Unpaid Dividend Account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the web-site of the company, if any, and also on any other web-site approved by the Central Government for this purpose, in such form, manner and other particulars as may be prescribed.

(3) Default in transferring of amount: If any default is made in transferring the total amount referred to in sub-section (1) or any part thereof to the Unpaid Dividend Account of the company,

- it shall pay, from the date of such default, interest on so much of the amount as has not been transferred to the said account, at the rate of twelve per cent per annum and the interest

accruing on such amount shall ensure to the benefit of the members of the company in proportion to the amount remaining unpaid to them.

(4) **Apply for payment of claimed amount:** Any person claiming to be entitled to any money transferred under sub-section (1) to the Unpaid Dividend Account of the company may apply to the company for payment of the money claimed.

(5) **Transfer of unclaimed amount to Investor Education and Protection Fund (IEPF):** Any money transferred to the Unpaid Dividend Account of a company in pursuance of this section which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company along with interest accrued, if any, thereon to the Fund established under section 125(1) and the company shall send a statement in the prescribed form of the details of such transfer to the authority which administers the said Fund and that authority shall issue a receipt to the company as evidence of such transfer.

(6) **Transfer of shares to IEPF:** All shares in respect of which dividend has not been paid or claimed for seven consecutive years or more shall be transferred by the company in the name of Investor Education and Protection Fund along with a statement containing such details as may be prescribed:

Right of owner of shares transferred to IEPF to claim from IEPF:

Provided that any claimant of shares transferred above shall be entitled to claim the transfer of shares from Investor Education and Protection Fund in accordance with such procedure and on submission of such documents as may be prescribed.

Explanation—For the removal of doubts, it is hereby clarified that in case any dividend is paid or claimed for any year during the said period of seven consecutive years, the share shall not be transferred to Investor Education and Protection Fund.

(7) **In case of contravention:** If a company fails to comply with any of the requirements of this section, the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Earlier law- Corresponding section 205A and 205B of the Companies Act, 1956 were in enforcement as this section 124 of the Companies Act, 2013 was not notified.

Reference of Page number of earlier existing section in the study material- 1.6

Notification of Section 125

The Ministry of Corporate Affairs vide Notification S.O. 125(E) dated 13th January, 2016 appointed 13th January, 2016 as the date on which the provisions of section 125(5), 125(6)

[except with respect to the manner of administration of the Investor Education and Protection Fund] and 125(7) of the Companies Act, 2013 have come into force.

Further, Ministry of Corporate Affairs vide Notification S.O. 2866 (E) dated 5th September, 2016 appointed 7th September, 2016 as the date on which the remaining sub-sections of section 125 of the Companies Act, 2013 have been notified and brought into force.

Section 125 of the Act deals with the Investor Education and Protection Fund (IEPF). This fund shall be utilized for refund of unclaimed and unpaid amounts, promotion of investors' awareness and protection of the interests of investors etc. in accordance with provisions of section 125 of the Companies Act, 2013. Provisions given are as follows:

125. (1) Establishment of Fund: The Central Government shall establish a Fund to be called the Investor Education and Protection Fund (herein referred to as the Fund).

(2) Credit of amount to the fund: There shall be credited to the Fund the following amounts—

- (a) **Amount given by the Central Government-** the amount given by the Central Government by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund;
- (b) **Donations by the Central Government-** donations given to the Fund by the Central Government, State Governments, companies or any other institution for the purposes of the Fund;
- (c) **Amount of Unpaid Dividend Account-** the amount in the Unpaid Dividend Account (UDA) of companies transferred to the Fund under section 124(5);
- (d) **Amount of the general revenue account of the Central Government-** the amount in the general revenue account of the Central Government which had been transferred to that account under section 205A(5) of the Companies Act, 1956 (1 of 1956), as it stood immediately before the commencement of the Companies (Amendment) Act, 1999 (21 of 1999), and remaining unpaid or unclaimed on the commencement of this Act;
- (e) **Amount in IEPF-** the amount lying in the Investor Education and Protection Fund under section 205C of the Companies Act, 1956;
- (f) **Income from investments-** the interest or other income received out of investments made from the Fund;
- (g) **Amount received through disgorgement or disposal of securities-** Amount received through disgorgement or disposal of securities under section 38(3) shall be credited to the IEPF provided under section 38(4);
- (h) **Application money-** the application money received by companies for allotment of any securities and due for refund;
- (i) **Matured deposits-** matured deposits with companies other than banking companies;

- (j) **Matured debentures-** matured debentures with companies;
- (k) **Interest-** interest accrued on the amounts referred to in clauses (h) to (j);
- (l) **Amount received from sale proceeds-** sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years;
- (m) **Redemption amount-** redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; and
- (n) **Other amount-** such other amount as prescribed the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

Exception- Provided that no such amount referred to in clauses (h) to (j) shall form part of the Fund unless such amount has remained unclaimed and unpaid for a period of seven years from the date it became due for payment.

- (3) **Utilization of the Fund:** The Fund shall be utilised for—
- (a) the refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon;
 - (b) promotion of investors' education, awareness and protection;
 - (c) distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement;
 - (d) reimbursement of legal expenses incurred in pursuing class action suits under sections 37 and 245 by members, debenture-holders or depositors as may be sanctioned by the Tribunal; and
 - (e) any other purpose incidental thereto, in accordance with such rules as prescribed under the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

Provided that the person whose amounts referred to in clauses (a) to (d) of sub-section (2) of section 205C transferred to Investor Education and Protection Fund, after the expiry of the period of seven years as per provisions of the Companies Act, 1956 (1 of 1956), shall be entitled to get refund out of the fund in respect of such claims in accordance with rules made under this section.

Explanation.—The disgorged amount refers to the amount received through disgorgement or disposal of securities.

- (4) **Application to the authority for payment:** Any person claiming to be entitled to the amount referred in sub-section (2) may apply to the authority constituted under sub-section (5) for the payment of the money claimed.

(5) **Constitution of authority for administration of fund:** The Central Government shall constitute, by notification, an authority for administration of the Fund consisting of a chairperson and such other members, not exceeding seven and a chief executive officer, as the Central Government may appoint.

(6) **Handling of the Fund:** The manner of administration of the Fund, appointment of chairperson, members and chief executive officer, holding of meetings of the authority shall be in accordance with such rules as may be prescribed under the Investor Education and Protection Fund Authority (Appointment of Chairperson and Members, holding of meetings and provision for offices and officers) Rules, 2016.

(7) **Providing of resources from central government to administer the fund:** The Central Government may provide to the authority such offices, officers, employees and other resources in accordance with the Investor Education and Protection Fund Authority (Appointment of Chairperson and Members, holding of meetings and provision for offices and officers) Rules, 2016.

(8) **Authority to work in consultation with CAG of India:** The authority shall administer the Fund and maintain separate accounts and other relevant records in relation to the Fund in such form as may be prescribed after consultation with the Comptroller and Auditor-General of India.

(9) **Right of the authority to spend the money:** It shall be competent for the authority constituted under sub-section (5) to spend money out of the Fund for carrying out the objects specified in sub-section (3).

(10) **Audit of the fund:** The accounts of the Fund shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and such audited accounts together with the audit report thereon shall be forwarded annually by the authority to the Central Government.

(11) **Preparation of the annual report by authority:** The authority shall prepare in such form and at such time for each financial year as may be prescribed its annual report giving a full account of its activities during the financial year and forward a copy thereof to the Central Government and the Central Government shall cause the annual report and the audit report given by the Comptroller and Auditor-General of India to be laid before each House of Parliament.

Earlier law- Corresponding section 205C of the Companies Act, 1956 was relevant and applicable as this section 125 of the Companies Act, 2013 was not notified.

Reference of Page number of earlier existing section in the study material- 1.7

2

ACCOUNTS AND AUDIT

Amendment in Rule 6 vide the Companies (Accounts) Amendment Rules, 2016 read with section 129.

The Ministry of Corporate Affairs vide Notification G.S.R. 742(E) dated 27th July, 2016 amended the *Companies (Accounts) Rules, 2014* by enforcement of the *Companies (Accounts) Amendment Rules, 2016*. Amendment has been made in Rule 6 which deals with the manner of consolidation of accounts. According to the amendment the second proviso of the principal rule have been substituted with the following-

"Provided further that nothing in this rule shall apply in respect of preparation of consolidated financial statements by a company if it meets the following conditions:-

- (i) it is a wholly-owned subsidiary, or is a partially-owned subsidiary of another company and all its other members, including those not otherwise entitled to vote, having been intimated in writing and for which the proof of delivery of such intimation is available with the company, do not object to the company not presenting consolidated financial statements;
- (ii) it is a company whose securities are not listed or are not in the process of listing on any stock exchange, whether in India or outside India; and
- (iii) its ultimate or any intermediate holding company files consolidated financial statements with the Registrar which are in compliance with the applicable Accounting Standards."

Earlier Law- In rule 6, the second proviso was as follows-

"Provided further that nothing in this rule shall apply in respect of preparation of consolidated financial statement by an intermediate wholly-owned subsidiary, other than a wholly-owned subsidiary whose immediate parent is a company incorporated outside India:

Provided also that nothing contained in this rule shall. subject to any other law or regulation, apply for the financial year commencing from the 1st day of April, 2014 and ending on the 31st March, 2015, in case of a company which does not have a subsidiary or subsidiaries but has one or more associate companies or Joint ventures or both, for the consolidation of financial statement in respect of associate companies or joint ventures or both, as the case may be."

Reference of Page number of the relevant Rule in the study material - 2.6

Notification of Section 130 & 131

The Ministry of Corporate Affairs vide Notification S.O. 1934 (E) dated 1st June 2016 notified sections 130 and 131 of the Companies Act, 2013 with effect from the date of publication of the notification.

(i) Re-opening of Accounts on Court's or Tribunal's Orders

130. (1) Apply to court for re-opening of accounts- A company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by-

- (a) the Central Government,
- (b) the Income-tax authorities,
- (c) the Securities and Exchange Board,
- (d) any other statutory regulatory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that—
 - (i) the relevant earlier accounts were prepared in a fraudulent manner; or
 - (ii) the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements:

Provided that the court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income-tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned and shall take into consideration the representations, if any, made by that Government or the authorities, Securities and Exchange Board or the body or authority concerned before passing any order under this section.

(2) Revised accounts shall be final: Without prejudice to the provisions contained in this Act the accounts so revised or re-cast under sub-section (1) shall be final.

Earlier law- This section was not notified. It's a new section in the Companies Act, 2013.

(ii) Voluntary Revision of Financial Statements or Board's Report

131. (1) Preparation of revised financial statement or revised report: If it appears to the directors of a company that—

- (a) the financial statement of the company; or
- (b) the report of the Board,

do not comply with the provisions of section 129 or section 134, they may prepare revised financial statement or a revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in such form

and manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar:

Tribunal to serve the notice: Provided that the Tribunal shall give notice to the Central Government and the Income tax authorities and shall take into consideration the representations, if any, made by that Government or the authorities before passing any order under this section:

Provided further that such revised financial statement or report shall not be prepared or filed more than once in a financial year:

Reason for revision to be disclosed: Provided also that the detailed reasons for revision of such financial statement or report shall also be disclosed in the Board's report in the relevant financial year in which such revision is being made.

(2) **Limits of revisions:** Where copies of the previous financial statement or report have been sent out to members or delivered to the Registrar or laid before the company in general meeting, the revisions must be confined to—

- (a) the correction in respect of which the previous financial statement or report do not comply with the provisions of section 129 or section 134; and
- (b) the making of any necessary consequential alternation.

(3) **Framing of rules by the Central Government in relation to revised financial statement or director's report:** The Central Government may make rules as to the application of the provisions of this Act in relation to revised financial statement or a revised director's report and such rules may, in particular—

- (a) make different provisions according to which the previous financial statement or report are replaced or are supplemented by a document indicating the corrections to be made;
- (b) make provisions with respect to the functions of the company's auditor in relation to the revised financial statement or report;
- (c) require the directors to take such steps as may be prescribed

Earlier law- This section was not notified. It's a new section in the Companies Act, 2013.

The Companies (Removal of Difficulties) Second Order, 2016

Section 133 of the Companies Act, 2013 deals with the power of the Central Government to prescribe the accounting standards.

Vide 2nd Order S. O. 1227(E), dated 29th March 2016 in section 133 of the Companies Act, 2013 the following proviso has been inserted to the section-

“Provided that until the National Financial Reporting Authority is constituted under section 132 of the Companies Act, 2013 (18 of 2013), the Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949 (38 of 1949), in consultation with and after examination of the recommendations made by National Advisory Committee on Accounting Standards Constituted under section 210A of the Companies Act, 1956”.

This order shall be deemed to have come into force from the 1st April, 2015.

Earlier law- No proviso to section 133 in the Principal Act. This is newly inserted proviso.

Reference of Page number of relevant section in the study material - 2.8

Amendment in Rule 8 vide the Companies (Accounts) Amendment Rules, 2016 read with section 134.

The Ministry of Corporate Affairs vide Notification G.S.R. 742(E) dated 27th July, 2016 amended the *Companies (Accounts) Rules, 2014* by enforcement of the *Companies (Accounts) Amendment Rules, 2016*. Amendment has been made in Rule 8 of the principal rules which deals with the matters to be included in Board's Report.

In rule 8 of the principal rules, in sub-rule (1), for the words “and the report shall contain a separate section wherein a report on the performance and financial position of each of the subsidiaries, associates and joint venture companies included in the consolidated financial statement is presented”, the words “**and shall report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company during the period under report**” shall be substituted.

Earlier Law- In Rule 8 of the principal rules, sub-rule (1) contains the words that “the report shall contain a separate section wherein a report on the performance and financial position of each of the subsidiaries, associates and joint venture companies included in the consolidated financial statement is presented”.

Reference of Page number of relevant Rule in the study material - 2.9

The Companies (Corporate Social Responsibility Policy) Amendments Rules, 2016 read with section 135.

Amendment in CSR activities

The Central Government hereby further amends the *Companies (Corporate Social Responsibility Policy) Rules, 2014* through the enforcement of the *Companies (Corporate*

Social Responsibility Policy) Amendments Rules, 2016 vide notification G.S.R. 540(E) dated 23rd May 2016, issued by the Ministry of Corporate Affairs.

In the *Companies (Corporate Social Responsibility Policy) Rules, 2014* in the Principal rules, in rule 4, for sub-rule (2), the following sub-rule shall be substituted, namely:—

“(2) The Board of a company may decide to undertake its CSR activities approved by the CSR Committee, through-

- (a) a company established under section 8 of the Act or a registered trust or a registered society, established by the company, either singly or along with any other company, or
- (b) a company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government or any entity established under an Act of Parliament or a State legislature :

Provided that- if, the Board of a company decides to undertake its CSR activities through a company established under section 8 of the Act or a registered trust or a registered society, other than those specified in this sub-rule, such company or trust or society shall have an established track record of three years in undertaking similar programs or projects; and the company has specified the projects or programs to be undertaken, the modalities of utilisation of funds of such projects and programs and the monitoring and reporting mechanism”.

Earlier Law –Rule 4(2) was as follows: The Board of a company may decide to undertake its CSR activities approved by the CSR Committee through a registered trust or a registered society or a company established under section 8 of the Act by the company, either singly or along with its holding or subsidiary or associate company, or along with any other company or holding or subsidiary or associate company of such other company or otherwise.

Provide that – if such trust, society or company not established by the company, either singly or along with its holding or subsidiary or associate company, or along with any other company or holding or subsidiary or associate company of such other company shall have an established track record of three years in undertaking similar programmes or projects;

The company has specified the project or programs to be undertaken through these entities, the modalities of utilization of funds on such projects and programs and the monitoring and reporting mechanism.

Reference of Page number of the relevant Rule in the study material - 2.16

The Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Amendment Rules, 2016 read with section 137

Vide Notification G.S.R. 397(E) dated 4th April, 2016 the Ministry of Corporate Affairs further amends the *Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015*, through the notification of the *Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Amendment Rules, 2016* with effect from 4th April, 2016.

In the *Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2015*, in rule 3, for the proviso, the following proviso shall be substituted, namely:-

“Provided that the companies in banking, insurance, power sector, non-banking financial companies and housing finance companies need not file financial statements under this rule.”

Earlier Law- As per Rule 3 of the *Companies (Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015* notified vide notification dated 9th September, 2015. This notification notified following class of companies which are required to file their financial statement and other documents under section 137 of the Companies Act, 2013 with the registrar using the XBRL taxonomy

Following proviso were substituted:

“Provided that the companies in Banking, Insurance, Power Sector and Non-Banking Financial companies are exempted from XBRL filing.”

Reference of Page number of the relevant Rule in the study material- 2.27

Amendment in Rule 13 vide the Companies (Accounts) Amendment Rules, 2016 read with Section 138.

Ministry of Corporate Affairs vide Notification G.S.R. 742(E) dated 27th July, 2016 amended the *Companies (Accounts) Rules, 2014* by enforcement of the *Companies (Accounts) Amendment Rules, 2016*. Amendment has been made in Rule 13 of the principal rules which deals with the companies which are required to appoint internal auditor.

In rule 13 of the principal rules, in sub-rule (1),- (a) in the opening portion, the words “or a firm of internal auditors”, the words “**which may be either an individual or a partnership firm or a body corporate**” shall be substituted;

(b) In the Explanation, for item (ii) containing the term "Chartered Accountant" shall mean a Chartered Accountant whether engaged in practice or not.'

the following item shall be substituted, namely:

(ii) the term “Chartered Accountant” or “Cost Accountant” shall mean a “Chartered Accountant” or a “Cost Accountant”, as the case may be, whether engaged in practice or not’.

Earlier Law- Rule 13 of the principal rules, sub-rule (1) contains in the opening portion, the words “or a firm of internal auditors”.

In the Explanation, for item; it contains

‘(ii) the term “Chartered Accountant” shall mean a Chartered Accountant whether engaged in practice or not.’

Reference of Page number of the relevant Rule in the study material - 2.24

The Companies (Removal of Difficulties) third Order Dated 30th June, 2016

Section 139 of the Companies Act, 2013 deals with the appointment of the auditors. Whereas sub-section (2) of Section 139 states the law related to the term of auditor.

Vide the Companies (Removal of Difficulties) third Order in section 139, in sub-section (2), for the third proviso, the following proviso shall be substituted, namely:-

"Provided also that every company, existing on or before the commencement of this Act which is required to comply with the provisions of this sub-section, shall comply with requirements of this sub-section within a period which shall not be later than the date of the first annual general meeting of the company held, within the period specified under sub-section (1) of section 96, after three years from the date of commencement of this Act."

This order shall be deemed to have come into force 1st April, 2014.

Earlier Law- In section 139, in sub-section (2), following third proviso have been substituted-

"Provided also that every company, existing on or before the commencement of this Act which is required to comply with provisions of this sub-section, shall comply with the requirements of this sub-section within three years from the date of commencement of this Act:"

Reference of Page number of relevant section in the study material - 2.28

Notification of Second proviso to section 140 (4) and section 140 (5)

Section 140 of the Companies Act, 2013 deals with the Removal, Resignation of Auditor and Giving of Special Notice. This section was notified on 1st April, 2014 except the second proviso to sub-section (4) and sub-section (5) of the said section.

Ministry of Corporate Affairs vide Notification S.O. 1934(E) notifies Second proviso to sub-section (4) and sub-section (5) of section 140 with effect from 1st June, 2016.

Following are the notified sections-

(1) Second Proviso to section 140 (4)

On satisfaction of Tribunal that the right deliberated to the auditor are being abused: Provided further that if the Tribunal is satisfied on an application either of the company or of any other aggrieved person that the rights conferred by this sub-section are being abused by the auditor, then, the copy of the representation may not be sent and the representation need not be read out at the meeting.

(2) Sub-section (5) to section 140

On satisfaction of Tribunal that the auditor of a company has acted in a fraudulent manner etc: Without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal either suo motu or on an application made to it by the Central Government or by any person concerned, if it is satisfied that the auditor of a company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, it may, by order, direct the company to change its auditors:

Requirement for change of auditor: Provided that if the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within fifteen days of receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place:

Ineligibility of auditor to be appointed: Provided further that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under section 447.

Explanation I. — It is hereby clarified that the case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to, the company or its director or officers.

Explanation II. — For the purposes of this Chapter the word “auditor” includes a firm of auditors.

Earlier Law- Second proviso to section 140 (4) and section 140 (5) of the Companies Act, 2013 were not notified.

Reference of Page number of relevant section in the study material - 2.35

The Companies (Removal of Difficulties) Order, 2016

Vide Order S.O.1226 (E) dated 29th March, 2016, Central Government hereby makes the following order to remove the difficulties regarding compliance with the provisions of sub-section (11) of section 143 in so far as they relate to consultation with National Financial Reporting Authority till the period it is duly constituted under section 132 of the Companies Act, 2013.

The provisions contained in section 143 of the Companies Act, 2013 provides for powers and duties of auditors and auditing standards that has come into force on the 1st April, 2014.

Sub-section (11) of section 143 of the said Act provides that the Central Government may, in consultation with the National Financial Reporting Authority, by general or special order, direct, in respect of such class or description of companies, as may be specified in the order, that the auditor's report shall also include a statement on such matters as may be specified therein;

In the Companies Act, 2013, in section 143, in sub-section (11), the following proviso shall be inserted to remove the said difficulties, namely

"Provided that until the National Financial Reporting Authority is constituted under section 132, the Central Government may hold consultation required under this sub-section with the Committee chaired by an officer of the rank of Joint Secretary or equivalent in the Ministry of corporate Affairs and the committee shall have the representatives from the Institute of Chartered Accountants of India and Industry Chambers and also special invitees from the National Advisory Committee on Accounting Standards and the office of the Comptroller and Auditor-General".

This order shall be deemed to have come into force from the 10th April, 2015.

Earlier law- No proviso to section 143(11) in the Principal Act. This is newly inserted proviso.

Reference of Page number of relevant section in the study material - 2.43

Notification of Section 143(12) amended vide the Companies (Amendment) Act, 2015

The Ministry of Corporate Affairs vide Notification S.O.3388 (E) dated 14th December 2015 through the *Companies (Amendment) Act, 2015* amended Sub-section 12 of section 143, and was made effective from 14th December 2015.

Sub-section 12 shall be substituted with the following:—

"(12) Notwithstanding anything contained in this section, if an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of

fraud involving such amount or amounts as may be prescribed, is being or has been committed in the company by its officers or employees, the auditor shall report the matter to the Central Government within such time and in such manner as may be prescribed:

Provided that in case of a fraud involving lesser than the specified amount, the auditor shall report the matter to the audit committee constituted under section 177 or to the Board in other cases within such time and in such manner as may be prescribed:

Provided further that the companies, whose auditors have reported frauds under this sub-section to the audit committee or the Board but not reported to the Central Government, shall disclose the details about such frauds in the Board's report in such manner as may be prescribed."

Earlier Law contained under section 143(12) stated -"Notwithstanding anything contained in this section, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government within such time and in such manner as may be prescribed."

Reference of Page number of relevant section in the study material - 2.44

Amendment in Rule 13 vide the Companies (Audit and Auditors) Amendment Rules, 2015

Vide Notification G.S.R. 972(E) Dated 14th December 2015, the Ministry of Corporate Affairs further amended the *Companies (Audit and Auditors) Rules, 2014* through the enforcement of the *Companies (Audit and Auditors) Amendment Rules, 2015* from the date of its publication in the Official Gazette.

Through this amendment Rules, for Rule 13, the following rule shall be substituted-

13. Reporting of Frauds by Auditor and Other Matters:

- (1) If an auditor of a company, in the course of the performance of his duties as statutory auditor, has reason to believe that an offence of fraud, which involves or is expected to involve individually an amount of rupees one crore or above, is being or has been committed against the company by its officers or employees, the auditor shall report the matter to the Central Government.
- (2) The auditor shall report the matter to the Central Government as under:-
 - (a) the auditor shall report the matter to the Board or the Audit Committee, as the case may be, immediately but not later than two days of his knowledge of the fraud, seeking their reply or observations within forty-five days;

- (b) on receipt of such reply or observations, the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within fifteen days from the date of receipt of such reply or observations;
 - (c) in case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of forty-five days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations;
 - (d) the report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed Post followed by an e-mail in confirmation of the same;
 - (e) the report shall be on the letter-head of the auditor containing postal address, e-mail address and contact telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and
 - (f) The report shall be in the form of a statement as specified in Form ADT-4.
- (3) In case of a fraud involving lesser than the amount specified in sub-rule (1), the auditor shall report the matter to Audit Committee constituted under section 177 or to the Board immediately but not later than two days of his knowledge of the fraud and he shall report the matter specifying the following:-
- (a) Nature of Fraud with description;
 - (b) Approximate amount involved; and
 - (c) Parties involved.
- (4) The following details of each of the fraud reported to the Audit Committee or the Board under sub-rule (3) during the year shall be disclosed in the Board's Report:-
- (a) Nature of Fraud with description;
 - (b) Approximate Amount involved;
 - (c) Parties involved, if remedial action not taken; and
 - (d) Remedial actions taken.
- (5) The provision of this rule shall also apply, mutatis mutandis, to a Cost Auditor and a Secretarial Auditor during the performance of his duties under section 148 and section 204 respectively."

Earlier Law-Rule 13 of the principal rules states - Reporting of frauds by auditor.

(1) For the purpose of sub-section (12) of section 143, in case the auditor has sufficient reason to believe that an offence involving fraud, is being or has been committed against the company by officers or employees of the company, he shall report the matter to the Central Government immediately but not later than sixty days of his knowledge and after following the procedure indicated herein below:

- (i) auditor shall forward his report to the Board or the Audit Committee, as the case may be, immediately after he comes to knowledge of the fraud, seeking their reply or observations within forty-five days;
 - (ii) on receipt of such reply or observations the auditor shall forward his report and the reply or observations of the Board or the Audit Committee alongwith his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within fifteen days of receipt of such reply or observations;
 - (iii) in case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of forty-five days, he shall forward his report to the Central Government alongwith a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he failed to receive any reply or observations within the stipulated time.
- (2) The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed post followed by an e-mail in confirmation of the same.
- (3) The report shall be on the letter-head of the auditor containing postal address, e-mail address and contact number and be signed by the auditor with his seal and shall indicate his Membership Number.
- (4) The report shall be in the form of a statement as specified in Form ADT-4.
- (5) The provision of this rule shall also apply, mutatis mutandis, to a cost auditor and a secretarial auditor during the performance of his duties under section 148 and section 204 respectively.

Reference of Page number of relevant Rule in the study material - 2.44

The Companies (Auditor's Report) Order, 2016

Vide Order S.O.1228 (E) dated 29th March, 2016, the Ministry of Corporate Affairs issued the Companies (Auditor's Report) Order, 2016 in consultation with the committee constituted under proviso to section 143(11) of the Companies Act, 2013. This order shall in addition, contains the matters specified in paragraphs 3 and 4 of the Companies (Auditor's Report) Order, 2016. It may be applicable on every report made by the auditor under section 143 of

the Companies Act, 2013 on the accounts of every company audited by him, to which this order applies, for the financial years commencing on or after 1st April, 2015.

Earlier Law- This order is in supersession of the Companies (Auditors's Report) Order, 2015 published vide Notification no. S.O.990 (E) dated 10th April, 2015.

Reference of Page number of relevant order in the study material - 2.43

Amendment in Rule 11 of the Companies (Audit and Auditors) Rules, 2014

The Ministry of Corporate Affairs **vide Notification dated 30th March, 2017**, in exercise of powers conferred by section 143, amendment was made in **Rule 11 of the Companies (Audit and Auditors) Rules, 2014 by the enforcement of the Companies(Audit and Auditor) Amendments Rules, 2017**. The amendment is as follows:

"(d) Whether the company had provided requisite disclosures in its financial statements as to holdings as well as dealings in Specified Bank Notes during the period from 8th November, 2016 to 30th December, 2016 and if so, whether these are in accordance with the books of accounts maintained by the company".

Earlier Law- Rule 11 of the Companies (Audit and Auditors) Rules, 2014 covered only (a),(b) & (c) clauses. This clause (d) is the new inclusion.

Reference of Page number of relevant order in the study material - 2.43

3

APPOINTMENT AND QUALIFICATIONS OF DIRECTORS

Notification of Section 169(4)

Section 169 of the Companies Act, 2013 deals with the removal of Directors. This section was notified on 1st April, 2014 except sub-section (4). The Ministry of Corporate Affairs vide Notification S.O. 1934(E) notifies sub-section (4) to section 169 with effect from 1st June, 2016.

Notified Section 169(4) is as follows:

“(4) **On serving of notice of a resolution to remove director:** Where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect thereto representation in writing to the company and requests its notification to members of the company, the company shall, if the time permits it to do so,—

- (a) in any notice of the resolution given to members of the company, state the fact of the representation having been made; and
- (b) send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company), and if a copy of the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting:

Provided that copy of the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it”.

Earlier Law-Section 169(4) was not notified.

Reference of Page number of relevant section in the study material -3.29

4

APPOINTMENT AND REMUNERATION OF MANAGERIAL PERSONNEL

The Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2016.

Vide Notification G.S.R. 646(E) dated 30th June 2016, the Ministry of Corporate Affairs further amends Rule 5 of the *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014* through the enforcement of the *Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2016* with effect from the date of its publication in the Official Gazette.

In rule 5 of the principal rules,- in sub-rule (2),-

- (I) for the words " the name of every employee of the company, who-" the words the names of the top ten employees in terms of remuneration drawn and the name of every employee, who-" shall be substituted;
- (II) in sub-clause (i) for the words "sixty lakh rupees", the words "one crore and two lakh rupees" shall be substituted;
- (III) in sub-clause (ii) for the words "five lakh rupees per month" the words " eight lakh and fifty thousand rupees per month" shall be substituted.

Earlier Law- Sub- rule 2 of the principal rules stated - The board's report shall include a statement showing the name of every employee of the company, who-

- (i) if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than sixty lakh rupees;
- (ii) if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than five lakh rupees per month;

Reference of Page number of relevant Rules in the study material - 4.6 – 4.7

Amendment in Schedule V

The Ministry of Corporate Affairs vide Notification S.O. 2922(E) dated 12th September 2016 amends Schedule V of the Companies Act, 2013. According to the notification in part II, for Section II, the following section shall be substituted with effect from the date of its publication in the official gazette-

Section II

Remuneration payable by companies having no profit or inadequate profit without Central Government approval

Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding, the limits under (A) and (B) given below:-

(A):

(1)	(2)
Where the effective capital is	Limit of yearly remuneration payable shall not exceed (Rupees)
(i) Negative or less than 5 crores	60 Lakhs
(ii) 5 crores and above but less than 100 crores	84 Lakhs
(iii) 100 crores and above but less than 250 crores	120 Lakhs
(iv) 250 crores and above	120 lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores:

Provided that the above limits shall be doubled if the resolution passed by the shareholders is a special resolution.

Explanation.- It is hereby clarified that for a period less than one year, the limits shall be pro-rated.

- (B) In case of a managerial person who is functioning in a professional capacity, no approval of Central Government is required, if such managerial person is not having any interest in the capital of the company or its holding company or any of its subsidiaries directly or indirectly or through any other statutory structures and not having any, direct or indirect interest or related to the directors or promoters of the company or its holding company or any of its subsidiaries at any time during the last two years before or on or after the date of appointment and possesses graduate level qualification with expertise and specialised knowledge in the field in which the company operates:

Provided that any employee of a company holding shares of the company not exceeding 0.5% of its paid up share capital under any scheme formulated for allotment of shares to such employees including Employees Stock Option Plan or by way of qualification shall be deemed to be a person not having any interest in the capital of the company;

Provided further that the limits specified under items (A) and (B) of this section shall apply, if-

- (i) payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of section 178 also by the Nomination and Remuneration Committee;
- (ii) the company has not committed any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in the preceding financial year before the date of appointment of such managerial person and in case of a default, the company obtains prior approval from secured creditors for the proposed remuneration and the fact of such prior approval having been obtained is mentioned in the explanatory statement to the notice convening the general meeting;
- (iii) an ordinary resolution or a special resolution, as the case may be, has been passed for payment of Remuneration as per the limits laid down in item (A) or a special resolution has been passed for payment of remuneration as per item (B), at the general meeting of the company for a period not exceeding three years.
- (iv) a statement along with a notice calling the general meeting referred to in clause (iii) is given to the shareholders containing the following information, namely:-

I. General information:

- (1) Nature of industry
- (2) Date or expected date of commencement of commercial production
- (3) In case of new companies, expected date of commencement of activities as per project approved by financial institutions appearing in the prospectus
- (4) Financial performance based on given indicators
- (5) Foreign investments or collaborations, if any.

II. Information about the appointee:

- (1) Background details
- (2) Past remuneration
- (3) Recognition or awards
- (4) Job profile and his suitability
- (5) Remuneration proposed
- (6) Comparative remuneration profile with respect to industry, size of the company, profile of the position and person (in case of expatriates the relevant details would be with respect to the country of his origin)

- (7) Pecuniary relationship directly or indirectly with the company, or relationship with the managerial personnel, if any.

III. Other information:

- (1) Reasons of loss or inadequate profits
- (2) Steps taken or proposed to be taken for improvement
- (3) Expected increase in productivity and profits in measurable terms

IV. Disclosures

The following disclosures shall be mentioned in the Board of Director's report under the heading "Corporate Governance", if any, attached to the Financial statement:

- (i) all elements of remuneration package such as salary, benefits, bonuses, stock options, pension, etc., of all the directors;
- (ii) details of fixed component and performance linked incentives along with the performance criteria;
- (iii) service contracts, notice period, severance fees; and
- (iv) stock option details, if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable.

Explanation: For the purposes of Section II of this part, "Statutory Structure" means any entity which is entitled to hold shares in any company formed under any statute. "

Earlier law on Schedule V - Section II — Remuneration payable by companies having no profit or inadequate profit without Central Government approval:

Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding the higher of the limits under (A) and (B) given below:—

A

(1)	(2)
Where the effective capital is	Limit of yearly remuneration payable shall not exceed (Rupees)
(i) Negative or less than 5 crores	30 Lakhs
(ii) 5 crores and above but less than 100 crores	42 Lakhs
(iii) 100 crores and above but less than 250 crores	60 Lakhs
(iv) 250 crores and above	60 lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores:

Provided that the above limits shall be doubled if the resolution passed by the shareholders is a special resolution.

Explanation.—It is hereby clarified that for a period less than one year, the limits shall be pro-rated.

- (B) In the case of a managerial person who was not a security holder holding securities of the company of nominal value of rupees five lakh or more or an employee or a director of the company or not related to any director or promoter at any time during the two years prior to his appointment as a managerial person, — 2.5% of the current relevant profit:

Provided that if the resolution passed by the shareholders is a special resolution, this limit shall be doubled:

Provided further that the limits specified under this section shall apply, if—

- (i) payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of section 178 also by the Nomination and Remuneration Committee;
- (ii) the company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in the preceding financial year before the date of appointment of such managerial person;
- (iii) a special resolution has been passed at the general meeting of the company for payment of remuneration for a period not exceeding three years;
- (iv) a statement along with a notice calling the general meeting referred to in clause (iii) is given to the shareholders containing the following information, namely:—

I. General Information:

- (1) Nature of industry
- (2) Date or expected date of commencement of commercial production
- (3) In case of new companies, expected date of commencement of activities as per project approved by financial institutions appearing in the prospectus
- (4) Financial performance based on given indicators
- (5) Foreign investments or collaborations, if any.

II. Information about the appointee:

- (1) Background details
- (2) Past remuneration
- (3) Recognition or awards
- (4) Job profile and his suitability

- (5) Remuneration proposed
- (6) Comparative remuneration profile with respect to industry, size of the company, profile of the position and person (in case of expatriates the relevant details would be with respect to the country of his origin)
- (7) Pecuniary relationship directly or indirectly with the company, or relationship with the managerial personnel, if any.

III. Other information:

- (1) Reasons of loss or inadequate profits
- (2) Steps taken or proposed to be taken for improvement
- (3) Expected increase in productivity and profits in measurable terms.

IV. Disclosures:

The following disclosures shall be mentioned in the Board of Director's report under the heading "Corporate Governance", if any, attached to the financial statement:—

- (i) all elements of remuneration package such as salary, benefits, bonuses, stock options, pension, etc., of all the directors;
- (ii) details of fixed component and performance linked incentives along with the performance criteria;
- (iii) service contracts, notice period, severance fees;
- (iv) stock option details, if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable.

Reference of Page number of relevant schedule in the study material - 4.17

5

MEETING OF BOARD AND ITS POWERS

Notification of Section 177 amended vide the Companies (Amendment) Act, 2015

The Ministry of Corporate Affairs vide Notification S.O.3388 (E) dated 14th December 2015 through the *Companies (Amendment) Act, 2015* amended section 177, and was made effective from 14th December 2015.

Section 177 of the Companies Act, 2013 deals with the Audit committee. Accordingly in Sub-clause (iv) to Sub-section (4) following proviso have been inserted-

“Provided that the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as prescribed under the Companies (Meeting of Board and its Power) Second Amendment Rules, 2015, Dated 14th December, 2015;”.

Earlier Law- No proviso to Section 177 in the principal Act. This is a newly inserted proviso.

Reference of Page number of relevant section in the study material - 5.7

Omission of Rule 10 of the Companies (Meetings of Board and its Powers) Rules, 2014 read with section 185

Vide Notification G.S.R. 971(E) dated 14th December 2015, the Ministry of Corporate Affairs through the *Companies (Meeting of Board and its Powers) Second Amendment Rules, 2015* omitted Rule 10 of the *Companies (Meetings of Board and its Powers) Rules, 2014*

Rule 10 dealt with the Loans to directors etc. under section 185 of the Companies Act, 2013. This rule have been substituted to avoid the conflict between the provisions given in section 185 and the respective rules.

Earlier Law- Rule 10 of the *Companies (Meetings of Board and its Powers) Rules, 2014* provided exemption to the following from the ambit of section 185- (1) Any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security

provided by a holding company in respect of any loan made to its wholly owned subsidiary company is exempted from the requirements under this section; and

(2) Any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company is exempted from the requirements under this section.

Provided that such loans made under sub-rules (1) and (2) are utilized by the subsidiary company for its principal business activities.

Reference of Page number of relevant rules in the study material - 5.21 & 5.22

In Rule 15(3) of the Companies (Meetings of Board and its Powers) Rules, 2014 read with section 188

As per the amendment made Vide Notification G.S.R.971 (E) dated 14th December 2015, the Ministry of Corporate Affairs through the *Companies (Meeting of Board and its Powers) Second Amendment Rules, 2015*, for the words “special resolution” wherever they occur the word resolution shall be substituted.

Rule 15 deals with the Contract or Arrangement with a Related Party. Amendments is in following sub-rules-

“(3) For the purposes of first proviso to sub-section (1) of section 188, except with the prior approval of the company by a resolution, a company shall not enter into a transaction or transactions, where the transaction or transactions to be entered into.

(2) In Explanation (2) to this sub-rule - In case of wholly owned subsidiary, the resolution is passed by the holding company shall be sufficient for the purpose of entering into the transaction between the wholly owned subsidiary and the holding company.”

Earlier law- In rule 15, in sub-rule (3), for the words 'resolution' wherever they occurred the word “special resolution” were there in the Companies (Meetings of Board and its Powers) Rules, 2014

Reference of Page number of relevant rules in the study material - 5.29

Amendment in Rule 15(3)(a) of the Companies (Meetings of Board and its Powers) Rules, 2014 read with section 188

Vide **Notification dated 30th March, 2017**, Ministry of Corporate Affairs through the enforcement of the Companies (Meetings of Board and its Powers) Amendment Rules, 2017, made changes in **rule 15 which deals with the Contract or Arrangement with a Related Party**. Following amendments were made in the items given in the Rule 15(3)(a):

(1) in item (i), item (ii), item (iii) and item (iv), for the words “exceeding ten per cent.” wherever they occur, the words “**amounting to ten per cent. or more**” shall be substituted; and

(2) in item (iii), for the words “ten per cent. of turnover” the words “**ten per cent. or more of turnover**” shall be substituted.

Reference of Page number of relevant rules in the study material - 5.29

Amendment in Section 182

Vide Notification of Finance Act, 2017 w.e.f. 31st March, 2017, changes was made in **section 182** of the Companies Act, 2013. This section deals with the Prohibitions and Restrictions Regarding Political Contributions. Following are the said changes:

(i) in sub-section (1)—

(a) first proviso shall be omitted;

(b) in the second proviso, —

(A) the word “further” shall be omitted;

(B) the words “and the acceptance” shall be omitted;

(ii) for sub-section (3), the following shall be substituted, namely:—

“(3) Every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates.

(3A) Notwithstanding anything contained in sub-section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account:

Provided that a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.”

Earlier law- Section 182. (1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party:

Provided that the amount referred to in sub-section (1) or, as the case may be, the aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent. of its average net profits during the three immediately preceding financial years:

Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors

and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.

(2) Without prejudice to the generality of the provisions of sub-section (1),—

(a) a donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party shall also be deemed to be contribution of the amount of such donation, subscription or payment to such person for a political purpose;

(b) the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication, being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like, shall also be deemed,—

(i) where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and

(ii) where such publication is not by or on behalf of, but for the advantage of a political party, to be a contribution for a political purpose.

(3) Every company shall disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year to which that account relates, giving particulars of the total amount contributed and the name of the party to which such amount has been contributed. (See General Circular No.19/2013)

(4) If a company makes any contribution in contravention of the provisions of this section, the company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed.

Explanation.—For the purposes of this section, “political party” means a political party registered under section 29A of the Representation of the People Act, 1951.

Reference of Page number of relevant section in the study material - 5.17

6

INSPECTION, INQUIRY AND INVESTIGATION

Amendment in section 206

Section 206 of the Companies Act, 2013 deals with the Power to call for information, inspect books and conduct inquiries.

The Ministry of Corporate Affairs vide Notification S.O.1626(E) dated 29th April, 2016, notified that the Central Government being satisfied that circumstances warrant, hereby delegate the powers to appoint inspectors for inspection of books and papers of a company under section 206(5) to the Regional Directors.

Earlier Law- Sub-section (5) states that without prejudice to the foregoing provisions of this section, the Central Government may, if it is satisfied that the circumstances so warrant, direct inspection of books and papers of a company by an inspector appointed by it for the purpose.

Reference of Page number of relevant section in the study material - 6.2

Amendment in section 208

Section 208 of the Companies Act, 2013 deals with the Report on inspection made.

The Ministry of Corporate Affairs vide Notification S.O. 3557(E) dated 31st December, 2015, notified that the Central Government hereby delegates to the Regional Directors at Mumbai, Kolkata, Chennai, Delhi, Ahmedabad, Hyderabad and Shillong, the power vested in it under section 208 of the said Act for receiving the report from the Registrar (having jurisdiction over the place of registered office of the company concerned) or from the Inspector where such report recommends action for violation of offences under the said Act for which imprisonment of less than two years is provided, (except for violation of offences under Chapter III, IV, section 127, 177 and 178 for which the report shall be received by Central Government), subject to the conditions, namely-

“On receipt of the report as referred above, the Regional Director –

- (a) shall examine the report and obtain legal advice, if required;
- (b) shall direct initiation of prosecution if he agrees with the recommendation of the Registrar or inspector to initiate prosecution against the company, officers or employees, Present

or past of the company, or any other person connected with the affairs of the company; and

- (c) shall inform the Central Government (along with reasons for non-acceptance of recommendation of Registrar or inspector, wherever he disagrees) about the action taken on the report submitted by Registrar or Inspector.

The Regional Director shall, on receipt of the report, where such report recommends action for violation of offences other than those specified in paragraph 1 above, examine the same, obtain legal advice, if required, and submit it to the Central Government seeking initiation of prosecution.”

Earlier Law- Section 208 which dealt with the Report on inspection made states that the Registrar or inspector shall, after the inspection of the books of account or an inquiry under section 206 and other books and papers of the company under section 207, submit a report in writing to the Central Government along with such documents, if any, and such report may, if necessary, include a recommendation that further investigation into the affairs of the company is necessary giving his reasons in support.

Reference of Page number of relevant section in the study material - 6.4

Notification of Section 213.

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies section 213 of the Companies Act, 2013 with effect from the date of publication of notification.

Section 213 deals with the Investigation into Company's Affairs in other cases. Section is as follows-

213. Cognizance of offence by Tribunal: The Tribunal may,—

- (a) on an application made by—
- (i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or
 - (ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or
- (b) **Order by tribunal:** On an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that—
- (i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or

in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;

- (ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or
- (iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company,

order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct:

(c) **Punishment in case of guilty:** Provided that if after investigation it is proved that—

- (i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or
- (ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.

Earlier law- Corresponding Section 237 of the Companies Act, 1956 was applicable as the section 213 of the Companies Act, 2013 was not notified.

Reference of Page number of relevant section in the study material - 6.17

Notification of Sub- section (2) to Section 216

Section 216 deals with the investigation of ownership of company. This section was notified on 1st April, 2014, except the sub section (2).

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies sub-section (2) to section 216 of the Companies Act, 2013 with effect from the date of publication of notification.

Section 216(2) states that –

“Without prejudice to its powers under sub-section (1), the Central Government shall appoint one or more inspectors under that sub-section, if the Tribunal, in the course of any proceeding before it, directs by an order that the affairs of the company ought to be investigated as regards the membership of the company and other matters relating to the company, for the purposes specified in sub-section (1).”

Earlier law- This sub-section was not notified. In fact this section 216 was regulated by corresponding section 247 of the Companies Act, 1956.

Reference of Page number of relevant section in the study material - 6.10

Notification of section 218

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies section 218 of the Companies Act, 2013 with effect from the date of publication of notification.

Section 218 of the Act deals with the Protection of Employees during Investigation

218. (1) Approval of tribunal to take action against the employee: Notwithstanding anything contained in any other law for the time being in force, if—

- (a) **during the course of any investigation of the affairs** and other matters of or relating to a company, other body corporate or person under section 210, section 212, section 213 or section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under section 216; or
- (b) **during the pendency of any proceeding** against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes—
 - (i) to discharge or suspend any employee; or
 - (ii) to punish him, whether by dismissal, removal, reduction in rank or otherwise; or
 - (iii) to change the terms of employment to his disadvantage,

the company, other body corporate or person, as the case may be, shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

- (2) **Action against employee:** If the company, other body corporate or person concerned does not receive within thirty days of making of application under sub-section (1), the approval of the Tribunal, then and only then, the company, other body corporate or person concerned may proceed to take against the employee, the action proposed.

(3) **Appeal:** If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of thirty days of the receipt of the notice of the objection, prefer an appeal to the Appellate Tribunal in such manner and on payment of such fees as may be prescribed.

(4) **Final and Binding order:** The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned.

(5) **Over-riding effect:** For the removal of doubts, it is hereby declared that the provisions of this section shall have effect without prejudice to the provisions of any other law for the time being in force.

Earlier Law- This section was not notified. The corresponding section 635B of the Companies Act, 1956 was applicable.

Notification of section 221

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies section 221 of the Companies Act, 2013 with effect from the date of publication of notification.

Section 221 of the Act deals with the Freezing of Assets of Company on Inquiry and Investigation.

221. (1) Order of the tribunal: Where it appears to the Tribunal, on a reference made to it by the Central Government or in connection with any inquiry or investigation into the affairs of a company under this Chapter or on any complaint made by such number of members as specified under sub-section (1) of section 244 or a creditor having one lakh amount outstanding against the company or any other person having a reasonable ground to believe that the removal, transfer or disposal of funds, assets, properties of the company is likely to take place in a manner that is prejudicial to the interests of the company or its shareholders or creditors or in public interest, it may by order direct that such transfer, removal or disposal shall not take place during such period not exceeding three years as may be specified in the order or may take place subject to such conditions and restrictions as the Tribunal may deem fit.

(2) **Punishment in case of contravention of order of tribunal:** In case of any removal, transfer or disposal of funds, assets, or properties of the company in contravention of the order of the Tribunal under sub-section (1), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

Earlier Law- This section was not notified. This is a newly inserted section in the Companies Act, 2013

Notification of Section 222

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies section 222 of the Companies Act, 2013 with effect from the date of publication of notification.

Section 222 of the Act deals with the Imposition of Restrictions upon Securities

222. (1) Tribunal may by order put restrictions upon securities: Where it appears to the Tribunal, in connection with any investigation under section 216 or on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any securities issued or to be issued by a company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions, as it may deem fit, are imposed, the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding three years as may be specified in the order.

(2) Punishment in case of contravention to an order: Where securities in any company are issued or transferred or acted upon in contravention of an order of the Tribunal under sub-section (1), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

Earlier Law – This section was not notified. The corresponding section 250 of the Companies Act, 1956 was applicable.

Reference of Page number of relevant section in the study material - 6.18

Notification of Sub-sections (2) & (5) to section 224

Section 224 of the Companies Act, 2013 deals with the Actions to be taken in pursuance of Inspector's report. This section was notified on 1st April, 2014 except Sub-section (2) and Sub-section (5).

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies Sub-section (5) to section 224 of the Companies Act, 2013 with effect from the date of publication of notification. Whereas vide Notification dated 7th December, 2016, Sub-section (2) to this Section have been notified.

224. (2) Presenting of petition of Winding up: If any company or other body corporate is liable to be wound up under this Act or under the Insolvency and Bankruptcy Code, 2016 and

it appears to the Central Government from any such report made under section 223 that it is expedient so to do by reason of any such circumstances as are referred to in section 213, the Central Government may, unless the company or body corporate is already being wound up by the Tribunal, cause to be presented to the Tribunal by any person authorised by the Central Government in this behalf—

- (a) a petition for the winding up of the company or body corporate on the ground that it is just and equitable that it should be wound up;
- (b) an application under section 241; or
- (c) both.

(5) Order of Disgorgement in case of fraud taken place in the company: Where the report made by an inspector states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property, or cash, as the case may be, and also for holding such director, key managerial personnel, officer or other person liable personally without any limitation of liability.

Earlier Law- These sub-sections (2) & (5) to Section 224 were not notified.

Reference of Page number of relevant section in the study material - 6.15

Notification of section 226

Section 226 of the Companies Act, 2013 deals with the Voluntary Winding up of Company, etc., Not to Stop Investigation Proceedings.

Vide Notification S.O. 3677(E).dated 7th December, 2016 the Central Government notifies the provisions of section 226 of the Companies Act, 2013 with effect from 15th December, 2016.

226. An investigation under this Chapter may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that—
(a) an application has been made under section 241;
(b) the company has passed a special resolution for voluntary winding up; or
(c) any other proceeding for the winding up of the company is pending before the Tribunal:

Provided that where a winding up order is passed by the Tribunal in a proceeding referred to in clause (c), the inspector shall inform the Tribunal about the pendency of the investigation proceedings before him and the Tribunal shall pass such order as it may deem fit:

Provided further that nothing in the winding up order shall absolve any director or other employee of the company from participating in the proceedings before the inspector or any liability as a result of the finding by the inspector.

Reference of Page No. of relevant section in the study material is 6.19

Notification of section 227

Section 227 deals with Legal Advisers and Bankers not to disclose certain information.

Vide Notification S.O. 2912 (E) dated 9th September 2016 the Central Government notifies the provisions of section 227 of the Companies Act, 2013 with effect from 9th September 2016.

227.Non-disclosure of certain information by certain persons-Nothing in this Chapter shall require the disclosure to the Tribunal or to the Central Government or to the Registrar or to an inspector appointed by the Central Government—

- (a) by a legal adviser, of any privileged communication made to him in that capacity, except as respects the name and address of his client; or
- (b) by the bankers of any company, body corporate, or other person, of any information as to the affairs of any of their customers, other than such company, body corporate, or person.

Earlier Law- Corresponding Section 251 of the Companies Act, 1956 was prevailing as this section 227 of the 2013 Act was not notified.

7

COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS

Compromises, Arrangements and Amalgamations [Sections 230- 240]

The provisions related to amalgamations, arrangements and compromise are covered under sections 230 to 240 of the Companies Act, 2013. These provisions were notified on 7th of December 2016 with effective from 15th of December 2016. This chapter deals with various corporate restructuring concepts prevailing in the corporate sphere.

Important aspects of this chapter are as follows:

- (i) This chapter provides the provisions which specifies the detailed disclosures to be made during the process of corporate restructuring. This requirement of extensive disclosures is to ensure transparency and allows stakeholders to take decisions.
- (ii) Introduction of voting by way of postal ballot, will ensure larger public participation.
- (iii) Introduction of concept of dispensation by providing a threshold for the dispensation of creditors meetings.
- (iv) This chapter also requires serving of notices to the various statutory authorities with regard to the scheme, arrangement or restructuring, so that participation of various regulators may assist the tribunal to take a informed decision.
- (v) Provision related to takeover of listed companies through the scheme of compromise or arrangement, emphasis on the pricing guidelines which the SEBI would prescribe ensuring uniformity in law.
- (vi) This chapter also provides of a provision which prohibits the maintenance of treasury stock. The practice of indirectly holding investments through intermediaries is now prohibited and cannot be structured by companies.
- (vii) Exit options to shareholders through pre-determined formula or valuation can be given on merger of listed company with an unlisted company.
- (viii) Statement certifying implementation of the scheme shall be given a Chartered Accountant or Company Secretary.
- (ix) The provision in this chapter are in compliance with the SEBI regulations and guidelines issued by RBI.

- (x) This chapter provides for amalgamations between-
 - (i) 2/more small companies, or
 - (ii) Holding company and its wholly owned subsidiaries.
- (xi) Enables cross border amalgamations between Indian Companies and Foreign companies.
- (xii) Lays the mechanism under which the transferee company under a scheme or contract can acquire shares of dissenting shareholders.
- (xiii) Provides of exit method for minority shareholders, and promoters to have 100% promoter entity. So that balance between the interests of the promoters and minority shareholders may be maintained.
- (xiv) This chapter also provides the process of amalgamation of companies for public interest.
- (xv) Books and Papers of the amalgamating company/ the company in which shares have been acquired by another company shall not be disposed of on prior permission of the Central Government.
- (xvi) Liability of the officers of the transferor company on any offence committed under this Act shall be retrospective even after the merger, amalgamation or acquisition.

Given provisions in this chapter are as follows:

Power to Compromise or Make Arrangements with Creditors and Members [Section 230]
--

Section 230 of the Companies Act, 2013 contains the powers of the Tribunal on the filing of application for the compromise or arrangement.

Accordingly, the provisions states the following:

- (1) **Power of tribunal on an application filed for a compromise /arrangement:**
Where a compromise or arrangement is proposed between—
 - (a) a company and its creditors or any class of them; or
 - (b) a company and its members or any class of them,the Tribunal may, on the application of the-
 - (i) company, or
 - (ii) of any creditor, or
 - (iii) member of the company, or
 - (iv) of the liquidator (in the case of a company which is being wound up), appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be,

order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation—For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

- (2) **Disclosures by applicant:** The company or any other person, by whom an application is made, shall disclose to the Tribunal by affidavit—
- (a) **all material facts** relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;
 - (b) **reduction of share capital** of the company, if any, included in the compromise or arrangement;
 - (c) **any scheme of corporate debt restructuring** consented to by not less than seventy-five per cent. of the secured creditors in value, including—
 - (i) a creditor's responsibility statement in the prescribed form;
 - (ii) safeguards for the protection of other secured and unsecured creditors;
 - (iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;
 - (iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and
 - (v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.
- (3) **Notice of meeting conducted on order of Tribunal:** Where a meeting is proposed to be called in pursuance of an order of the Tribunal, a notice of such meeting shall be sent to—
- all the creditors or class of creditors, and
 - to all the members or class of members,
 - and the debenture-holders of the company,
- individually at the address registered with the company.

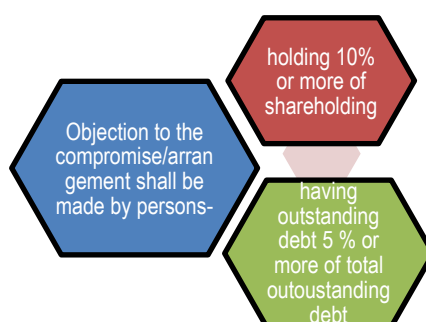
Annexure with Notice: Notice of meeting shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be as prescribed under *Rule 6 of the Companies (Compromises, arrangements and amalgamations) Rules, 2016*.

Advertisement of notice: Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as prescribed under *Rule 7 of the Companies (Compromises, arrangements and amalgamations) Rules, 2016*.

Time period for the receipt of the copies of the compromise or arrangement: Provided further that where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

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

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement.



- (5) **Notices to sectoral regulators to make representation, if likely to be affected by the compromise or arrangement:** A notice along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the

Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

- (6) **Binding order of Tribunal:** Where, at a meeting held, majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator, "appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be," and the contributories of the company.
- (7) **Particulars to be stated in the order:** An order made by the Tribunal, shall provide for all or any of the following matters, namely:—
- (a) **where the compromise or arrangement provides for conversion of preference shares into equity shares**, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
 - (b) the **protection of any class** of creditors;
 - (c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;
 - (d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction (BIFR) established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;
 - (e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:
- Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.
- (8) **Filing of order of tribunal with registrar:** The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

- (9) **The Tribunal may dispense with calling of a meeting** of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent. Value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.
- (10) **Exemption in relation to buy-back of securities:** No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.
- *[(11) **Inclusion of takeover offer:** Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

- (12) **Application to tribunal by aggrieved party:** An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.]

Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

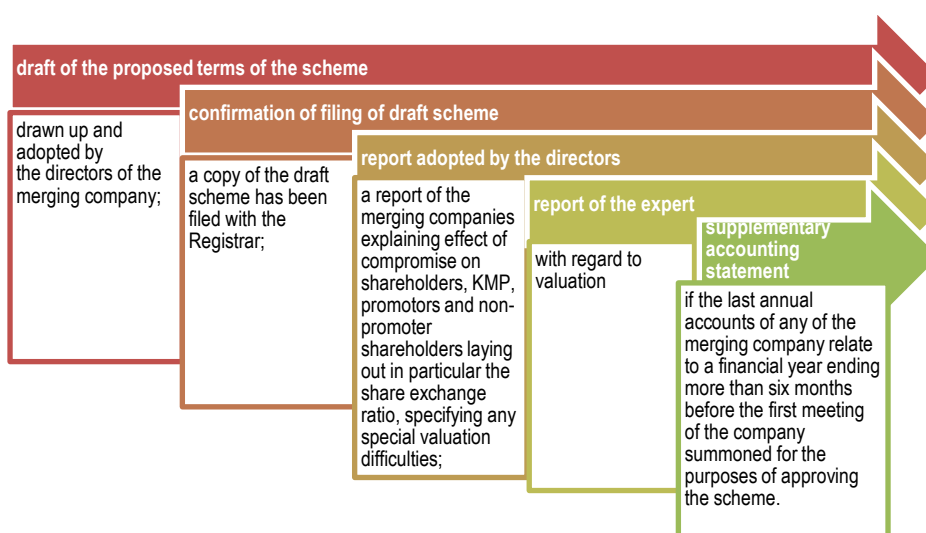
*Sub-sections (11) and (12) are yet to be notified.

Power of Tribunal to enforce compromise or arrangement [Section 231]

- (1) **Power of tribunal to enforce the order:** Where the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it—
- (a) shall have power to **supervise the implementation** of the compromise or arrangement; and
 - (b) may, at the time of making such order or at any time thereafter, **give such directions** in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper implementation of the compromise or arrangement.
- (2) **Winding up order by tribunal:** If the Tribunal is satisfied that the compromise or arrangement sanctioned under section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company and such an order shall be deemed to be an order made under section 273.
- (3) **Retrospective effect of order:** The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act sanctioning a compromise or an arrangement.

Merger and Amalgamation of Companies [Section 232]

- (1) **Filing of an application for purpose of reconstruction or companies involving merger/ amalgamation or transfer of undertaking, property etc.:** Where an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—
- that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and
 - that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies,
- the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply *mutatis mutandis*.
- (2) **Circulation of information for the meeting by the merging companies / the companies in respect of which a division is proposed:** Where an order has been made by the Tribunal as above, merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—



- (a) the **draft of the proposed terms of the scheme** drawn up and adopted by the directors of the merging company;
 - (b) **confirmation that a copy of the draft scheme has been filed** with the Registrar;
 - (c) a **report adopted by the directors of the merging companies** explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;
 - (d) **the report of the expert** with regard to valuation, if any;
 - (e) a **supplementary accounting statement** if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.
- (3) **Order of tribunal on the agreement of compromise or arrangement:** The Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and (2) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—
- (a) **the transfer to the transferee company** of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;
 - (b) **the allotment or appropriation by the transferee company** of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

Provided that a transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished;
 - (c) **the continuation by or against the transferee company of any legal proceedings** pending by or against any transferor company on the date of transfer;
 - (d) **dissolution, without winding-up**, of any transferor company;
 - (e) **the provision to be made for any persons who**, within such time and in such manner as the Tribunal directs, **dissent from the compromise or arrangement**;
 - (f) **where share capital is held by any non-resident shareholder** under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the

transferee company to such shareholder shall be in the manner specified in the order;

(g) **the transfer of the employees of the transferor company** to the transferee company;

(h) **where the transferor company is a listed company and the transferee company is an unlisted company,—**

(A) the transferee company shall remain an unlisted company until it becomes a listed company;

(B) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal:

Provided that the amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it;

(i) **where the transferor company is dissolved**, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and

(j) such **incidental, consequential and supplemental matters** as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless **a certificate by the company's auditor has been filed with the Tribunal** to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

(4) **Effect of an order of tribunal:** Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall by virtue of the compromise or arrangement, cease to have effect.

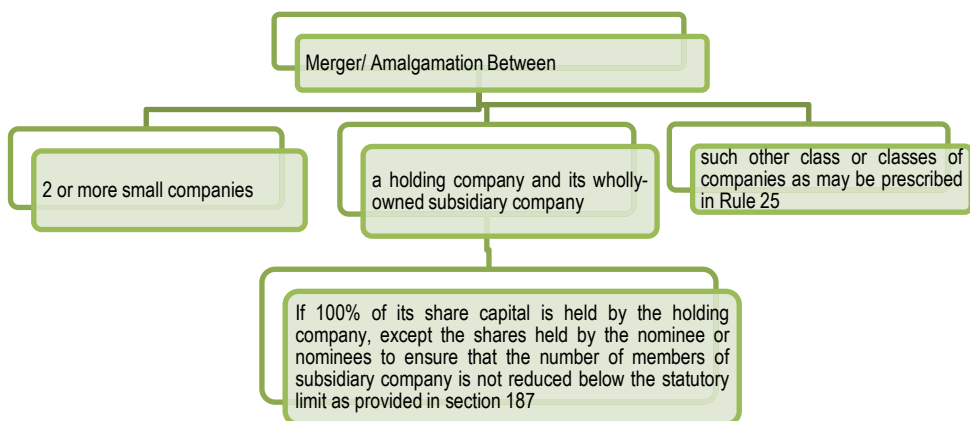
(5) **Filing of certified copy of order with registrar:** Every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

- (6) **Effective date specified in scheme:** The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.
- (7) **Filing of duly certified statement of compliance of scheme with registrar:** Every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.
- (8) **In case of contravention:** If a transferor company or a transferee company contravenes the provisions of this section, the transferor company or the transferee company, as the case may be, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of such transferor or transferee company who is in default, shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

Explanation— For the purposes of this section,—

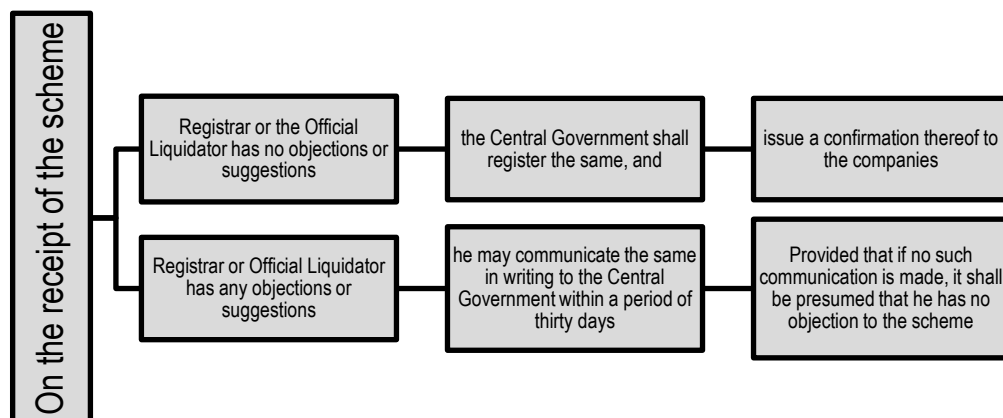
- (i) **in a scheme involving a merger**, where under the scheme the undertaking, property and liabilities of one or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to another existing company, it is a merger by absorption, or where the undertaking, property and liabilities of two or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to a new company, whether or not a public company, it is a merger by formation of a new company;
- (ii) **references to merging companies** are in relation to a merger by absorption, to the transferor and transferee companies, and, in relation to a merger by formation of a new company, to the transferor companies;
- (iii) **a scheme involves a division**, where under the scheme the undertaking, property and liabilities of the company in respect of which the compromise or arrangement is proposed are to be divided among and transferred to two or more companies each of which is either an existing company or a new company; and
- (iv) **property includes** assets, rights and interests of every description and liabilities include debts and obligations of every description.

Merger or Amalgamation of Certain Companies [Section 233]



- (1) **Companies who may enter into scheme of merger or amalgamation:** A scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as given in Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, subject to the following, namely:—
- a **notice of the proposed scheme inviting objections or suggestions**, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company;
 - the **objections and suggestions received are considered by the companies** in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. of the total number of shares;
 - each of the companies involved in the merger files a **declaration of solvency**, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and
 - the **scheme is approved by majority** representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.
- (2) **Filing of copy of scheme with the Central Government, Registrar and the Official Liquidator :** The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

(3) On the receipt of the scheme, objections and suggestions:



- (4) **Filing of application by Central government with Tribunal:** If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal **within a period of sixty days of the receipt of the scheme**, stating its objections and requesting that the Tribunal may consider the scheme under section 232.
- (5) **Passing of an order of Tribunal:** On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit:
- Provided that if the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.
- (6) **Communication of an order to registrar:** A copy of the order confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.
- (7) The registration of the scheme, shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.
- (8) **Effect of Registration of Scheme:** The registration of the scheme shall have the following effects, namely:—

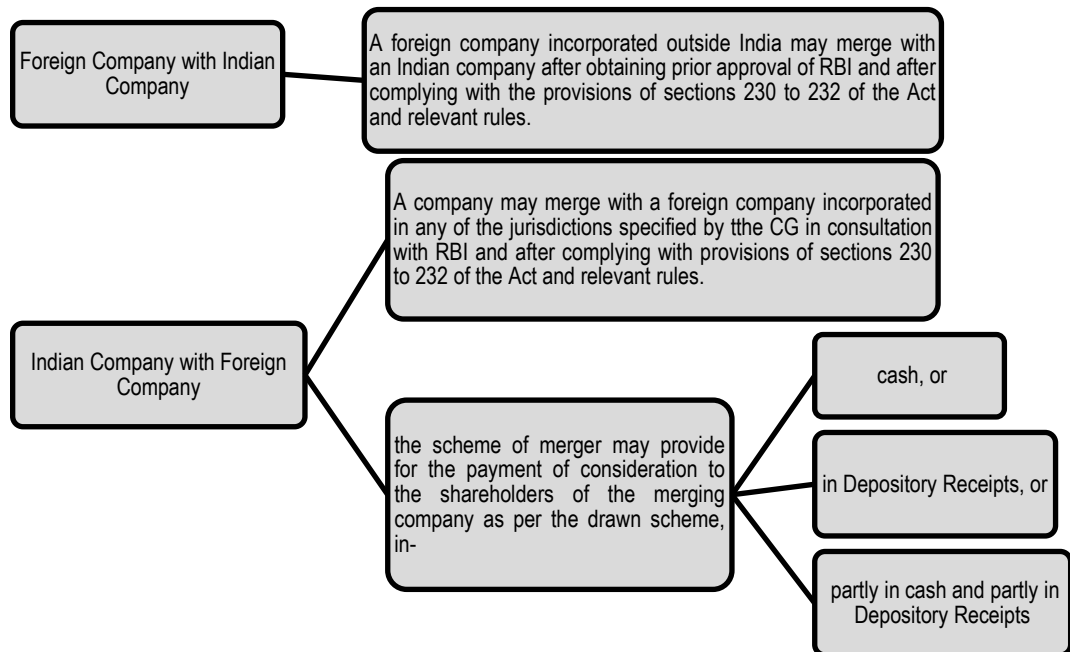
- transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company
- the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;
- legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and
- where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.

- (9) **Effect of merger and amalgamation on transferee:** A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.
- (10) **Filing of an application by transferee company with the Registrar:** The transferee company shall file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital:
- Provided that the fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorised capital enhanced by the merger or amalgamation.
- (11) **Applicability of the provisions:** The provisions of this section shall mutatis mutandis apply to-
- a company or companies specified in sub-section (1) in respect of a scheme of compromise or arrangement referred to in section 230, or
 - division or transfer of a company referred to clause (b) of subsection (1) of section 232.
- (12) The Central Government may provide for the merger or amalgamation of companies in such manner as may be prescribed.
- (13) A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation.

Merger or Amalgamation of Company with Foreign Company [Section 234]

The provisions given in this section is also known as provision related to cross border merger.

The expression “**foreign company**” means any company or body corporate incorporated outside India whether having a place of business in India or not.



Power to Acquire Shares of Shareholders Dissenting from Scheme or Contract Approved by Majority [Section 235]

(1) Basic requirements as to acquisition of shares:

- The scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has been approved by the holders of not less than 9/10th in value of the shares whose transfer is involved.
- The approval from 9/10th shareholders in value shall be received within four months after making of an offer in that behalf by the transferee company.
- The shares already held at the date of the offer by Transferee Company, or by a nominee of the transferee company or its subsidiary companies shall not be counted for this purpose.
- The transferee company shall express his desire to acquire the remaining shares of dissenting shareholders within two months after the expiry of the said four months and shall give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares

(2) Order of Tribunal to acquire shares of dissenting shareholders: Where a notice under sub-section (1) is given, the transferee company shall, unless on an application

made by the dissenting shareholder to the Tribunal, within one month from the date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

(3) Application by dissenting shareholders:

(i) Where a notice has been given by the transferee company **on an application made by the dissenting shareholder** and the Tribunal has not, made an order to the contrary i.e. order made in favour of the company- the transferee company shall, on the expiry of one month from the date on which the notice has been given, or,

(ii) if an application to the Tribunal by the dissenting shareholder is then pending, - Nothing is required to be done.

(iii) after that **application has been disposed of-**

shall send a copy of the notice to the transferor company together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferor company and on its own behalf by the transferee company, and pay or transfer to the transferor company- the amount or other consideration representing the price payable by the transferee company for the shares which that company is entitled to acquire,.

(iv) The **transferor company shall—**

(a) thereupon register the transferee company as the holder of those shares; and

(b) within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee company.

(4) **Separate Bank account for disbursement to entitled shareholders:** Any sum received by the transferor company under this section shall be paid into a separate bank account, and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received and shall be disbursed to the entitled shareholders within sixty days.

(5) **Scheme/contract made before the commencement of Act:** In relation to an offer made by a transferee company to shareholders of a transferor company before the commencement of this Act, this section shall have effect with the following modifications, namely:—

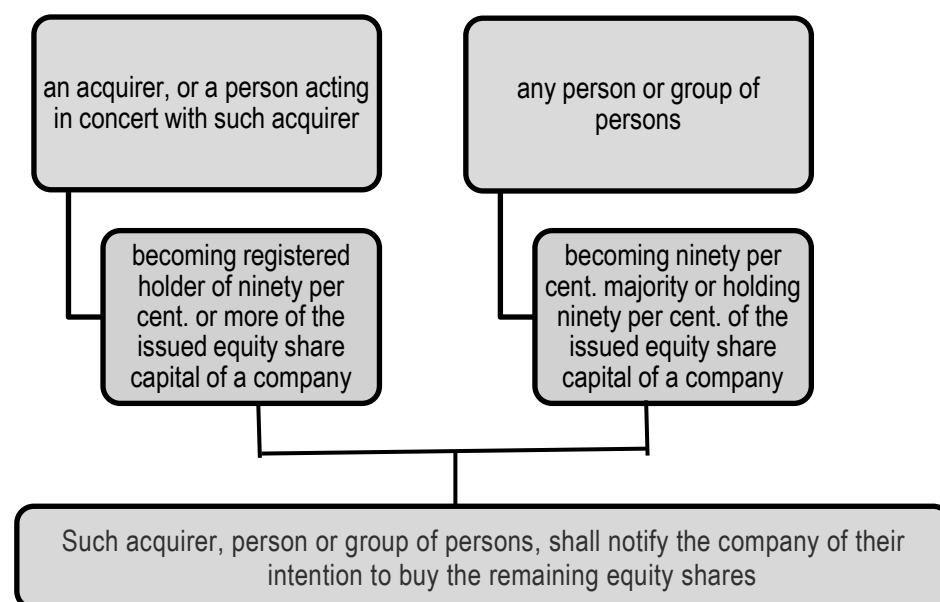
(a) in sub-section (1), for the words “the shares whose transfer is involved other than shares already held at the date of the offer by, or by a nominee of, the transferee

company or its subsidiaries,” the words “the shares affected” shall be substituted; and

- (b) in sub-section (3), the words “together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferor company” shall be omitted.

Explanation—For the purposes of this section, “dissenting shareholder” includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

Purchase of Minority Shareholding [Section 236]



(1) **Notify to company for purchase of minority shareholding:**

- In the event of an acquirer, or a person acting in concert with such acquirer - becoming registered holder of ninety per cent. or more of the issued equity share capital of a company, or
- in the event of any person or group of persons- becoming ninety per cent. majority or holding ninety per cent. of the issued equity share capital of a company,

-by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.

- (2) **Offer of equity shares to minority shareholders by acquirer, person or group of persons:** The acquirer, person or group of persons shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on the basis of valuation by a registered valuer in accordance with *Rule 27*.
- (3) **Offer to majority shareholder to purchase the minority equity shareholding:** The minority shareholders of the company may offer to the majority shareholders to purchase the minority equity shareholding of the company at the price determined in accordance with *Rule 27*.
- (4) **Deposit of amount in separate bank account:** The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them under sub-section (2) or sub-section (3), as the case may be, in a separate bank account to be operated by the transferor company for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days:
- Provided that such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period of sixty days or if the disbursement have been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement.
- (5) **Role of Transferor Company to act as a transfer agent in the event of purchase:** In the event of a purchase under this section, the transferor company shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be.
- (6) **Transferor company to issue shares:** In the absence of a physical delivery of shares by the shareholders within the time specified by the company,
- the share certificates shall be deemed to be cancelled, and
 - the transferor company shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law, and
 - make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by despatch of such payment.
- (7) **Right of shareholders to make an offer for sale of minority equity shareholding:** In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for-
- any shareholder or shareholders who have died or ceased to exist, or
 - whose heirs, successors, administrators or assignees have not been brought on record by transmission,

the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding.

(8) Sharing of additional compensation:

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

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

Explanation—For the purposes of this section, the expressions “acquirer” and “person acting in concert” shall have the meanings respectively assigned to them in clause (b) and clause (e) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

(9) On failure of acquisition of shares: When a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the provisions of this section shall continue to apply to the residual minority equity shareholders, even though,—

- (a) the shares of the company of the residual minority equity shareholder had been delisted; and
- (b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, had elapsed.

Power of Central Government to Provide for Amalgamation of Companies in Public Interest [Section 237]

(1) Central Government may by order provide for amalgamation in the public interest:

Where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order.

(2) Continuation by or against the transferee company of any legal proceedings: The order may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and such

consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.

- (3) **Same Interest Rights or Compensation:** Every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.
- (4) **Appeal by aggrieved person on assessment of compensation:** Any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.
- (5) **Requirements for passing of an order:** No order shall be made under this section unless—
- (a) a copy of the proposed order has been sent in draft to each of the companies concerned;
 - (b) the time for preferring an appeal under sub-section (4) has expired, or where any such appeal has been preferred, the appeal has been finally disposed off; and
 - (c) the Central Government has considered, and made such modifications, if any, in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.
- (6) **Copies to be presented to parliament:** The copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

Registration of offer of Schemes involving transfer of shares [Section 238]
--

- (1) **Registration of circular/ offer involving transfer of shares:** In relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company under section 235,—

- (a) **every circular containing such offer and recommendation** to the members of the transferor company by its directors to accept such offer shall be accompanied by such information and in such manner as prescribed in *Rule 28*;
- (b) **every such offer** shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that necessary cash will be available; and
- (c) **every such circular shall be presented to the Registrar** for registration and no such circular shall be issued until it is so registered:

Provided that the Registrar may refuse, for reasons to be recorded in writing, to register any such circular which does not contain the information required to be given under clause (a) or which sets out such information in a manner likely to give a false impression, and communicate such refusal to the parties within thirty days of the application.

- (2) **Appeal against the order of the registrar:** An appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub-section (1).
- (3) **In care of failure of registration:** The director who issues a circular which has not been presented for registration and registered under clause (c) of sub-section (1), shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.

Preservation of Books and Papers of Amalgamated Companies [Section 239]

The books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter shall not be disposed of without the prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

Liability of Officers in Respect of Offences Committed Prior to Merger, Amalgamation, etc. [Section 240]

Retrospective effect of liability: Notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.

Earlier Law- This chapter containing provisions related to compromises, arrangements and amalgamation were based on the Companies Act, 1956

8

PREVENTION OF OPPRESSION AND MIS-MANAGEMENT

Notification of section 241

Section 241 of the Act deals with the provisions related to filing of application to tribunal for relief in cases of oppression, etc.

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies section 241 of the Companies Act, 2013 with effect from the date of publication of notification.

Application to Tribunal for Relief in Cases of Oppression, etc.

241. Right to apply by member: (1) Any member of a company who complains that—

- (a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or
 - (b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.
- (2) **Central Government suo moto to apply the Tribunal:** The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

Earlier Law- Corresponding Sections 397, 398, 401, 402, 403, & 404 of the Companies Act, 1956 was prevailing as the section 241 of the 2013 Act was not notified.

Reference of Page number of relevant sections in the study material - 8.3 - 8.5

Notification of section 242

Section 242 of the Companies Act, 2013 deals with the Powers of Tribunal.

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies section 242 except clause (b) of sub-section(1) and clauses(c) and (g) of sub-section(2) of the Companies Act, 2013 with effect from the date 1st June 2016.

Further, Ministry of Corporate Affairs vide notification S.O.2912 (E), dated 9th September 2016, notified clause (b) of sub-section(1) and clauses(c) and (g) of sub-section(2) to section 242 of the Companies Act, 2013 with effect from 9th September 2016.

242. (1) Order passed by the tribunal: If, on any application made under section 241, the Tribunal is of the opinion—

- (a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and
- (b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.
- (2) **Powers:** Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—
 - (a) the regulation of conduct of affairs of the company in future;
 - (b) the purchase of shares or interests of any members of the company by other members thereof or by the company;
 - (c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;
 - (d) restrictions on the transfer or allotment of the shares of the company;
 - (e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;
 - (f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e):

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

- (g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before

the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

- (h) removal of the managing director, manager or any of the directors of the company;
 - (i) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;
 - (j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);
 - (k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;
 - (l) imposition of costs as may be deemed fit by the Tribunal;
 - (m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.
- (3) **Filing of copy of order of tribunal:** A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.
- (4) **Interim order:** The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.
- (5) **Alteration through order of the tribunal:** Where an order of the Tribunal under sub-section (1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.
- (6) **Altered provision shall apply:** Subject to the provisions of sub-section (1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.
- (7) **Certified copy of altered order shall be filed with the Registrar:** A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.
- (8) **Punishment in case of contravention:** If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine which shall not be less than one

lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

Earlier Law- Corresponding Sections 397, 398, 401, 402, 403, & 404 of the Companies Act, 1956 was prevailing as the section 242 of the 2013 Act was not notified.

Reference of Page number of relevant sections in the study material - 8.3 - 8.5

Notification of Section 243

Section 243 of the Companies Act, 2013 deals with the consequence of termination or modification of certain agreements.

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies section 243 of the Companies Act, 2013 with effect from the date 1st June 2016.

243. (1) Where an order made under section 242 terminates, sets aside or modifies an agreement such as is referred to in sub-section (2) of that section,—

- (a) such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;
- (b) no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company:

Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

- (2) Any person who knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1), and every other director of the company who is knowingly a party to such contravention, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five lakh rupees, or with both.

Earlier Law- Corresponding Section 407 of the Companies Act, 1956 was prevailing as the section 243 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 8.5

Notification of section 244

Section 244 of the Companies Act, 2013 deals with the **right to apply under section 241**.

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies section 244 of the Companies Act, 2013 with effect from 1st June 2016.

244. Right to members to apply : (1) The following members of a company shall have the right to apply under section 241, namely:—

- (a) **in the case of a company having a share capital**, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;
- (b) **in the case of a company not having a share capital**, not less than one-fifth of the total number of its members:

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

Explanation.—For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(2) Entitlement to members to make an application: Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

Earlier Law- Corresponding Section 399 of the Companies Act, 1956 was prevailing as the section 244 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 8.2

Notification of Section 245

Section 245 of the Companies Act, 2013 deals with class action.

Vide Notification S.O.1934 (E) dated 1st June 2016, the Ministry of Corporate Affairs notifies section 245 of the Companies Act, 2013 with effect from 1st June 2016.

245. Filing of application before the Tribunal on behalf of the members or depositors:

(1) Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (2) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner

prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely:—

- (a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;
- (b) to restrain the company from committing breach of any provision of the company's memorandum or articles;
- (c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;
- (d) to restrain the company and its directors from acting on such resolution;
- (e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;
- (f) to restrain the company from taking action contrary to any resolution passed by the members;
- (g) to claim damages or compensation or demand any other suitable action from or against—
 - (i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
 - (ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
 - (iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;
- (h) to seek any other remedy as the Tribunal may deem fit.

(2) **Remedy:** Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

(3) **Required number of members to apply:**

- (i) The requisite number of members provided in sub-section (1) shall be as under:—
 - (a) **in the case of a company having a share capital**, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than

such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) **in the case of a company not having a share capital**, not less than one-fifth of the total number of its members.

(ii) **The requisite number of depositors** provided in sub-section (1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever less is, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.

(4) **Requirement for consideration of application:** In considering an application under sub-section (1), the Tribunal shall take into account, in particular—

- (a) whether the member or depositor is acting in good faith in making the application for seeking an order;
- (b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a) to (f) of subsection (1);
- (c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;
- (d) any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;
- (e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—
 - (i) authorised by the company before it occurs; or
 - (ii) ratified by the company after it occurs;
- (f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

(5) **In case of admission of application:** If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely:—

- (a) public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;
- (b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

- (c) two class action applications for the same cause of action shall not be allowed;
- (d) the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.
- (6) **Order shall be binding:** Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.
- (7) **Punishment for non-compliance:** Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.
- (8) **Application filed is frivolous/vexatious:** Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.
- (9) **Exemption from application of section:** Nothing contained in this section shall apply to a banking company.
- (10) **Application may be filed on behalf of affected persons:** Subject to the compliance of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub-section (1).

Earlier Law- New section inserted by the Companies Act, 2013. It was not notified.

Notification of Section 246

Section 246 of the Companies Act, 2013 deals with application of certain provisions to proceedings under Section 241 or Section 245.

Vide Notification S.O.2912 (E) dated 9th September, 2016, the Ministry of Corporate Affairs notifies section 246 of the Companies Act, 2013 with effect from 9th September, 2016.

246. The provisions of sections 337, 338, 339, 340 and 341 (both inclusive) related to winding up, shall apply mutatis mutandis, in relation to an application made to the Tribunal under section 241 or section 245.

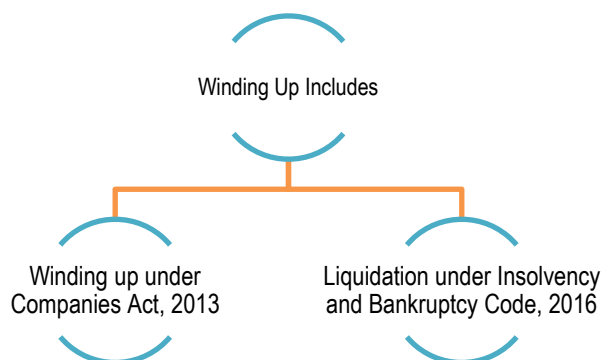
Earlier Law- Corresponding Section 406 of the Companies Act, 1956 was prevailing as the section 246 of the 2013 Act was not notified.

10

WINDING UP

WINDING UP

As per Section 2(94A) of the Companies Act, 2013, winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.



Chapter XX of the Companies Act, 2013 of Winding up is comprised of four parts.

Introductory (Section 270)

Part I: Winding up by the tribunal (Section 271-303),

Part II: Voluntary winding up (Section 304- 323), Omitted

Part III: Provisions applicable to every mode of winding up (Section 324-358),

Part IV: Official Liquidators (Section 359 -365),

Following are the important aspect of the chapter of winding up-

- (i) This chapter contains provisions for winding up of companies registered under the Act and under the previous companies' laws.
- (ii) This chapter XX is broadly discussed here under four headings, Introductory section, Part I regulates the process of winding up by the tribunal, Part II directs the process for voluntary winding up, Part III contains provisions which are applicable to every mode of winding up and Part IV provides for a summary procedure for winding up for companies having assets of a book value not exceeding Rupees 1 crore.

- (iii) This chapter also provides panel of professionals as company liquidators, who carry out the responsibilities of a liquidator in the winding up of company.
- (iv) Part II of this chapter deals with the voluntary winding up of companies. This part had been omitted in the Companies Act, 2013 vide enforcement of the Insolvency and Bankruptcy Code, 2016. So now this part regulating the voluntary winding up is regulated by the Insolvency and Bankruptcy Code, 2016.

Relevant provisions are as follows:

(I) Modes of Winding Up [Section 270]

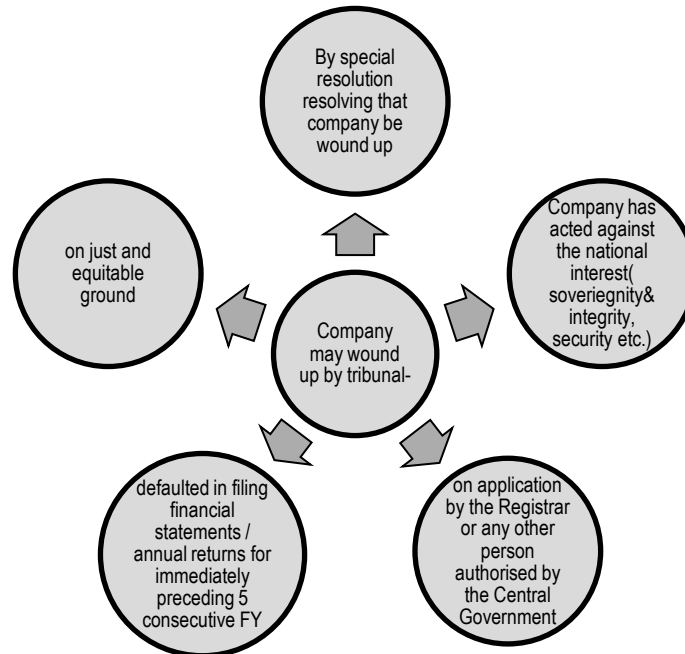
The provisions of Part I shall apply to the winding up of a company by the Tribunal under this Act.

Part I : Winding up by the Tribunal [Section 271 – 303]

(II) Circumstances in Which Company May be Wound Up by Tribunal [Section 271]

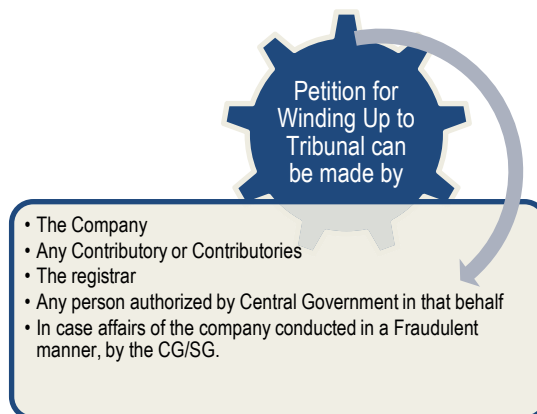
A company may, on a petition under section 272, be wound up by the Tribunal,—

- (a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;
- (b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
- (c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
- (d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or
- (e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.



(III) Petition for Winding up [Section 272]

(1) Petition may be presented by :



Subject to the provisions of this section, a petition to the Tribunal for the winding up of a company shall be presented by—

- (a) the company;
- (b) any contributory or contributories;
- (c) all or any of the persons specified in clauses (a) and (b);

- (d) the Registrar;
 - (e) any person authorised by the Central Government in that behalf; or
 - (f) in a case falling under clause (b) of section 271, by the Central Government or a State Government.
- (2) **Petition by contributory:** A contributory shall be entitled to present a petition for the winding up of a company.

Shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up or have devolved on him through the death of a former holder.

Contributory can file petition ignoring the following points

- He may be the holder of fully paid-up shares.
- The company may have no assets at all.
- The company may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities.

- (3) **Petition by registrar:** The Registrar shall be entitled to present a petition for winding up under section 271, except on the grounds specified in clause (a) or clause (e) of that sub-section:

Provided that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition:

Provided further that the Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

- (4) **Petition presented by company:** A petition presented by the company for winding up before the Tribunal shall be admitted only if accompanied by a statement of affairs in such form and in such manner as may be prescribed.
- (5) **Copy of petition with registrar:** A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition.

(IV) Powers of Tribunal [Section 273]

- (1) **Order passed by tribunal:** The Tribunal may, on receipt of a petition for winding up under section 272 pass any of the following orders, namely:—
- (a) dismiss it, with or without costs;
 - (b) make any interim order as it thinks fit;

- (c) appoint a provisional liquidator of the company till the making of a winding up order;
- (d) make an order for the winding up of the company with or without costs; or
- (e) any other order as it thinks fit:

Time limit for passing of an order: Provided that an order under this sub-section shall be made within ninety days from the date of presentation of the petition:

Notice to company on appointing of provisional liquidator: Provided further that before appointing a provisional liquidator, the Tribunal shall give notice to the company and afford a reasonable opportunity to it to make its representations, if any, unless for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice:

Tribunal shall not refuse to make a winding up order: Provided also that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged for an amount equal to or in excess of those assets, or that the company has no assets.

- (2) **Tribunal make order for any other remedy on just and equitable ground:** Where a petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy.

(V) Directions for Filing Statement of Affairs [Section 274]

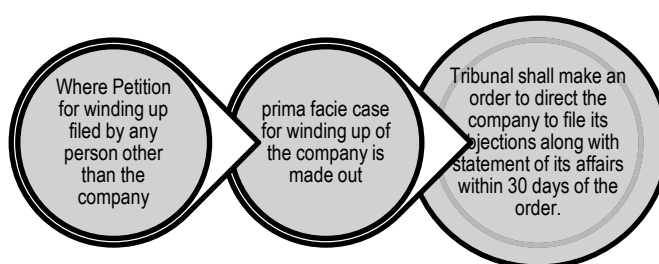
- (1) **Tribunal may order company to file a statement of its affairs:** Where a petition for winding up is filed before the Tribunal by any person other than the company, the Tribunal shall, if satisfied that a prima facie case for winding up of the company is made out, by an order direct the company to file its objections along with a statement of its affairs within thirty days of the order in such form and in such manner as may be prescribed.

Extension of time for filing: Provided that the Tribunal may allow a further period of thirty days in a situation of contingency or special circumstances:

Deposit of security: Provided further that the Tribunal may direct the petitioner to deposit such security for costs as it may consider reasonable as a precondition to issue directions to the company.

- (2) **Punishment for not filing of the statement of affairs:** A company, which fails to file the statement of affairs as referred to in sub-section (1), shall forfeit the right to oppose the petition and such directors and officers of the company as found responsible for such non-compliance, shall be liable for punishment under sub-section (4).

- (3) **Officers to pay cost of the company, book of accounts completed and audited to the Liquidator :** The directors and other officers of the company, in respect of which an order for winding up is passed by the Tribunal under clause (d) of sub-section (1) of section 273, shall, within a period of thirty days of such order, submit, at the cost of the company, the books of account of the company completed and audited up to the date of the order, to such liquidator and in the manner specified by the Tribunal.
- (4) **Contravention of section:** If any director or officer of the company contravenes the provisions of this section, the director or the officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.
- (5) **Complaint to be presented before special court may be filed by:** The complaint may be filed in this behalf before the Special Court by Registrar, provisional liquidator, Company Liquidator or any person authorised by the Tribunal.



(VI) Company Liquidators and their appointments [Section 275]

- (1) **Appointment of official liquidator:** For the purposes of winding up of a company by the Tribunal, the Tribunal at the time of the passing of the order of winding up, shall appoint an Official Liquidator or a liquidator from the panel maintained as the Company Liquidator.
- (2) **Appointment of provisional liquidator or the Company Liquidator by tribunal:** The provisional liquidator or the Company Liquidator, as the case may, shall be appointed by the Tribunal from amongst the insolvency professionals registered under the Insolvency and Bankruptcy Code, 2016;
- (3) **Tribunal may limit the powers of a provisional liquidator:** Where a provisional liquidator is appointed by the Tribunal, the Tribunal may limit and restrict his powers by the order appointing him or it or by a subsequent order, but otherwise he shall have the same powers as a liquidator.

- (4) **Tribunal to specify the terms and conditions of appointment of provisional liquidator:** The terms and conditions of appointment of a provisional liquidator or Company Liquidator and the fee payable to him or it shall be specified by the Tribunal on the basis of task required to be performed, experience, qualification of such liquidator and size of the company.
- (5) **Filing of declaration by liquidator on appointment:** On appointment as provisional liquidator or Company Liquidator, as the case may be, such liquidator shall file a declaration within seven days from the date of appointment in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal and such obligation shall continue throughout the term of his appointment.
- (6) **Appointment of provisional liquidator as the company liquidator:** While passing a winding up order, the Tribunal may appoint a provisional liquidator, if any, appointed under clause (c) of sub-section (1) of section 273, as the Company Liquidator for the conduct of the proceedings for the winding up of the company.

(VII) Removal and Replacement of Liquidator [Section 276]

- (1) **Removal of provisional liquidator or the Company Liquidator:** The Tribunal may, on a reasonable cause being shown and for reasons to be recorded in writing, remove the provisional liquidator or the Company Liquidator, as the case may be, as liquidator of the company on any of the following grounds, namely:—
 - (a) misconduct;
 - (b) fraud or misfeasance;
 - (c) professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;
 - (d) inability to act as provisional liquidator or as the case may be, Company Liquidator;
 - (e) conflict of interest or lack of independence during the term of his appointment that would justify removal.
- (2) **Transfer of work of liquidators:** In the event of death, resignation or removal of the provisional liquidator or as the case may be, Company Liquidator, the Tribunal may transfer the work assigned to him or it to another Company Liquidator for reasons to be recorded in writing.
- (3) **Recover of loss or damage from liquidator:** Where the Tribunal is of the opinion that any liquidator is responsible for causing any loss or damage to the company due to fraud or misfeasance or failure to exercise due care and diligence in the performance of his or its powers and functions, the Tribunal may recover or cause to be recovered such loss or damage from the liquidator and pass such other orders as it may think fit.

- (4) **Reasonable opportunity of being heard to the provisional liquidator:** The Tribunal shall, before passing any order under this section, provide a reasonable opportunity of being heard to the provisional liquidator or, as the case may be, Company Liquidator.

(VIII) Intimation to Company Liquidator, Provisional Liquidator and Registrar [Section 277]

- (1) **Intimation of an order of tribunal:** Where the Tribunal makes an order for-

- appointment of provisional liquidator or
- the winding up of a company,

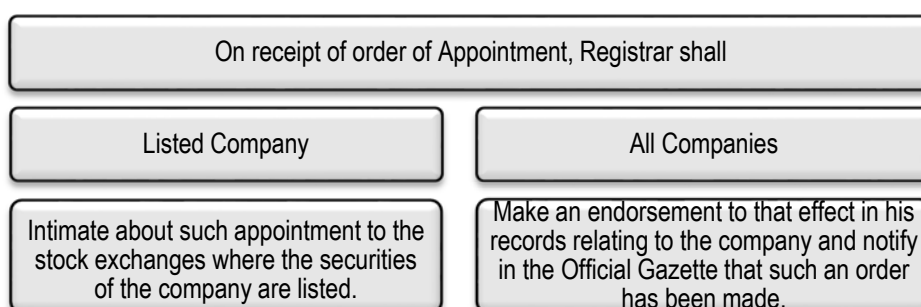
it shall, within a period not exceeding seven days from the date of passing of the order, cause intimation thereof to be sent to the-

- Company Liquidator or provisional liquidator, as the case may be, and
- the Registrar.

- (2) **Registrar to intimate of an order:**

With respect to all companies- On receipt of the copy of order of appointment of provisional liquidator or winding up order, the Registrar shall make an endorsement to that effect in his records relating to the company and notify in the Official Gazette that such an order has been made, and

In the case of a listed company, the Registrar shall intimate about such appointment or order, as the case may be, to the stock exchange or exchanges where the securities of the company are listed.



- (3) **Winding up order shall be deemed to be notice of discharge:** The winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the company, except when the business of the company is continued.
- (4) **Constitution of winding up committee to monitor liquidation proceedings:** Within three weeks from the date of passing of winding up order, the Company Liquidator shall make an application to the Tribunal for constitution of a winding up

committee to assist and monitor the progress of liquidation proceedings by the Company Liquidator in carrying out the function as provided in sub-section (5) and such winding up committee shall comprise of the following persons, namely:—

- (i) Official Liquidator attached to the Tribunal;
 - (ii) nominee of secured creditors; and
 - (iii) a professional nominated by the Tribunal.
- (5) **Functions of winding up committee:** The Company Liquidator shall be the convener of the meetings of the winding up committee which shall assist and monitor the liquidation proceedings in following areas of liquidation functions, namely:—
- (i) taking over assets;
 - (ii) examination of the statement of affairs;
 - (iii) recovery of property, cash or any other assets of the company including benefits derived therefrom;
 - (iv) review of audit reports and accounts of the company;
 - (v) sale of assets;
 - (vi) finalisation of list of creditors and contributories;
 - (vii) compromise, abandonment and settlement of claims;
 - (viii) payment of dividends, if any; and
 - (ix) any other function, as the Tribunal may direct from time to time.
- (6) **Submission of report & minutes of meetings of the committee before tribunal:** The Company Liquidator shall place before the Tribunal a report along with minutes of the meetings of the committee on monthly basis duly signed by the members present in the meeting for consideration till the final report for dissolution of the company is submitted before the Tribunal.
- (7) **Company liquidator to prepare draft final report:** The Company Liquidator shall prepare the draft final report for consideration and approval of the winding up committee.
- (8) **Submission of approved final report before the tribunal for passing of dissolution order:** The final report so approved by the winding up committee shall be submitted by the Company Liquidator before the Tribunal for passing of a dissolution order in respect of the company.

(IX) Effect of Winding up order [Section 278]

The order for the winding up of a company shall operate in favour of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories.

Stay of Suits, etc., on Winding up Order [Section 279]

- (1) **Suit or legal proceeding can be commenced after winding up order/appointment of liquidator only with permission of tribunal:** When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:

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

- (2) **In case proceeding pending in appeal:** Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

(X) Jurisdiction of Tribunal [Section 280]

The Tribunal shall have jurisdiction to entertain, or dispose of,—

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company, including claims by or against any of its branches in India;
- (c) any application made under section 233 [Fast track merger];
- (d) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made.

(XI) Submission of Report by Company Liquidator [Section 281]

- (1) **Particulars to be mentioned in the report of company liquidator:** Where the Tribunal has made a winding up order or appointed a Company Liquidator, such liquidator shall, within sixty days from the order, submit to the Tribunal, a report containing the following particulars, namely:—

Contents of Liquidator's Report

The nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company. The valuation of the assets shall be obtained from registered valuers for this purpose.

Amount of capital issued, subscribed and paid-up

The existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and

In the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given

The debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof

Guarantees, if any, extended by the company

List of contributories and dues, if any, payable by them and details of any unpaid call

Details of trade marks and intellectual properties, if any, owned by the company

Details of subsisting contracts, joint ventures and collaborations, if any

Details of holding and subsidiary companies, if any

Details of legal cases filed by or against the company

Any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include

- (2) **Duties of liquidator to give desirable information in the report:** The Company Liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the Tribunal.
- (3) **Report on viability of business of the company:** The Company Liquidator shall also make a report on the viability of the business of the company or the steps which, in his opinion, are necessary for maximising the value of the assets of the company.
- (4) **Any other necessitated report:** The Company Liquidator may also, if he thinks fit, make any further report or reports.
- (5) **Inspection of reports:** Any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this section and take copies thereof or extracts therefrom on payment of the prescribed fees.

(XII) Directions of Tribunal on Report of Company Liquidator [Section 282]

- (1) **Time limit for the preceeding shall be fixed:** The Tribunal shall, on consideration of the report of the Company Liquidator, fix a time limit within which the entire proceedings shall be completed and the company be dissolved:

Revision of time limit: Provided that the Tribunal may, if it is of the opinion, at any stage of the proceedings, or on examination of the reports submitted to it by the Company Liquidator and after hearing the Company Liquidator, creditors or contributories or any other interested person, that it will not be advantageous or economical to continue the proceedings, revise the time limit within which the entire proceedings shall be completed and the company be dissolved.

- (2) **Order of tribunal:** The Tribunal may, on examination of the reports submitted to it by the Company Liquidator and after hearing the Company Liquidator, creditors or contributories or any other interested person, order sale of the company as a going concern or its assets or part thereof:

Provided that the Tribunal may, where it considers fit, appoint a sale committee comprising such creditors, promoters and officers of the company as the Tribunal may decide to assist the Company Liquidator in sale under this sub-section.

- (3) **Tribunal may order for investigation against the company in respect of commission of fraud :** Where a report is received from the Company Liquidator or the Central Government or any person that a fraud has been committed in respect of the company, the Tribunal shall, without prejudice to the process of winding up, order for investigation under section 210, and on consideration of the report of such investigation it may pass order and give directions under sections 339 to 342 or direct the Company Liquidator to file a criminal complaint against persons who were involved in the commission of fraud.
- (4) **Tribunal to take measures to safe guard the assets of the company:** The Tribunal may order for taking such steps and measures, as may be necessary, to protect, preserve or enhance the value of the assets of the company.
- (5) **Tribunal may pass such other order /directions as it may consider fit:** The Tribunal may pass such other order or give such other directions as it considers fit.

(XIII) Custody of Company's Properties [Section 283]

Sl.No.	Provisions	Provisions
1.	Where a winding up order has been made or where a provisional liquidator has been appointed-	the liquidator, shall, on the order of the Tribunal immediately take into his or its custody or control – • all the property, • effects and

		• actionable claims to which the company is or appears to be entitled to and take such steps and measures, as may be necessary, to protect and preserve the properties of the company.
2.	Computation of custody time period	all the property and effects of the company shall be deemed to be in the custody of the Tribunal from the date of the order for the winding up of the company
3.	On an application by the Company Liquidator, the tribunal may order to pay /deliver etc. any money, property etc. of the company to the Liquidator.	The Tribunal may, at any time after the making of a winding up order, require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent, officer or other employee of the company,- • to pay, • deliver, • surrender or • transfer forthwith, or • within such time as the Tribunal directs, • - to the Company Liquidator, • any money, property or books and papers in his custody or under his control to which the company is or appears to be entitled.

(XIV) Promoters, Directors, etc., to cooperate with Company Liquidator [Section 284]

- (1) **Persons to extend full cooperation to the liquidators:** The promoters, directors, officers and employees, who are or have been in employment of the company or

acting or associated with the company shall extend full cooperation to the Company Liquidator in discharge of his functions and duties.

- (2) **On failure to discharge obligations:** Where any person, without reasonable cause, fails to discharge his obligations under sub-section (1), he shall be punishable with imprisonment which may extend to six months or with fine which may extend to fifty thousand rupees, or with both.

(XV) Settlement of List of Contributories and Application of Assets [Section 285]

- (1) **Tribunal to perform acts:** As soon as may be after the passing of a winding up order by the Tribunal, the Tribunal shall -
- settle a list of contributories,
 - cause rectification of register of members in all cases where rectification is required in pursuance of this Act, and
 - shall cause the assets of the company to be applied for the discharge of its liability.

Provided that where it appears to the Tribunal that it would not be necessary to make calls on or adjust the rights of contributories, the Tribunal may dispense with the settlement of a list of contributories.

- (2) **Identifying contributories on the basis of nature of rights:** In settling the list of contributories, the Tribunal shall distinguish between those who are contributories in their own right and those who are contributories as being representatives of, or liable for the debts of, others.
- (3) **Persons liable to contribute to the assets on certain conditions:** While settling the list of contributories, the Tribunal shall include every person, who is or has been a member, who shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, subject to the following conditions, namely:—

Sl.No.	Liabilities	Conditions describe the liabilities to contribute towards the assets
1.	a person who has been a member shall not be liable to contribute	if he has ceased to be a member for the preceding one year or more before the commencement of the winding up
2.	a person who has been a member shall not be liable to contribute in respect	If such debt or liability contracted after he ceased to be a member

	of any debt or liability of the company	
3.	a person who has been a member shall be liable to contribute	When it appears to the Tribunal that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act
4.	in the case of a company limited by shares	no contribution shall be required from any person, who is or has been a member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member;
5.	in the case of a company limited by guarantee	if the company has a share capital, such member shall be liable to contribute to the extent of any sum unpaid on any shares held by him as if the company were a company limited by shares.

(XVI) Obligations of Directors and Managers [Section 286]

Unlimited liability of a person in the case of a limited company: In the case of a limited company, any person who is or has been a director or manager, whose liability is unlimited under the provisions of this Act, shall, in addition to his liability, if any, to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of winding up, a member of an unlimited company:

Provided that —

- (a) **Person ceased to hold office for a year or more:** a person who has been a director or manager shall not be liable to make such further contribution, if he has ceased to hold office for a year or upwards before the commencement of the winding up;
- (b) **Persons not liable to contribute any debt/ liability of the company after he ceased to hold office:** a person who has been a director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;
- (c) **Persons not liable unless tribunal deems it necessary to satisfy the debts and liabilities:** subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the Tribunal deems it necessary to require the contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.

(XVII) Advisory Committee [Section 287]

- (1) **Appointment of advisory committee:** The Tribunal may, while passing an order of winding up of a company, direct that there shall be, an advisory committee to advise the Company Liquidator and to report to the Tribunal on such matters as the Tribunal may direct.
- (2) **Composition:** The advisory committee appointed by the Tribunal shall consist of not more than twelve members, being-
 - creditors and contributories of the company, or
 - such other persons in such proportionas the Tribunal may, keeping in view the circumstances of the company under liquidation, direct.
- (3) **Conduct of meeting:** The Company Liquidator shall convene a meeting of creditors and contributories, as ascertained from the books and documents, of the company within thirty days from the date of order of winding up for enabling the Tribunal to determine the persons who may be members of the advisory committee.
- (4) **Right to inspection of documents:** The advisory committee shall have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time.
- (5) **Procedure for the conduct of meeting and business shall be as prescribed by rules:** The provisions relating to the convening of the meetings, the procedure to be followed thereat and other matters relating to conduct of business by the advisory committee shall be such as may be prescribed.
- (6) **Company liquidator shall be chairperson:** The meeting of advisory committee shall be chaired by the Company Liquidator.

(XVIII) Submission of Periodical Reports to Tribunal [Section 288]

- (1) **Periodical reports to the tribunal:** The Company Liquidator shall make periodical reports to the Tribunal and in any case make a report at the end of each quarter with respect to the progress of the winding up of the company in such form and manner as may be prescribed.
- (2) **Review of orders by tribunal:** The Tribunal may, on an application by the Company Liquidator, review the orders made by it and make such modifications as it thinks fit.

(XIX) 289- omitted**(XX) Powers and Duties of Company Liquidator [Section 290]**

- (1) **Powers of Company Liquidator:** Subject to directions by the Tribunal, if any, in this regard, the Company Liquidator, in a winding up of a company by the Tribunal, shall have the power—
- (a) **to carry on the business** of the company so far as may be necessary for the beneficial winding up of the company;
 - (b) **to do all acts and to execute**, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use, when necessary, the company's seal;
 - (c) **to sell the immovable and movable property and actionable claims** of the company by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels;
 - (d) **to sell the whole of the undertaking** of the company as a going concern;
 - (e) **to raise any money** required on the security of the assets of the company;
 - (f) **to institute or defend any suit**, prosecution or other legal proceeding, civil or criminal, **in the name and on behalf of the company**;
 - (g) to invite and **settle claim of creditors, employees or any other claimant** and distribute sale proceeds in accordance with priorities established under this Act;
 - (h) to **inspect the records** and returns of the company on the files of the Registrar or any other authority;
 - (i) to **prove rank and claim in the insolvency** of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;
 - (j) to **draw, accept, make and endorse any negotiable instruments** including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;
 - (k) **to take out, in his official name, letters of administration** to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company Liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company Liquidator himself;

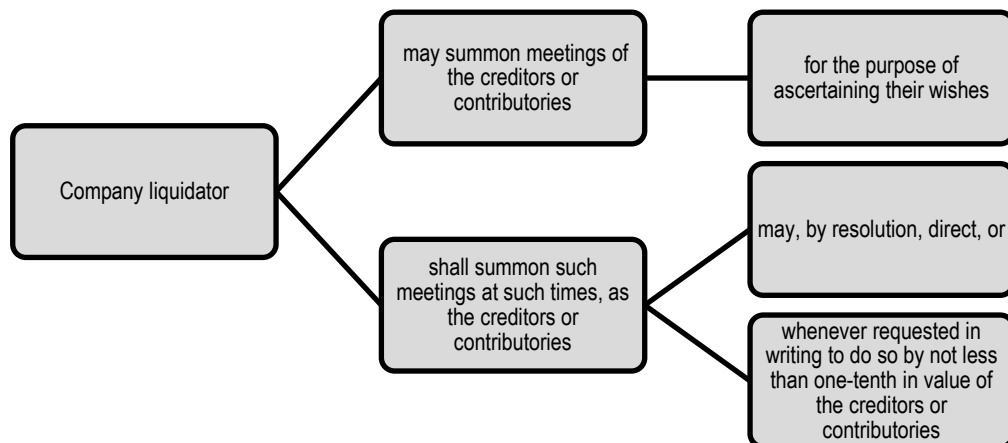
- (l) **to obtain any professional assistance** from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company Liquidator is unable to do himself;
 - (m) **to take all such actions, steps, or to sign, execute and verify any paper, deed, document**, application, petition, affidavit, bond or instrument as may be necessary,—
 - (i) for winding up of the company;
 - (ii) for distribution of assets;
 - (iii) in discharge of his duties and obligations and functions as Company Liquidator; and
 - (n) to apply to the Tribunal for such orders or directions as may be necessary for the winding up of the company.
- (2) **Powers of Liquidator shall be under control of tribunal:** The exercise of powers by the Company Liquidator shall be subject to the overall control of the Tribunal.
- (3) **Other duties:** The Company Liquidator shall perform such other duties as the Tribunal may specify in this behalf.

(XXI) Provision for Professional Assistance to Company Liquidator [Section 291]

- (1) **Company liquidator to appoint one/more professionals:** The Company Liquidator may, with the sanction of the Tribunal, appoint one or more chartered accountants or company secretaries or cost accountants or legal practitioners or such other professionals on such terms and conditions, as may be necessary, to assist him in the performance of his duties and functions under this Act.
- (2) **Disclose of conflict of interest:** Any person appointed under this section shall disclose forthwith to the Tribunal in the prescribed form any conflict of interest or lack of independence in respect of his appointment.

(XXII) Exercise and Control of Company Liquidator's Powers [Section 292]

- (1) **Administration & Distribution of assets:** The Company Liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by-
 - the resolution of the creditors or contributories at any general meeting, or
 - by the advisory committee.
- (2) **Direction given by creditors or contributories shall override:** Any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the advisory committee.

(3) **Summons from Company Liquidator—**

- (4) **Apply to Tribunal against the decision of Company Liquidator:** Any person aggrieved by any act or decision of the Company Liquidator may apply to the Tribunal, and the Tribunal may confirm, reverse or modify the act or decision complained of and make such further order as it thinks just and proper in the circumstances

(XXIII) Books to be kept by Company Liquidator [Section 293]

- (1) **Company liquidator to maintain proper books for records of entries or minutes:** The Company Liquidator shall keep proper books in such manner, as may be prescribed, in which he shall cause entries or minutes to be made of proceedings at meetings and of such other matters as may be prescribed.
- (2) **Inspection of such books:** Any creditor or contributory may, subject to the control of the Tribunal, inspect any such books, personally or through his agent.

(XXIV) Audit of Company Liquidator's Accounts [Section 294]

- (1) **Maintenance of books of accounts:** The Company Liquidator shall maintain proper and regular books of account including accounts of receipts and payments made by him in such form and manner as may be prescribed.
- (2) **Presentation of an account of the receipts and payments to the tribunal:** The Company Liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Tribunal an account of the receipts and payments as such liquidator in the prescribed form in duplicate, which shall be verified by a declaration in such form and manner as may be prescribed.

- (3) **Audit of accounts:** The Tribunal shall cause the accounts to be audited in such manner as it thinks fit, and for the purpose of the audit, the Company Liquidator shall furnish to the Tribunal with such vouchers and information as the Tribunal may require, and the Tribunal may, at any time, require the production of, and inspect, any books of account kept by the Company Liquidator.
- (4) **Filing of copy of accounts with the tribunal and the registrar:** When the accounts of the company have been audited, one copy thereof shall be filed by the Company Liquidator with the Tribunal, and the other copy shall be delivered to the Registrar which shall be open to inspection by any creditor, contributory or person interested.
- (5) **Accounts related to a government companies:** Where an account referred to in sub-section (4) relates to a Government company, the Company Liquidator shall forward a copy thereof—
- to the Central Government, if that Government is a member of the Government company; or
 - to any State Government, if that Government is a member of the Government company; or
 - to the Central Government and any State Government, if both the Governments are members of the Government company.
- (6) **Summary of accounts to be communicated to every creditor and contributory:** The Company Liquidator shall cause the accounts when audited, or a summary thereof, to be printed, and shall send a printed copy of the accounts or summary thereof by post to every creditor and every contributory:
- Provided that the Tribunal may dispense with the compliance of the provisions of this sub-section in any case it deems fit.

(XXV) Payment of Debts by Contributory and Extent of Set-off [Section 295]

- (1) **Tribunal to pass an order to pay any money due:** The Tribunal may, at any time after passing of a winding up order, pass an order requiring any contributory for the time being on the list of contributories to pay, in the manner directed by the order, any money due to the company, from him or from the estate of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.
- (2) **Order of Tribunal:** The Tribunal, in making an order, may,—

in the case of an unlimited company	allow to the contributory, by – - way of setoff, any money due to him, or - to the estate which he represents,
-------------------------------------	---

	from the company, on any independent dealing or contract with the company. But not any money due to him as a member of the company in respect of any dividend or profit;
in the case of a limited company	allow to any director or manager whose liability is unlimited, or to his estate, such set-off

- (3) **Payment of money due against any subsequent call:** In the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

(XXVI) Power of Tribunal to Make Calls [Section 296]

The Tribunal may, at any time after the passing of a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company,—

- (a) **make calls on all or any of the contributories** for the time being on the list of the contributories, to the extent of their liability, for payment of any money which the Tribunal considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves; and
- (b) **make an order for payment of any calls** so made.

(XXVII) Adjustment of Rights of Contributories [Section 297]

The Tribunal shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.

(XXVIII) Power to Order Costs [Section 298]

In case assets of a company being insufficient to satisfy its liabilities: The Tribunal may, in the event of the assets of a company being insufficient to satisfy its liabilities, make an order for the payment out of the assets, of the costs, charges and expenses incurred in the winding up, in such order of priority inter se as the Tribunal thinks just and proper.

(XXIX) Power to Summon Persons Suspected of Having Property of Company, etc. [Section 299]

- (1) **Summons:** The Tribunal may,
 - at any time after the appointment of a provisional liquidator, or
 - the passing of a winding up order,
 Summon before it –

- any officer of the company or
 - person known or
 - suspected to have in his possession any property or books or papers, of the company, or
 - known or suspected to be indebted to the company, or
 - any person whom the Tribunal thinks to be capable of giving information concerning the promotion, formation, trade, dealings, property, books or papers, or affairs of the company.
- (2) **Examination:** The Tribunal may examine any officer or person so summoned on oath concerning the matters aforesaid, either by –
- word of mouth or
 - on written interrogatories or
 - on affidavit and
- may, in the first case, reduce his answers to writing and require him to sign them.
- (3) **Production of books and papers:** The Tribunal may require any officer or person so summoned to produce any books and papers relating to the company in his custody or power, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to such lien, and the Tribunal shall have power to determine all questions relating to that lien.
- (4) **Liquidator to file a report in respect of debt or property of the company:** The Tribunal may direct the liquidator to file before it a report in respect of debt or property of the company in possession of other persons.
- (5) **Order:** If the Tribunal finds that—
- (a) a **person is indebted to the company**, the Tribunal may order him to pay to the provisional liquidator or, as the case may be, the liquidator at such time and in such manner as the Tribunal may consider just, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Tribunal thinks fit, with or without costs of the examination;
 - (b) a **person is in possession of any property belonging to the company**, the Tribunal may order him to deliver to the provisional liquidator or, as the case may be, the liquidator, that property or any part thereof, at such time, in such manner and on such terms as the Tribunal may consider just.
- (6) **Person summoned fails to appear:** If any officer or person so summoned fails to appear before the Tribunal at the time appointed without a reasonable cause, the Tribunal may impose an appropriate cost.

- (7) **Execution of order:** Every order made under sub-section (5) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure, 1908.
- (8) **Discharge of liability:** Any person making any payment or delivery in pursuance of an order made under sub-section (5) shall by such payment or delivery be, unless otherwise directed by such order, discharged from all liability whatsoever in respect of such debt or property.

[XXX] Power to Order Examination of Promoters, Directors, etc. [Section 300]

- (1) **Power of tribunal to order the person to attend and be examined before the tribunal:** Where an order has been made for the winding up of a company by the Tribunal, and the Company Liquidator has made a report to the Tribunal under this Act, stating that in his opinion a fraud has been committed by any person in the promotion, formation, business or conduct of affairs of the company since its formation, the Tribunal may, after considering the report, direct that—
- such person or officer shall attend before the Tribunal on a day appointed by it for that purpose, and
 - be examined as to the promotion or formation or the conduct of the business of the company or as to his conduct, and
 - dealings as an officer thereof.
- (2) **Participation of Company liquidator in the examination:** The Company Liquidator shall take part in the examination, and for that purpose he or it may, if specially authorised by the Tribunal in that behalf, employ such legal assistance as may be sanctioned by the Tribunal.
- (3) **Examination on oath:** The person shall be examined on oath and shall answer all such questions as the Tribunal may put, or allow to be put, to him.
- (4) **Rights available to the person to be examined:** A person ordered to be examined under this section—
- (a) shall, before his examination, **be furnished at his own cost with a copy of the report** of the Company Liquidator; and
 - (b) **may at his own cost employ chartered accountants or company secretaries or cost accountants or legal practitioners** entitled to appear before the Tribunal under section 432, who shall be at liberty to put to him such questions as the Tribunal may consider just for the purpose of enabling him to explain or qualify any answers given by him.
- (5) **Appearing of company liquidator on hearing of an application applied by person being freed from charges:** If any such person applies to the Tribunal to be exculpated from any charges made or suggested against him, it shall be the duty of the Company Liquidator to appear on the hearing of such application and call the

attention of the Tribunal to any matters which appear to the Company Liquidator to be relevant.

- (6) **Order for payment of costs:** If the Tribunal, after considering any evidence given or hearing witnesses called by the Company Liquidator, allows the application made under sub-section (5), the Tribunal may order payment to the applicant of such costs as it may think fit.
- (7) **Records of the examinations in writing:** Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, a copy be supplied to him and may thereafter be used in evidence against him, and shall be open to inspection by any creditor or contributory at all reasonable times.
- (8) **Adjournment:** The Tribunal may, if it thinks fit, adjourn the examination from time to time.
- (9) **Examination can be before any person/authority:** An examination under this section may, if the Tribunal so directs, be held before any person or authority authorised by the Tribunal.
- (10) **Exercise of tribunal powers by the concerned person /authority:** The powers of the Tribunal under this section as to the conduct of the examination, but not as to costs, may be exercised by the person or authority before whom the examination is held in pursuance of sub-section (9).

[Section XXXI] Arrest of Person Trying to Leave India or Abscond [Section 301]

Any time either before or after passing a winding up order, if the Tribunal is satisfied that -

- a contributory, or
- a person having property, accounts or papers of the company in his possession

is about-

- to leave India or
- otherwise to abscond, or
- is about to remove or conceal any of his property, for evading payment of calls, or
- of avoiding examination respecting the affairs of the company,

the Tribunal may cause—

- the contributory to be detained until such time as the Tribunal may order; and
- his books and papers and movable property to be seized and safely kept until such time as the Tribunal may order.

[XXXII] Dissolution of Company by Tribunal [Section 302]

Sl.no.	Condition	Effect
1.	When the affairs of a company have been completely wound up	the Company Liquidator shall make an application to the Tribunal for dissolution of such company
2.	Tribunal shall on an application filed by the Company Liquidator, or when the Tribunal is of the opinion that it is just and reasonable in the circumstances that an order for the dissolution of the company should be made	Tribunal shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly
3.	Copy of the order shall, within thirty days from the date thereof, be forwarded by the Company Liquidator to the Registrar	Registrar shall record in the register relating to the company a minute of the dissolution of the company
4.	If the Company Liquidator makes a default in forwarding a copy of the order within the period specified	the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues

(XXXIII) Appeals from Orders Made Before Commencement of Act [Section 303]

Prospective effect: Nothing in this Chapter shall affect the operation or enforcement of any order made by any Court in any proceedings for the winding up of a company immediately before the commencement of this Act and an appeal against such order shall be filed before such authority competent to hear such appeals before such commencement.

(XXXIV) (Part II- Voluntary winding up) Sections 304- 323- Omitted

Provisions under Companies Act, 2013 stands omitted due to section 255 of Insolvency & Bankruptcy Code, 2016 and section 59 covered under Chapter V of Insolvency & Bankruptcy Code, 2016 has been notified on 01.04.2017. For reference of the stated section see the reading material "An overview of Insolvency & Bankruptcy Code, 2016". It is available at the following link <http://resource.cdn.icai.org/45558bos35644.pdf>

Part III—Provisions Applicable to Every Mode of Winding Up**(XXXV) Debts of all Descriptions to be Admitted to Proof [Section 324]**

In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act or of the law of insolvency), -

- all debts payable on a contingency, and
- all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages,

shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value.

(XXXVI) Section 325- omitted**(XXXVII) Overriding Preferential Payments [Section 326]**

- (1) **Debts to be paid in priority:** In the winding up of a company under this Act, the following debts shall be paid in priority to all other debts:—

- (a) workmen's dues; and
- (b) where a secured creditor has realised a secured asset, so much of the debts due to such secured creditor as could not be realised by him or the amount of the workmen's portion in his security (if payable under the law), whichever is less, *pari passu* with the workmen's dues:

Provided that in case of the winding up of a company, the sums referred to in sub-clauses (i) and (ii) of clause (b) of the Explanation, which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in priority to all other debts (including debts due to secured creditors), within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

- (2) **Proviso mentioning the debts shall be paid in full:** The debts payable under the proviso to sub-section (1) shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that subsection shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Illustration:

The value of the security of a secured creditor of a company is ₹ 1,00,000. The total amount of the workmen's dues is ₹ 1,00,000. The amount of the debts due from the company to its secured creditors is ₹ 3,00,000. The aggregate of the amount of workmen's dues and the amount of debts due to secured creditors is ₹ 4,00,000. The workmen's portion of the security is, therefore, one-fourth of the value of the security, that is ₹ 25,000.

Explanation—For the purposes of this section, and section 327—

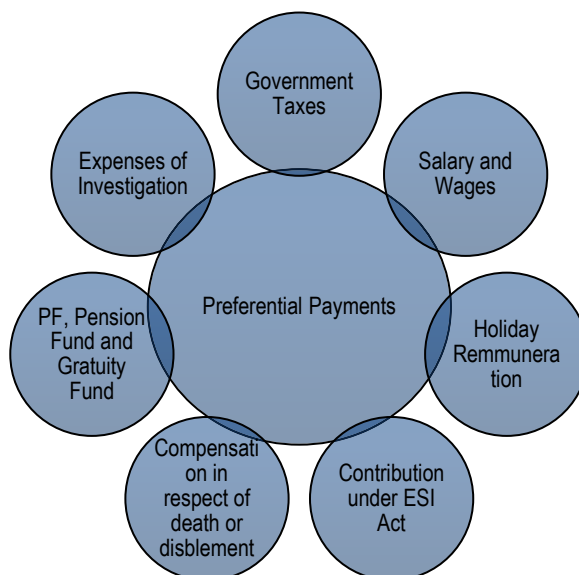
- (a) **"workmen"**, in relation to a company, means the employees of the company, being workmen within the meaning of clause (s) of section 2 of the Industrial Disputes Act, 1947;
- (b) **"workmen's dues"**, in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:—
 - (i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947
 - (ii) all accrued holiday remuneration becoming payable to any workman or, in the case of his death, to any other person in his right on the termination of his employment before or by the effect of the winding up order or resolution;
 - (iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (19 of 1923), rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;
 - (iv) all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the company;
- (c) **"workmen's portion"**, in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amount of the debts due to the secured creditors.

[XXXVIII] Preferential Payments [Section 327]

- (1) In a winding up, subject to the provisions of section 326, there shall be paid in priority to all other debts,—

- (a) all revenues, taxes, cesses and rates due from the company to the Central Government or a State Government or to a local authority at the relevant date, and having become due and payable within the twelve months immediately before that date;
- (b) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any employee in respect of services rendered to the company and due for a period not exceeding four months within the twelve months immediately before the relevant date, subject to the condition that the amount payable under this clause to any workman shall not exceed such amount as may be notified;
- (c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death, to any other person claiming under him, on the termination of his employment before, or by the winding up order, or, as the case may be, the dissolution of the company;
- (d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company, all amount due in respect of contributions payable during the period of twelve months immediately before the relevant date by the company as the employer of persons under the Employees' State Insurance Act, 1948 or any other law for the time being in force;
- (e) unless the company has, at the commencement of winding up, under such a contract with any insurer as is mentioned in section 14 of the Workmen's Compensation Act, 1923, rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company:

Provided that where any compensation under the said Act is a weekly payment, the amount payable under this clause shall be taken to be the amount of the lump sum for which such weekly payment could, if redeemable, be redeemed, if the employer has made an application under that Act;
- (f) all sums due to any employee from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the employees, maintained by the company; and
- (g) the expenses of any investigation held in pursuance of sections 213 and 216, in so far as they are payable by the company.



- (2) **Payment in case of employee:** Where any payment has been made to any employee of a company on account of -
- wages or salary, or
 - accrued holiday remuneration, himself or,
 - in the case of his death, to any other person claiming through him,
 - out of money advanced by some person for that purpose, the person by whom the money was advanced
- shall, in a winding up, have a right of priority in respect of the money so advanced and paid-up to the amount by which the sum in respect of which the employee or other person in his right would have been entitled to priority in the winding up has been reduced by reason of the payment having been made.
- (3) **Payments of debts:** The debts enumerated in this section shall—
- (a) **rank equally among themselves and be paid in full**, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and
 - (b) so far as the assets of the company available for payment to general creditors are insufficient to meet them, have **priority over the claims of holders of debentures** under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.
- (4) **Discharged from payment of debts:** Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the debts under this

section shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given under clause (d) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

- (5) **Debts to which priority is given, shall be a first charge on the goods:** In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months immediately before the date of a winding up order, the debts to which priority is given under this section shall be a first charge on the goods or effects so distrained on or the proceeds of the sale thereof:

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

- (6) **Remuneration of holiday/ of absence from work:** Any remuneration in respect of a period of holiday or of absence from work on medical grounds through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period.
- (7) **Non-applicability of sections 326 & 327:** Sections 326 and 327 shall not be applicable in the event of liquidation under the Insolvency and Bankruptcy Code, 2016.

Explanation—For the purposes of this section,—

- (a) the expression “**accrued holiday remuneration**” includes, in relation to any person,
- all sums which, by virtue either of his contract of employment or of any enactment including any order made or direction given thereunder,
 - are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday;
- (b) the expression “**employee**” does not include a workman; and
- (c) the expression “**relevant date**” means in the case of a company being wound up by the Tribunal-
- the date of appointment or first appointment of a provisional liquidator, or
 - if no such appointment was made, the date of the winding up order,
- unless, in either case, the company had commenced to be wound up voluntarily before that date under the Insolvency and Bankruptcy Code, 2016;

(XXXIX) Fraudulent Preference [Section 328]

- (1) **When any transaction may be treated as fraudulent preference:** Where a

company has given preference to a person who is-

- one of the creditors of the company, or
- a surety or guarantor for any of the debts or other liabilities of the company,

and the company does anything or suffers anything done which has the effect of putting that person into a position which, in the event of the company going into liquidation, will be better than the position he would have been in if that thing had not been done prior to six months of making winding up application, -

the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

(2) **Order of tribunal:** If the Tribunal is satisfied that there is a-

- preference transfer of property, movable or immovable, or
- any delivery of goods,
- payment,
- execution made, taken or done by or against a company within six months before making winding up application,

the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

(XL) Transfers Not in Good Faith to be Void [Section 329]

Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being –

- a transfer or delivery made in the ordinary course of its business, or
- in favour of a purchaser or encumbrancer in good faith and for valuable consideration,

if made within a period of one year before the presentation of a petition for winding up by the Tribunal under this Act- Such transfer shall be void against the Company Liquidator.

(XLI) Certain Transfers to be Void [Section 330]

Any transfer or assignment by a company of all its properties or assets to trustees for the benefit of all its creditors shall be void.

(XLII) Liabilities and Rights of Certain Persons Fraudulently Preferred [Section 331]

- (1) **Determination of rights and liabilities of fraudulently preferred persons:** Where a company is being wound up and anything made, taken or done after the commencement of this Act is invalid under section 328 as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, then, without prejudice to any rights or liabilities arising, apart from this

provision, the person preferred shall be subject to the same liabilities, and shall have the same rights, as if he had undertaken to be personally liable as a surety for the debt,-

- to the extent of the mortgage or charge on the property, or
- the value of his interest,

whichever is less.

- (2) **Value of interest shall be determined as at the date if the transaction constituting the fraudulent preference:** The value of the interest of the person preferred under sub-section (1) shall be determined as at the date of the transaction constituting the fraudulent preference, as if the interest were free of all encumbrances other than those to which the mortgage or charge for the debt of the company was then subject.
- (3) **Application to tribunal to make payment:** On an application made to the Tribunal with respect to any payment on the ground that the payment was a fraudulent preference of a surety or guarantor, the Tribunal shall have jurisdiction to determine any questions with respect to the payment arising between the person to whom the payment was made and the surety or guarantor and to grant relief in respect thereof, notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose, may give leave to bring in the surety or guarantor as a third party as in the case of a suit for the recovery of the sum paid.
- (4) The provisions of sub-section (3) shall apply mutatis mutandis in relation to transactions other than payment of money.

(XLIII) Effect of Floating Charge [Section 332]

Where a company is being wound up,

- a floating charge on the undertaking or property of the company created within the twelve months immediately preceding the commencement of the winding up,

shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except for the amount of any cash paid to the company at the time of, or subsequent to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum or such other rate as may be notified by the Central Government in this behalf.

(XLIV) Disclaimer of Onerous Property [Section 333]

- (1) **Disclaim of property by company liquidator:** Where any part of the property of a company which is being wound up consists of—
- (a) land of any tenure, burdened with onerous covenants;
 - (b) shares or stocks in companies;

- (c) any other property which is not saleable or is not readily saleable by reason of the possessor thereof being bound either to the performance of any onerous act or to the payment of any sum of money; or
- (d) unprofitable contracts,

the Company Liquidator may, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto or done anything in pursuance of the contract, with the leave of the Tribunal and subject to the provisions of this section, -

by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Tribunal, disclaim the property:

Provided that where the Company Liquidator had not become aware of the existence of any such property within one month from the commencement of the winding up, the power of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Tribunal.

- (2) **Determination of rights, interest and liabilities in respect of the property disclaimed:** The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interest and liabilities of the company in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights, interest or liabilities of any other person.
- (3) **Notices to be given to the interested persons:** The Tribunal, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Tribunal considers just and proper.
- (4) **Application made in writing to disclaim/ not to disclaim :** The Company Liquidator shall not be entitled to disclaim any property in any case where an application in writing has been made to him by any person interested in the property requiring him to decide whether he will or will not disclaim and the Company Liquidator has not, within a period of twenty-eight days after the receipt of the application or such extended period as may be allowed by the Tribunal, give notice to the applicant that he intends to apply to the Tribunal for leave to disclaim, and in case the property is under a contract, if the Company Liquidator after such an application as aforesaid does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.
- (5) **Application of person who is entitled to benefit of a contract made with a company:** The Tribunal may, on the application of any person who is, as against the Company Liquidator, entitled to the benefit or subject to the burden of a contract

made with the company, make an order-

- rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or
- otherwise as the Tribunal considers just and proper, and
- any damages payable under the order to any such person may be proved by him as a debt in the winding up.

(6) **Order of tribunal after hearing interested person on an application:** The Tribunal may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged under this Act in respect of any disclaimed property, and after hearing any such persons as it thinks fit, make an order for the –

- vesting of the property in, or
- the delivery of the property to,
- any person entitled thereto or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid,
- or a trustee for him, and

on such terms as the Tribunal considers just and proper, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person named therein in that behalf without any conveyance or assignment for the purpose:

Provided that where the property disclaimed is of a **leasehold nature-**

the Tribunal shall not make a vesting order in favour of any person claiming under the company, whether as under-lessee or as mortgagee or holder of a charge by way of demise, except upon the terms of making that person—

- (a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up; or
- (b) if the Tribunal thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date,

and in either event as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in, and security upon the property, and,

if there is no person claiming under the company who is willing to accept an order upon such terms, the Tribunal shall have power to vest the estate and interest of the company in the property in any person liable, either personally or in a

representative character, and either alone or jointly with the company, to perform the covenants of the lessee in the lease, free and discharged from all estates, encumbrances and interests created therein by the company.

- (7) **Affected person shall be deemed creditor of company:** Any person affected by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the compensation or damages payable in respect of such effect, and may accordingly prove the amount as a debt in the winding up.

(XLV) Transfers, etc., After Commencement of Winding Up to be Void [Section 334]

In the case of a winding up by the Tribunal, any disposition of the property including actionable claims, of the company and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up shall, unless the Tribunal otherwise orders, be void.

(XLVI) Certain Attachments, Executions, etc., in Winding Up by Tribunal to be Void [Section 335]

- (1) Where any company is being wound up by the Tribunal,—
- (a) **any attachment, distress or execution** put in force, without leave of the Tribunal **against the estate or effects of the company**, after the commencement of the winding up; or
 - (b) **any sale held**, without leave of the Tribunal of **any of the properties or effects of the company**, after such commencement,
-shall be void.
- (2) **Not applicable to proceedings for the recovery of any tax/dues:** Nothing in this section shall apply to any proceedings for the recovery of any tax or impost or any dues payable to the Government.

(XLVII) Offences by Officers of Companies in Liquidation [Section 336]

- (1) If any person, who is or has been an officer of a company which, at the time of the commission of the alleged offence, is being wound up, by the Tribunal under this Act or which is subsequently ordered to be wound up by the Tribunal under this Act—

Offences committed
by Officers of
Companies

- No disclosure of assets
- No deliver of property
- No deliver of books and papers
- No deliver of informations
- Material omissions
- Prevents the production of any book or paper
- Displays fictitious losses or expenses
- False representation

- (a) **No disclosure of assets:** does not, to the best of his knowledge and belief, fully and truly disclose to the Company Liquidator all the property, movable and immovable, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary course of the business of the company;
- (b) **No deliver of property:** does not deliver up to the Company Liquidator, or as he directs, all such part of the movable and immovable property of the company as is in his custody or under his control and which he is required by law to deliver up;
- (c) **No deliver of books and papers:** does not deliver up to the Company Liquidator, or as he directs, all such books and papers of the company as are in his custody or under his control and which he is required by law to deliver up;
- (d) **No deliver of informations:** within the twelve months immediately before the commencement of the winding up or at any time thereafter,—
- (i) **conceals any part of the property** of the company to the value of one thousand rupees or more, or conceals any debt due to or from the company;
 - (ii) **fraudulently removes any part of the property** of the company to the value of one thousand rupees or more;
 - (iii) **conceals, destroys, mutilates or falsifies**, or is privy to the concealment, destruction, mutilation or falsification of, **any book or paper** affecting or relating to, the property or affairs of the company;
 - (iv) **makes, or is privy to the making of, any false entry** in any book or paper affecting or relating to, the property or affairs of the company;
 - (v) **fraudulently parts with, alters or makes any omission in**, or is privy to the fraudulent parting with, altering or making of any omission in, **any book or paper** affecting or relating to the property or affairs of the company;

- (vi) by any **false representation or other fraud, obtains on credit**, for or on behalf of the company, any property which the company does not subsequently pay for;
 - (vii) under the **false pretence that the company is carrying on its business, obtains on credit**, for or on behalf of the company, any property which the company does not subsequently pay for; or
 - (viii) **pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid** for, unless such pawning, pledging or disposing of the property is in the ordinary course of business of the company;
- (e) **Material omissions:** makes any material omission in any statement relating to the affairs of the company;
- (f) knowing or believing that a false debt has been proved by any person under the winding up, fails for a period of one month to inform the Company Liquidator thereof;
- (g) **Prevents the production of any book or paper:** after the commencement of the winding up, prevents the production of any book or paper affecting or relating to the property or affairs of the company;
- (h) **Displays fictitious losses or expenses:** after the commencement of the winding up or at any meeting of the creditors of the company within the twelve months next before the commencement of the winding up, attempts to account for any part of the property of the company by fictitious losses or expenses; or
- (i) **False representation:** is guilty of any false representation or fraud for the purpose of obtaining the consent of the creditors of the company or any of them, to an agreement with reference to the affairs of the company or to the winding up,
- he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees:
- Provided that it shall be a good defence if the accused proves that he had no intent to defraud or to conceal the true state of affairs of the company or to defeat the law.
- (2) **Person who takes in pawn or pledge or otherwise receives the property, knowing it to be pawned, pledged, or disposed of in circumstances under sub-clause (viii) of clause (d) of sub-section (1)** -Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under sub-clause (viii) of clause (d) of sub-section (1), every person who takes in pawn or pledge or otherwise receives the property, knowing it to be pawned, pledged, or

disposed of in such circumstances as aforesaid, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than three lakh rupees but which may extend to five lakh rupees.

Explanation -For the purposes of this section, the expression “**officer**” includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

(XLVIII) Penalty for Frauds by Officers [Section 337]

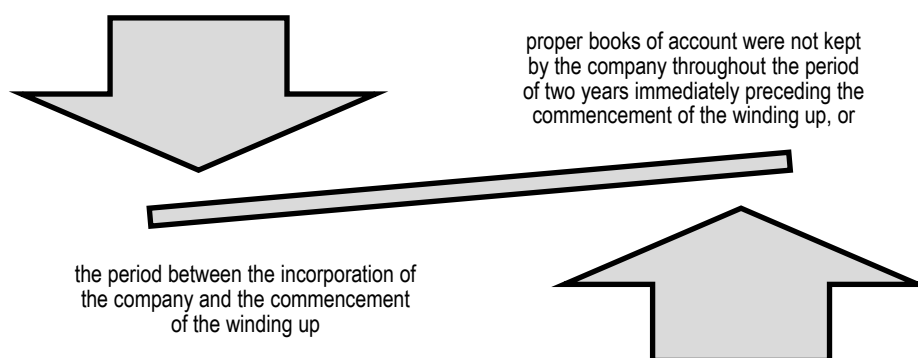
If any person, being at the time of the commission of the alleged offence an officer of a company which is subsequently ordered to be wound up by the Tribunal under this Act—

- (a) has, **by false pretences or by means of any other fraud, induced any person to give credit** to the company;
- (b) **with intent to defraud creditors of the company or any other person, has made or caused to be made any gift or transfer of, or charge on,** or has caused or connived at the levying of any execution against, the property of the company; or
- (c) **with intent to defraud creditors of the company, has concealed or removed any part of the property** of the company since the date of any unsatisfied judgment or order for payment of money obtained against the company or within two months before that date,

he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

(XLIX) Liability Where Proper Accounts not Kept [Section 338]

- (1) Where a company is being wound up, if it is shown that-



whichever is shorter, every officer of the company who is in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable, be punishable with

imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

- (2) It shall be deemed that proper books of account have not been kept in the case of any company,—
- (a) if such books of account as are necessary to exhibit and explain the transactions and financial position of the business of the company, including books containing entries made from day-to-day in sufficient detail of all cash received and all cash paid, have not been kept; and
 - (b) where the business of the company has involved dealings in goods, statements of the annual stock takings and, except in the case of goods sold by way of ordinary retail trade, of all goods sold and purchased, showing the goods and the buyers and the sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified, have not been kept.

(L) Liability for Fraudulent Conduct of Business [Section 339]

- (1) **Tribunal to declare the liability of the persons:** If in the course of the winding up of a company, it appears that any business of the company has been carried on with-

- intent to defraud creditors of the company or
- any other persons or
- for any fraudulent purpose,

the Tribunal, on the application of the –

- Official Liquidator, or
- the Company Liquidator or
- any creditor or contributory of the company,

may, if it thinks it proper so to do, declare that any person, who is or has been a director, manager, or officer of the company or any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct:

Provided that on the hearing of an application under this sub-section, the Official Liquidator or the Company Liquidator, as the case may be, may himself give evidence or call witnesses.

- (2) **Tribunal to give further directions to give effect to the declaration:** Where the Tribunal makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration and, in particular,—

- (a) make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf;
 - (b) make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.
- (3) **Liable for fraud:** Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be liable for action under section 447.
- (4) **Over riding effect of this section:** This section shall apply, notwithstanding that the person concerned may be punishable under any other law for the time being in force in respect of the matters on the ground of which the declaration is to be made.

Explanation.—For the purposes of this section,—

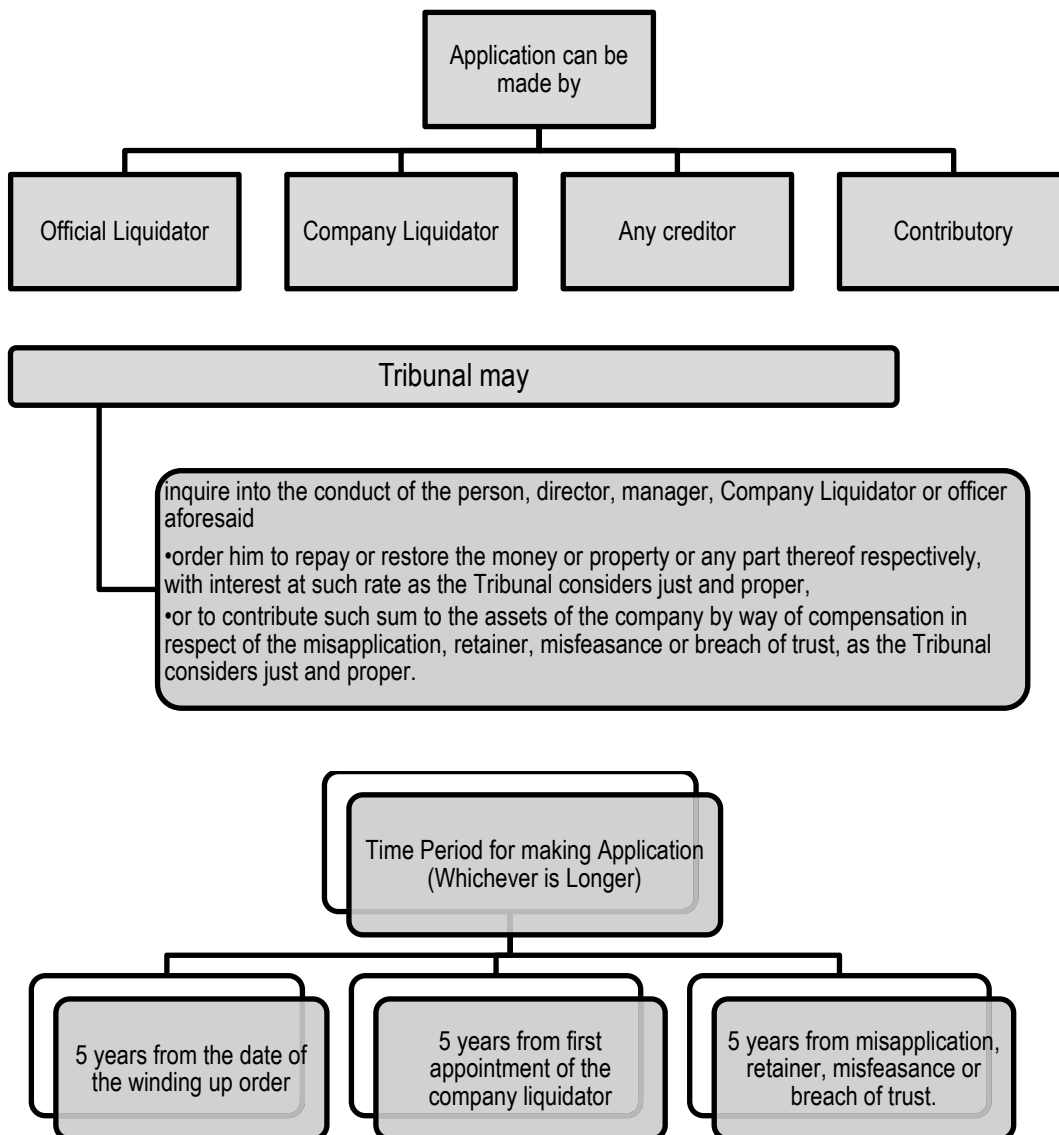
- (a) the expression “**assignee**” includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made;
- (b) the expression “**officer**” includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

[LI] Power of Tribunal to Assess Damages against Delinquent Directors, etc. [Section 340]

It appears that any person who has taken part in the promotion or formation of the company, or any person, who is or has been a director, manager, Company Liquidator or officer of the company

has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

has been guilty of any misfeasance or breach of trust in relation to the company,



This section shall apply, notwithstanding that the matter is one for which the person concerned may be criminally liable.

(LII) Liability Under Sections 339 and 340 to Extend to Partners or Directors in Firms or Companies [Section 341]

Where a declaration under section 339 or an order under section 340 is made in respect of a firm or body corporate, the Tribunal shall also have power to make a declaration under section 339, or pass an order under section 340, as the case may be, in respect of

any person who was at the relevant time a partner in that firm or a director of that body corporate.

(LIII) Prosecution of Delinquent Officers and Members of Company [Section 342]

- (1) **Tribunal to direct the liquidator to prosecute the offender:** If it appears to the Tribunal in the course of a winding up by the Tribunal, that any person, who is or has been -

- an officer, or
 - any member, of the company
- has been guilty of any offence in relation to the company, the Tribunal may, either-
- on the application of any person interested in the winding up, or
 - suo motu,

direct the liquidator to prosecute the offender or to refer the matter to the Registrar.

- (2) **To give assistance in prosecution:** When any prosecution is instituted under this section, it shall be the duty of the liquidator and of every person, who is or has been an officer and agent of the company to give all assistance in connection with the prosecution which he is reasonably able to give.

Explanation—For the purposes of this sub-section, the expression “agent”, in relation to a company, shall include any banker or legal adviser of the company and any person employed by the company as auditor.

- (3) **In case of failure:** If a person fails or neglects to give assistance, he shall be liable to pay fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(LIV) Company Liquidator to Exercise Certain Powers Subject to Sanction [Section 343]

- (1) **Order passed by the Company Liquidator with the sanction of the tribunal:** The Company Liquidator may, with the sanction of the Tribunal, when the company is being wound up by the Tribunal,—

- (i) pay any class of creditors in full;
- (ii) make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, against the company, or whereby the company may be rendered liable; or
- (iii) compromise any call or liability to call, debt, and liability capable of resulting in a debt, and any claim, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or alleged to subsist between the company and a contributory or alleged contributory or other debtor or

person apprehending liability to the company, and all questions in any way relating to or affecting the assets or liabilities or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

- (2) **Central Government to make rules to regulate powers of the Company Liquidator:** In the case of a winding up by the Tribunal, the Central Government may make rules to provide that the Company Liquidator may, under such circumstances, if any, and subject to such conditions, restrictions and limitations, if any, as may be prescribed, exercise any of the powers referred to in sub clause (ii) or sub-clause (iii) of clause (b) of sub-section (1) without the sanction of the Tribunal.
- (3) **Right to apply to the tribunal on the exercise of powers of the Company Liquidator:** Any creditor or contributory may apply in the manner prescribed to the Tribunal with respect to any exercise or proposed exercise of powers by the Company Liquidator under this section, and the Tribunal shall after giving a reasonable opportunity to such applicant and the Company Liquidator, pass such orders as it may think fit.

[LV] Statement that Company is in Liquidation [Section 344]

- (1) **Statement of wound up:** Where a company is being wound up, whether by
- the Tribunal or
 - voluntarily,
- every invoice, order for goods or business letter issued-
- by or on behalf of the company or
 - a Company Liquidator of the company, or
 - a receiver or
 - manager of the property of the company,
- being a document on or in which the name of the company appears, shall contain a statement that the company is being wound up.
- (2) **If a company contravenes the above provisions,** the company, and every officer of the company, the Company Liquidator and any receiver or manager, who wilfully authorises or permits the non-compliance, shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees.

(LVI) Books and Papers of Company to be Evidence [Section 345]

Books and Papers shall be prima facie evidence of truth: Where a company is being wound up, all books and papers of the company and of the Company Liquidator shall, as

between the contributories of the company, be prima facie evidence of the truth of all matters purporting to be recorded therein.

(LVII) Inspection of Books and Papers by Creditors and Contributories [Section 346]

- (1) **Inspection of Books and Papers:** At any time after the making of an order for the winding up of a company by the Tribunal, any creditor or contributory of the company may inspect the books and papers of the company only in accordance with, and subject to such rules as may be prescribed.
- (2) **No effect on the rights of the following persons:** Nothing contained in sub-section (1) shall exclude or restrict any rights conferred by any law for the time being in force—
 - (a) on the Central Government or a State Government;
 - (b) on any authority or officer thereof; or
 - (c) on any person acting under the authority of any such Government or of any such authority or officer.

(LVIII) Disposal of Books and Papers of Company [Section 347]

- (1) **Disposal of books and papers:** When the affairs of a company have been completely wound up and it is about to be dissolved, the books and papers of such company and those of the Company Liquidator may be disposed of in such manner as the Tribunal directs.".]
- (2) **Transfer of responsibility:** After the expiry of five years from the dissolution of the company, no responsibility shall devolve-
 - on the company,
 - the Company Liquidator, or
 - any personto whom the custody of the books and papers has been entrusted, by reason of any book or paper not being forthcoming to any person claiming to be interested therein.
- (3) The Central Government may, by rules,—
 - (a) **prevent for such period** as it thinks proper **the destruction of the books and papers** of a company which has been wound up and of its Company Liquidator; and
 - (b) **enable any creditor or contributory of the company to make representations** to the Central Government in respect of the matters specified in clause (a) and **to appeal to the Tribunal** from any order which may be made by the Central Government in the matter.
- (4) **If any person acts in contravention** of any rule framed or an order made under

sub-section (3), he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees, or with both.

(LIX) Information as to Pending Liquidations [Section 348]

- (1) **Conclusion of winding up process from its commencement:** If the winding up of a company is not concluded **within one year** after its commencement, the Company Liquidator shall (unless he is exempted from so doing), either-
wholly or in part by the Central Government, within two months of the expiry of such year and thereafter until the winding up is concluded, at intervals of not more than one year or at such shorter intervals, if any, as may be prescribed,
file a statement in such form containing such particulars as may be prescribed,
duly audited, by a person qualified to act as auditor of the company, with respect to the proceedings in, and position of, the liquidation, with the Tribunal:
Provided that no such audit as is referred to in this sub-section shall be necessary where the provisions of section 294 apply;

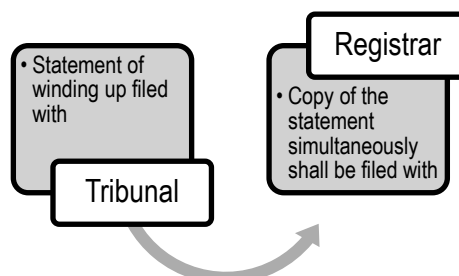
Winding up of a company is not concluded within 1 year after its commencement

within two months of the expiry of such year and thereafter until the winding up is concluded

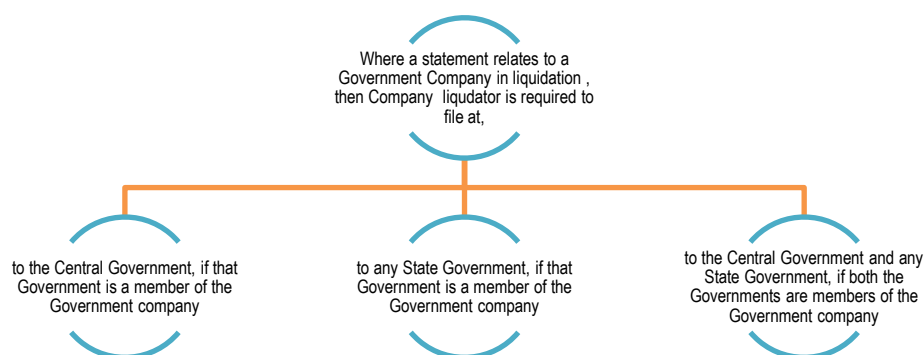
at intervals of not more than one year or at such shorter intervals

Central Government file a statement in such form containing such particulars as may be prescribed, duly audited, by a person qualified to act as auditor of the company

- (2) **Copy of statement to be filed with the registrar:** When the statement is filed with the Tribunal under clause (a) of sub-section (1), a copy shall simultaneously be filed with the Registrar and shall be kept by him along with the other records of the company.



(3) **Where the company in liquidation is a Government Company:**



- (4) **Person entitled to inspect the statement, etc.:** Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement referred to in sub-section (1), and to receive a copy thereof or an extract therefrom.
- (5) **Fraudulently representing himself creditor or contributory:** Any person fraudulently stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall, on the application of the Company Liquidator, be punishable accordingly.
- (6) **Contravention of provisions by Company Liquidator:** If a Company Liquidator contravenes the provisions of this section, the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the failure continues.
- (7) **In case of wilful default:** If a Company Liquidator makes wilful default in causing the statement referred to in sub-section (1) audited by a person who is not qualified to act as an auditor of the company, the Company Liquidator shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one lakh rupees, or with both.

(LX) Official Liquidator to Make Payments into Public Account of India [Section 349]

Every Official Liquidator shall, in such manner and at such times as may be prescribed, pay the monies received by him as Official Liquidator of any company, into the public account of India in the Reserve Bank of India.

(LXI) Company Liquidator to Deposit Monies into Scheduled Bank [Section 350]

- (1) **Deposit of monies in a scheduled bank:** Every Company Liquidator of a company shall, in such manner and at such times as may be prescribed, deposit the monies received by him in his capacity as such in a scheduled bank to the credit of a special bank account opened by him in that behalf:

Provided that if the Tribunal considers that it is advantageous for the creditors or contributories or the company, it may permit the account to be opened in such other bank specified by it.

- (2) **Retention of amount after the prescribed period :** If any Company Liquidator at any time retains for more than **ten days** a sum exceeding five thousand rupees or such other amount as the Tribunal may, on the application of the Company Liquidator, authorise him to retain, then, unless he explains the retention to the satisfaction of the Tribunal, he shall—
- (a) **pay interest on the amount so retained in excess**, at the rate of twelve per cent. per annum and also pay such penalty as may be determined by the Tribunal;
 - (b) **be liable to pay any expenses occasioned** by reason of his default; and
 - (c) **also be liable to have all or such part of his remuneration**, as the Tribunal may consider just and proper, disallowed, or may also be removed from his office.

(LXII) Liquidator Not to Deposit Monies into Private Banking Account [Section 351]

Neither the Official Liquidator nor the Company Liquidator of a company shall deposit any monies received by him in his capacity as such into any private banking account.

(LXIII) Company Liquidation Dividend and Undistributed Assets Account [Section 352]

- (1) **Money in the hands of the liquidator:** Where any company is being wound up and the liquidator has in his hands or under his control any money representing—
- (a) **dividends payable to any creditor** but which had remained unpaid for six months after the date on which they were declared; or
 - (b) **assets refundable to any contributory** which have remained undistributed for six months after the date on which they become refundable, the liquidator shall forthwith deposit the said money into a separate special account to be known as the Company Liquidation Dividend and Undistributed Assets Account maintained in a scheduled bank.

- (2) **Transfer of money into the Company Liquidation Dividend and Undistributed Assets Account:** The liquidator shall, on the dissolution of the company, pay into the Company Liquidation Dividend and Undistributed Assets Account any money representing unpaid dividends or undistributed assets in his hands at the date of dissolution.
- (3) **Furnishing of statement all sums to registrar:** The liquidator shall, when making any payment referred to in sub-sections (1) and (2), furnish to the Registrar, a statement in the prescribed form, setting forth, in respect of all sums included in such payment, the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.
- (4) **Receivable of receipt of money payment from scheduled bank:** The liquidator shall be entitled to a receipt from the scheduled bank for any money paid to it, and such receipt shall be an effectual discharge of the Company Liquidator in respect thereof.
- (5) **In case of voluntary winding up of company:** Where a company is being wound up voluntarily, the Company Liquidator shall, when filing a statement as per section 348,
- indicate the sum of money which is payable, during the six months preceding the date on which the said statement is prepared, and
- shall, within fourteen days of the date of filing the said statement-
- pay that sum into the Company Liquidation Dividend and Undistributed Assets Account.
- (6) **Application to registrar by the entitled person to any money paid:** Any person claiming to be entitled to any money paid into the Company Liquidation Dividend and Undistributed Assets Account, whether paid in pursuance of this section or under the provisions of any previous company law
- may apply to the Registrar for payment thereof, and
 - the Registrar, if satisfied that the person claiming is entitled, may make the payment to that person of the sum due.
- Period of settlement of claim:** Provided that the Registrar shall settle the claim of such person within a period of sixty days from the date of receipt of such claim, failing which the Registrar shall make a report to the Regional Director giving reasons of such failure.
- (7) **Unclaimed money in Company Liquidation Dividend and Undistributed Assets Account:** Any money paid into the Company Liquidation Dividend and Undistributed Assets Account in pursuance of this section, which remains unclaimed thereafter -
- for a period of fifteen years,

- shall be transferred to the general revenue account of the Central Government,
 - but a claim to any money so transferred may be preferred under sub-section (6) and shall be dealt with as if such transfer had not been made and the order, if any, for payment on the claim will be treated as an order for refund of revenue.
- (8) **In contravention:** Any liquidator retaining any money which should have been paid by him into the Company Liquidation Dividend and Undistributed Assets Account under this section shall—
- (a) **pay interest on the amount so retained at the rate of twelve per cent. per annum** and also pay such penalty as may be determined by the Registrar:
Provided that the Central Government may in any proper case remit either in part or in whole the amount of interest which the liquidator is required to pay under this clause;
 - (b) **be liable to pay any expenses** occasioned by reason of his default; and
 - (c) **where the winding up is by the Tribunal**, also be liable to have all or such part of his remuneration, as the Tribunal may consider just and proper, to be disallowed, and to be removed from his office by the Tribunal.

(LXIV) Liquidator to Make Returns, etc. [Section 353]

- (1) **Company liquidator makes default in filing, delivering of documents etc.:** If any Company Liquidator who has made any default—
- in filing, delivering or making any return, account or other document, or
 - in giving any notice which he is by law required to file, deliver, make or give, fails to make good the default
 - within fourteen days after the service on him of a notice requiring him to do so, the Tribunal may, on an application made to it by any—
 - contributory or creditor of the company or
 - by the Registrar,
- make an order directing the Company Liquidator to make good the default within such time as may be specified in the order.
- (2) **Cost to be bear by company liquidator:** Any order under sub-section (1) may provide that all costs of, and incidental to, the application shall be borne by the Company Liquidator.
- (3) **This section is not effecting on the other enactment imposing penalty on company liquidator:** Nothing in this section shall prejudice the operation of any

enactment imposing penalties on a Company Liquidator in respect of any such default as aforesaid.

(LXV) Meetings to Ascertain Wishes of Creditors or Contributories [Section 354]

- (1) **Ascertain the wishes:** In all matters relating to the winding up of a company, the Tribunal may—
 - (a) **have regard to the wishes of creditors or contributories** of the company, as proved to it by any sufficient evidence;
 - (b) if it thinks fit for the purpose of ascertaining those wishes, **direct meetings of the creditors or contributories** to be called, held and conducted in such manner as the Tribunal may direct; and
 - (c) **appoint a person to act as chairman** of any such meeting, and
 - (d) **to report the result** thereof to the Tribunal.
- (2) **While ascertaining the wishes of creditors**, regard shall be had to the value of each debt of the creditor.
- (3) **While ascertaining the wishes of contributories**, regard shall be had to the number of votes which may be cast by each contributory.

(LXVI) Court, Tribunal or Person, etc., Before Whom Affidavit May be Sworn [Section 355]

(1) Affidavit:

Any affidavit required to be sworn under chapter , may be sworn

in India, before

- any court
- tribunal
- judge, or
- person lawfully authorised to take and receive affidavits;

in any other country , before

- any court
- judge or
- person lawfully authorised to take and receive affidavits
 - in that country or
 - before an Indian diplomatic or
 - consular officer

- (2) **Judicial notice of the affidavit and other related documents:** All tribunals, judges, Justices, commissioners and persons acting judicially in India shall take judicial notice of the seal, stamp or signature, as the case may be, of any such court, tribunal, judge, person, diplomatic or consular officer, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Chapter.

(LXVII) Powers of Tribunal to Declare Dissolution of Company Void [Section 356]

- (1) **Power of tribunal to declare dissolution to be void:** Where a company has been dissolved, the Tribunal may -

- at any time within two years of the date of the dissolution,
- on application by the Company Liquidator of the company or
- by any other person who appears to the Tribunal to be interested,

make an order, upon such terms as the Tribunal thinks fit, declaring the dissolution to be void, and thereupon such proceedings may be taken as if the company had not been dissolved.

- (2) **Failure in filing of a certified copy of order of tribunal with registrar :** It shall be the duty of the Company Liquidator or the person on whose application the order was made, within thirty days after the making of the order or such further time as the Tribunal may allow, to file a certified copy of the order with the Registrar who shall register the same, and if the Company Liquidator or the person fails so to do, the Company Liquidator or the person shall be punishable with fine which may extend to ten thousand rupees for every day during which the default continues.

(LXVIII) Commencement of Winding Up by Tribunal [Section 357]

The winding up of a company by the Tribunal under this Act shall be deemed to commence at the time of the presentation of the petition for the winding up.

(LXIX) Exclusion of Certain Time in Computing Period of Limitation [Section 358]

Notwithstanding anything in the Limitation Act, 1963, or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a company which is being wound up by the Tribunal, the period from the date of commencement of the winding up of the company to a period of one year immediately following the date of the winding up order shall be excluded.

Part IV- Official Liquidator

(LXX) Appointment of Official Liquidator [Section 359]

- (1) For the purposes of this Act, so far as it relates to the winding up of companies by the Tribunal, the Central Government may appoint as many-

- Official Liquidators, Joint, Deputy or Assistant Official Liquidators as it may consider necessary to discharge the functions of the Official Liquidator.
- (2) The liquidators so appointed, shall be whole-time officers of the Central Government.
- (3) The salary and other allowances of the Official Liquidator, Joint Official Liquidator, Deputy Official Liquidator and Assistant Official Liquidator shall be paid by the Central Government

(LXXI) Powers and Functions of Official Liquidator [Section 360]

- (1) **Such powers as prescribed by the Central Government:** The Official Liquidator shall exercise such powers and perform such duties as the Central Government may prescribe.
- (2) **Others powers:** Without prejudice to the provisions of sub-section (1), the Official Liquidator may—
 - (a) exercise all or any of the powers as may be exercised by a Company Liquidator under the provisions of this Act; and
 - (b) Conduct inquiries or investigations, if directed by the Tribunal or the Central Government, in respect of matters arising out of winding up proceedings.

(LXXII) Summary Procedure for Liquidation [Section 361]

- (1) **Central Government may order for summary procedure:** Where the company to be wound up under this Chapter, —
 - (i) has assets of book value not exceeding one crore rupees; and
 - (ii) belongs to such class or classes of companies as may be prescribed, the Central Government may order it to be wound up by summary procedure provided under this Part.
- (2) **Appointment of official liquidator:** Where an order under sub-section (1) is made, the Central Government shall appoint the Official Liquidator as the liquidator of the company.
- (3) **Duties of official liquidator:** The Official Liquidator shall forthwith take into his custody or control all assets, effects and actionable claims to which the company is or appears to be entitled.
- (4) **Submission of report to Central Government:** The Official Liquidator shall, within thirty days of his appointment, submit a report to the Central Government in such manner and form, as may be prescribed, including a report whether in his opinion, any fraud has been committed in promotion, formation or management of the affairs of the company or not.
- (5) **Central Government may direct for investigation:** On receipt of the report, if

the Central Government is satisfied that any fraud has been committed by the promoters, directors or any other officer of the company, it may direct further investigation into the affairs of the company and that a report shall be submitted within such time as may be specified.

- (6) **Order of Central Government for the winding up:** After considering the investigation report under sub-section (5), the Central Government may order that winding up may be proceeded under Part I of this Chapter or under the provision of this Part.

(LXXIII) Sale of Assets and Recovery of Debts Due to Company [Section 362]

- (1) **Disposal of assets:** The Official Liquidator shall expeditiously dispose of all the assets whether movable or immovable within sixty days of his appointment.
- (2) **Serving of notice to deposit payable amount:** The Official Liquidator shall serve a notice within thirty days of his appointment calling upon the debtors of the company or the contributories, as the case may be, to deposit within thirty days with him the amount payable to the company.
- (3) **Order passed by Central Government:** Where any debtor does not deposit the amount under sub-section (2), the Central Government may, on an application made to it by the Official Liquidator, pass such orders as it thinks fit.
- (4) **Deposition of recovered amount:** The amount recovered under this section by the Official Liquidator shall be deposited in accordance with the provisions of section 349.

(LXXIV) Settlement of Claims of Creditors by Official Liquidator [Section 363]

- (1) The Official Liquidator within thirty days of his appointment shall call upon the creditors of the company to prove their claims in such manner as may be prescribed, within thirty days of the receipt of such call.
- (2) The Official Liquidator shall prepare a list of claims of creditors in such manner as may be prescribed and each creditor shall be communicated of the claims accepted or rejected along with reasons to be recorded in writing.

(LXXV) Appeal by Creditor [Section 364]

- (1) **Appeal against the decision of official liquidator before central government:** Any creditor aggrieved by the decision of the Official Liquidator under section 363 may file an appeal before the Central Government within thirty days of such decision.
- (2) **Central government either dismiss or modify the decision:** The Central Government may after calling the report from the Official Liquidator either dismiss the appeal or modify the decision of the Official Liquidator.
- (3) **Payment to the accepted claims:** The Official Liquidator shall make payment to

the creditors whose claims have been accepted.

- (4) **Referring of matter to tribunal:** The Central Government may, at any stage during settlement of claims, if considers necessary, refer the matter to the Tribunal for necessary orders.

(LXXVI) Order of Dissolution of Company [Section 365]

- (1) **Submission of final report of wound up:** The Official Liquidator shall, if he is satisfied that the company is finally wound up, submit a final report to—

Sl.no.	Concerned authority	Condition
(i)	Central Government	in case no reference was made to the Tribunal under sub-section (4) of section 364;
(ii)	in any other case	the Central Government and the Tribunal

- (2) **Order of dissolution:** The Central Government, or as the case may be, the Tribunal on receipt of such report shall order that the company be dissolved.
- (3) **Consequences of order:** Where an order is made, the Registrar shall strike off the name of the company from the register of companies and publish a notification to this effect.

Provision related to the Companies authorised to register under this Act and the winding up of unregistered companies

Provisions related to this Companies who are authorized to register under this Act and the winding up of unregistered companies are contained in chapter XXI of the Companies Act, 2013. This chapter is divided into two parts.

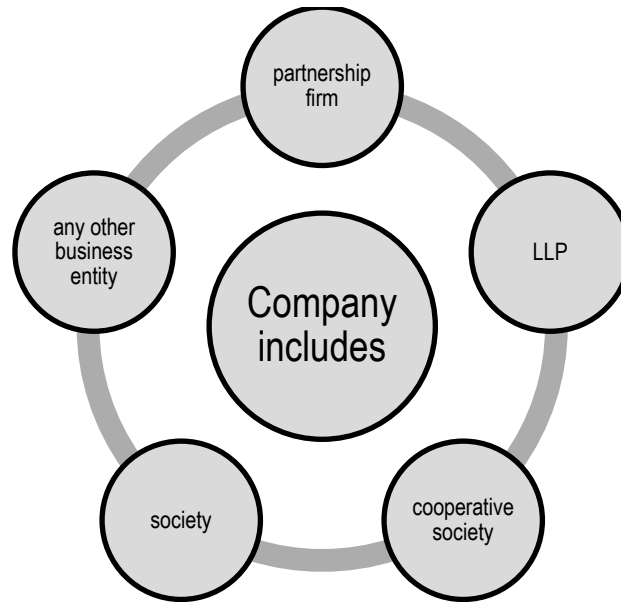
Part I deals with the companies authorised to register under this Act. It contains 9 sections. Whereas **Part II** deals with the winding up of unregistered companies. It comprises of 4 sections.

This chapter covers sections from 366- 378 of the Companies Act, 2013.

Part I — Companies Authorised to Register Under this Act

(I) Companies Capable of Being Registered [Section 366]

- (1) **Meaning of company:** For the purposes of this Part, the word “company” includes the following entities which applies for registration under this Part.-



- (2) **Registration of companies:** With the exceptions and subject to the provisions contained in this section, any company formed, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act or of any other law for the time being in force or being otherwise duly constituted according to law, and consisting of seven or more members, may at any time register under this Act -

- as an unlimited company, or
- as a company limited by shares, or
- as a company limited by guarantee,

in such manner as may be prescribed and the registration shall not be invalid by reason only that it has taken place with a view to the company's being wound up:

Provided that—

- (i) **Company registered under the previous company law:** a company registered under the Indian Companies Act, 1882 or under the Indian Companies Act, 1913 or the Companies Act, 1956, shall not register in pursuance of this section;
- (ii) **Limited liability of member:** a company having the liability of its members limited by any Act of Parliament other than this Act or by any other law for the time being in force, shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;

- (iii) **Company can be registered as a company limited by shares only:** a company shall be registered in pursuance of this section as a company limited by shares only if it has a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in the one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons;
 - (iv) **Companies can be registered with the assent of the majority:** a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person, or where proxies are allowed, by proxy, at a general meeting summoned for the purpose;
 - (v) **Company to register as a limited company requires majority to assent:** where a company not having the liability of its members limited by any Act of Parliament or any other law for the time being in force is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person, or where proxies are allowed, by proxy, at the meeting;
 - (vi) **Company is about to register as a company limited by guarantee , assent to be accompanied by resolution:** where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.
- (3) **Computation of majority:** In computing any majority required for the purposes of sub-section (1), when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the Company.

(II) Certificate of Registration of Existing Companies [Section 367]

On compliance with the requirements of this Chapter with respect to registration, and on payment of such fees, if any, as are payable under section 403,-

- the Registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and
- in the case of a limited company that it is limited and thereupon the company shall be so incorporated.

(III) Vesting of Property on Registration [Section 368]

All property, movable and immovable (including actionable claims), belonging to or vested in a company at the date of its registration in pursuance of this Part, shall,

- on such registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

(IV) Saving of existing liabilities [Section 369]

The registration of a company in pursuance of this Part shall not affect its rights or liabilities in respect of any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of, the company before registration.

(V) Continuation of Pending Legal Proceedings [Section 370]

All suits and other legal proceedings taken by or against-

- the company, or
- any public officer or
- member thereof,

which are pending at the time of the registration of a company in pursuance of this Part, may be continued in the same manner as if the registration had not taken place.

Provided that execution shall not issue against the property or persons of any individual member of the company on any decree or order obtained in any such suit or proceeding; but, in the event of the property of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company in accordance with the provisions of this Act or of the Insolvency and Bankruptcy Code, 2016.

(VI) Effect of Registration Under this Part [Section 371]

- (1) When a company is registered in pursuance of this Part, sub-sections (2) to (7) shall apply.
- (2) All provisions contained in any Act of Parliament or any other law for the time being in force, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles.
- (3) **Application of the provisions of this Act:** All the provisions of this Act shall apply to the-
 - company and the members,

- contributories and creditors thereof,

in the same manner in all respects as if it had been formed under this Act, subject as follows:—

- (a) **Table F in Schedule I shall not apply** unless and except in so far as it is adopted by special resolution;
 - (b) **the provisions of this Act relating to the numbering of shares shall not apply** to any company whose shares are not numbered;
 - (c) **in the event of the company being wound up, every person shall be a contributory**, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability, or to pay or contribute to the payment of the costs, charges and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid;
 - (d) **in the event of the company being wound up, every contributory shall be liable to contribute to the assets of the company**, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives of deceased contributories, or with respect to the assignees of insolvent contributories, as the case may be, shall apply.
- (4) **Application of the provisions of this Act:** The provisions of this Act with respect to—
- (a) the registration of an unlimited company as a limited company;
 - (b) the powers of an unlimited company on registration as a limited company, to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called-up except in the event of winding up;
 - (c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called-up except in the event of winding up,
- shall apply, notwithstanding anything in any Act of Parliament or any other law for the time being in force, or other instrument constituting or regulating the company.
- (5) **No alteration of any provisions contained in the instrument:** Nothing in this section shall authorise the company to alter any such provisions contained in any instrument constituting or regulating the company as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act.

- (6) **Powers of altering the constitution or regulations as vested in the company:** None of the provisions of this Act (apart from those of section 242) shall derogate from any power of altering its constitution or regulations which may be vested in the company, by virtue of any Act of Parliament or any other law for the time being in force, or other instrument constituting or regulating the company.
- (7) In this section, the expression “**instrument**” includes deed of settlement, deed of partnership, or limited liability Partnership.

(VII) Power of Court to Stay or Restrain Proceedings [Section 372]

The provisions of this Act or of the Insolvency and Bankruptcy Code, 2016, as the case may be with respect to staying and restraining suits and other legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order, shall, in the case of a company registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and other legal proceedings against any contributory of the company.

(VIII) Suits Stayed on Winding Up Order [Section 373]

Where an order has been made for winding up, or a provisional liquidator has been appointed for, a company registered in pursuance of this Part,

- no suit or other legal proceeding shall be proceeded with or commenced against the company or any contributory of the company in respect of any debt of the company, except by leave of the Tribunal and except on such terms as the Tribunal may impose.

(IX) Obligations of Companies Registering Under this Part [Section 374]

Every company which is seeking registration under this Part shall,—

- (a) **Consent given by secured creditors to company's registration:** ensure that secured creditors of the company, prior to its registration under this Part, have either consented to or have given their no objection to company's registration under this Part;
- (b) **Publication of notice of registration:** publish in a newspaper, advertisement one in English and one in vernacular language in such form as may be prescribed giving notice about registration under this Part, seeking objections and address them suitably;
- (c) **Affidavit of the submission of necessary documents:** file an affidavit, duly not arised, from all the members or partners to provide that in the event of registration under this Part, necessary documents or papers shall be submitted to the registering or other authority with which the company was earlier registered, for its dissolution as partnership firm, limited liability partnership, cooperative society, society or any other business entity, as the case may be.

- (d) **comply with such other conditions** as may be prescribed.

PART II.—Winding Up of Unregistered Companies

(X) Winding Up of Unregistered Companies [Section 375]

- (1) **Application of provisions of winding up on unregistered companies:** Subject to the provisions of this Part, any unregistered company may be wound up under this Act, in such manner as may be prescribed, and all the provisions of this Act, with respect to winding up shall apply to an unregistered company, with the exceptions and additions mentioned in sub-sections (2) to (4).
- (2) **No voluntary winding up of unregistered companies:** No unregistered company shall be wound up under this Act voluntarily.
- (3) **Circumstances of winding up of unregistered companies:** An unregistered company may be wound up under the following circumstances, namely:—
 - (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
 - (b) if the company is unable to pay its debts;
 - (c) if the Tribunal is of opinion that it is just and equitable that the company should be wound up.
- (4) **When unregistered company is unable to pay debts:** An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—
 - (a) **if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due**, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Tribunal may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for three weeks after the service of the demand, neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;
 - (b) **if any suit or other legal proceeding has been instituted against any member for any debt or demand due, or claimed to be due**, from the company, or from him in his character as a member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such manner as the Tribunal may approve or direct, the company has not, within ten days after service of the notice,—
 - (i) paid, secured or compounded for the debt or demand;

- (ii) procured the suit or other legal proceeding to be stayed; or
- (iii) indemnified the defendant to his satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;
- (c) if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied in whole or in part;
- (d) if it is otherwise proved to the satisfaction of the Tribunal that the company is unable to pay its debts.

Explanation.— For the purposes of this Part, the expression "**unregistered company**"—

- (a) shall not include—
 - (i) a railway company incorporated under any Act of Parliament or other Indian law or any Act of Parliament of the United Kingdom;
 - (ii) a company registered under this Act; or
 - (iii) a company registered under any previous companies law and not being a company the registered office whereof was in Burma, Aden, Pakistan immediately before the separation of that country from India; and
- (b) save as aforesaid, shall include any partnership firm, limited liability partnership or society or co-operative society, association or company consisting of more than seven members at the time when the petition for winding up the partnership firm, limited liability partnership or society or co-operative society, association or company, as the case may be, is presented before the Tribunal.

(XI) Power to Wind Up Foreign Companies, Although Dissolved [Section 376]

Where a **body corporate incorporated outside India which has been carrying on business in India, ceases to carry on business in India**, it may be wound up as an unregistered company under this Part, notwithstanding that the body corporate has been dissolved or otherwise ceased to exist as such under or by virtue of the laws of the country under which it was incorporated.

(XII) Provisions of Chapter Cumulative [Section 377]

- (1) **The provisions of this Part, with respect to unregistered companies shall be in addition to and not in derogation of**, any provisions herein before in this Act contained with respect to the winding up of companies by the Tribunal.
- (2) **The Tribunal or Official Liquidator may exercise any powers or do any act in**

the case of unregistered companies which might be exercised or done by the Tribunal or Official Liquidator in winding up of companies formed and registered under this Act:

Provided that an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part.

(XIII) Saving and Construction of Enactments Conferring Power to Wind Up Partnership Firm, Association or Company, etc., in Certain Cases [Section 378]

Nothing in this Part, shall affect the operation of any enactment which provides for any partnership firm, limited liability partnership or society or co-operative society, association or company being wound up, or being wound up as a company or as an unregistered company, under the Companies Act, 1956, or any Act repealed by that Act.

Provided that references in any such enactment to any provision contained in the Companies Act, 1956 or in any Act repealed by that Act shall be read as references to the corresponding provision, if any, contained in this Act.

Earlier Law- This chapter related to winding up in the study material were based on Companies Act, 1956.

12

COMPANIES INCORPORATED OUTSIDE INDIA

Notification of Sub-section (2) of Section 391

Application of Sections 34 to 36 and Chapter XX: This section 391 of the Companies Act provides of application of provisions 34 to 36 [Criminal Liability for Mis-statements in Prospectus, Punishment for Fraudulently Inducing Persons to Invest Money & Civil Liability for Mis-statements in Prospectus] of the said Act and chapter XX [Winding Up] on the Companies incorporated outside India.

Sub –section (1) to this Section was notified earlier on 01/04/2014, However Subsection (2) have been notified on 07/12/2016 and was effective from 15/12/2016.

- 391.(1) The provisions of sections 34 to 36 (both inclusive) shall apply to—
- (i) the issue of a prospectus by a company incorporated outside India under section 389 as they apply to prospectus issued by an Indian company;
 - (ii) the issue of Indian Depository Receipts by a foreign company.
- (2) The provisions of Chapter XX shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India.

Vide General Circular no. 01/2017, Ministry of Corporate Affairs have issued a **clarification with regard to the application of section 391(2)** of the Companies Act, 2013 in relation to closure of place of business by a foreign company. This section came into enforcement on 15th December 2016. The Ministry on harmoniously reading section 391(1) & 391(2), clarified that provisions of section 391(2) of the Companies Act, 2013 would apply only in case of a foreign company which has issued prospectus or IDRs pursuant to provisions of chapter XXII(Companies incorporated outside India) of the Companies Act, 2013.

15

NATIONAL COMPANY LAW TRIBUNAL AND APPELLATE TRIBUNAL (NCLT & NCLAT)

Constitution of NCLT read with Section 408

The Ministry of Corporate Affairs Vide notification S.O.1932 (E) dated 1st June 2016, hereby constitutes the NCLT to exercise and discharge the powers and functions as are or may be conferred on it by or under the said Act with effect from 1st June 2016.

Earlier Law- This section 408 was notified on 12th September, 2013 however date of enforcement was not notified. So body was not in operation.

Reference of Page number of relevant section in the study material - 15.2

Constitution of NCLAT read with Section 410

The Ministry of Corporate Affairs Vide notification S.O.1933 (E) dated 1st June 2016, hereby constitutes the NCLAT for hearing appeals against the orders of the NCLT with effect from 1st June 2016.

Earlier Law- This section 410 was notified on 12th September, 2013 however date of enforcement was not notified. So this appellate body was not in operation.

Reference of Page number in the study material - 15.3

Notification of Sections 415 to 433, and Clause (a) and (b) to Sub section (1) and to Sub section (2) to 434 of the Companies Act, 2013.

Provisions related to NCLT and NCLAT are being covered under sections 407 to 434 of the Companies Act, 2013. Section 407 to 414 were enforced with effect from 12th September 2013. Further sections from 415 to 433 and certain sub-sections of 434 have been notified by the Ministry of Corporate Affairs vide notification S.O. 1934(E) dated 1st June 2016 with effect from 1st June 2016.

Acting President and Chairperson of Tribunal or Appellate Tribunal

415. (1) In the event of the occurrence of any vacancy in the office of the President or the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the President or the Chairperson, as the case may be, until the date on which a new President or Chairperson appointed in accordance with the provisions of this Act to fill such vacancy enters upon his office.

(2) When the President or the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the President or the Chairperson, as the case may be, until the date on which the President or the Chairperson resumes his duties.

Earlier Law- Corresponding Section 10FH and 10FS of the Companies Act, 1956 was prevailing as the section 415 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.5 & 15.9

Resignation of Members

416. The President, the Chairperson or any Member may, by notice in writing under his hand addressed to the Central Government, resign from his office:

Provided that the President, the Chairperson, or the Member shall continue to hold office until the expiry of three months from the date of receipt of such notice by the Central Government or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is earliest.

Earlier Law- Corresponding Section 10FI and 10FU of the Companies Act, 1956 was in enforcement as the section 416 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.5 & 15.9

Removal of members

417. (1) Power of Central Government: The Central Government may, after consultation with the Chief Justice of India, remove from office the President, Chairperson or any Member, who—

- (a) has been adjudged an insolvent; or
- (b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
- (c) has become physically or mentally incapable of acting as such President, the Chairperson, or Member; or

- (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such President, the Chairperson or Member; or
- (e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that the President, the Chairperson or the Member shall not be removed on any of the grounds specified in clauses (b) to (e) without giving him a reasonable opportunity of being heard.

(2) **Grounds for removal:** Without prejudice to the provisions of sub-section (1), the President, the Chairperson or the Member shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government in which such President, the Chairperson or Member had been informed of the charges against him and given a reasonable opportunity of being heard.

(3) **Suspension by Central Government in concurrence with CJI:** The Central Government may, with the concurrence of the Chief Justice of India (CJI), suspend from office, the President, the Chairperson or Member in respect of whom reference has been made to the Judge of the Supreme Court under sub-section (2) until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court on such reference.

(4) **Central Government to make regulation for inquiry procedure:** The Central Government shall, after consultation with the Supreme Court, make rules to regulate the procedure for the inquiry on the ground of proved misbehaviour or incapacity referred to in sub-section (2).

Earlier Law- Corresponding Section 10FJ and 10FV of the Companies Act, 1956 was in enforcement as the section 417 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.6 & 15.9

Staff of Tribunal and Appellate Tribunal

418. (1) Providing of staff to discharge the function: The Central Government shall, in consultation with the Tribunal and the Appellate Tribunal, provide the Tribunal and the Appellate Tribunal, as the case may be, with such officers and other employees as may be necessary for the exercise of the powers and discharge of the functions of the Tribunal and the Appellate Tribunal.

(2) **Supervision of the President on the discharge of function:** The officers and other employees of the Tribunal and the Appellate Tribunal shall discharge their functions under the

general superintendence and control of the President, or as the case may be, the Chairperson, or any other Member to whom powers for exercising such superintendence and control are delegated by him.

(3) **Terms of services to be regulated by respective rules:** The salaries and allowances and other conditions of service of the officers and other employees of the Tribunal and the Appellate Tribunal shall be such as may be prescribed.

Earlier Law- Corresponding Section 10FK and 10GA of the Companies Act, 1956 was in enforcement as the section 418 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.6 & 15.12

Benches of Tribunal

419. (1) Number of benches: There shall be constituted such number of Benches of the Tribunal, as may, by notification, be specified by the Central Government.

(2) **Presiding of the Principal Bench:** The Principal Bench of the Tribunal shall be at New Delhi which shall be presided over by the President of the Tribunal.

(3) **Power exercisable by benches:** The powers of the Tribunal shall be exercisable by Benches consisting of two Members out of whom one shall be a Judicial Member and the other shall be a Technical Member:

Provided that it shall be competent for the Members of the Tribunal authorised in this behalf to function as a Bench consisting of a single Judicial Member and exercise the powers of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

(4) **Constitution of special benches;** The President shall, for the disposal of any case relating to rehabilitation, restructuring, reviving, of companies, constitute one or more Special Benches consisting of three or more Members, majority necessarily being of Judicial Members.

(5) **Decision where members differ in opinion:** If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to

the opinion of the majority of Members who have heard the case, including those who first heard it.

Earlier Law- Corresponding Section 10FL of the Companies Act, 1956 was in enforcement as the section 419 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.7

Order of Tribunal

420.(1) Reasonable opportunity of being heard: The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) **Amendment in order:** The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) **To send the copy of order:** The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

Earlier Law- Corresponding Section 10FM of the Companies Act, 1956 was in enforcement as the section 420 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.8

Appeal from Orders of Tribunal

421.(1) Appeal to an order: Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) **Requires consent of parties:** No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) **Period for filing of appeal:** Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five

days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) **Pass order after giving of reasonable opportunity of being heard:** On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) **Copy of order to tribunal and parties to appeal:** The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

Earlier Law- Corresponding Section 10FQ of the Companies Act, 1956 was in enforcement as the section 421 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.9

Expeditious Disposal by Tribunal and Appellate Tribunal

422. (1) Speedy disposal: Every application or petition presented before the Tribunal and every appeal filed before the Appellate Tribunal shall be dealt with and disposed of by it as expeditiously as possible and every endeavour shall be made by the Tribunal or the Appellate Tribunal, as the case may be, for the disposal of such application or petition or appeal within three months from the date of its presentation before the Tribunal or the filing of the appeal before the Appellate Tribunal.

(2) **Reasons to be recorded for delay:** Where any application or petition or appeal is not disposed of within the period specified in sub-section (1), the Tribunal or, as the case may be, the Appellate Tribunal, shall record the reasons for not disposing of the application or petition or the appeal, as the case may be, within the period so specified; and the President or the Chairperson, as the case may be, may, after taking into account the reasons so recorded, extend the period referred to in sub-section (1) by such period not exceeding ninety days as he may consider necessary.

Earlier Law- Section 422 of the 2013 Act was not notified. It is newly inserted section in the Companies Act, 2013.

Appeal to Supreme Court

423. Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Earlier Law- Corresponding Section 10GF of the Companies Act, 1956 was in enforcement as the section 423 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.13

Procedure before Tribunal and Appellate Tribunal

424. (1) Tribunal regulate their own procedure based on natural justice: The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act and of any rules made there under, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) Vested with same power as that of a civil court: The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) dismissing a representation for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
- (h) any other matter which may be prescribed.

(3) Nature of decree and its execution: Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—

- (a) in the case of an order against a company, the registered office of the company is situate; or

- (b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.
- (4) **Nature of proceedings:** All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

Earlier Law- Corresponding Section 10FZA of the Companies Act, 1956 was in enforcement as the section 424 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.11

Power to punish for contempt

425. The Tribunal and the Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971, which shall have the effect subject to modifications that—

- (a) the reference therein to a High Court shall be construed as including a reference to the Tribunal and the Appellate Tribunal; and
- (b) the reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officers as the Central Government may, specify in this behalf.

Earlier Law- Corresponding Section 10G of the Companies Act, 1956 was in enforcement as the section 425 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.12

Delegation of Powers

426. The Tribunal or the Appellate Tribunal may, by general or special order, direct, subject to such conditions, if any, as may be specified in the order, any of its officers or employees or any other person authorised by it to inquire into any matter connected with any proceeding or, as the case may be, appeal before it and to report to it in such manner as may be specified in the order.

Earlier Law- Corresponding Section 10FO of the Companies Act, 1956 was in enforcement as the section 426 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.8

President, Members, Officers, etc., to be Public Servants

427. The President, Members, officers and other employees of the Tribunal and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Earlier Law- Corresponding Section 10FY of the Companies Act, 1956 was in enforcement as the section 427 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.11

Protection of Action Taken in Good Faith

428. No suit, prosecution or other legal proceeding shall lie against the Tribunal, the President, Member, officer or other employee, or against the Appellate Tribunal, the Chairperson, Member, officer or other employees thereof or liquidator or any other person authorised by the Tribunal or the Appellate Tribunal for the discharge of any function under this Act in respect of any loss or damage caused or likely to be caused by any act which is in good faith done or intended to be done in pursuance of this Act.

Earlier Law- Corresponding Section 10FZ of the Companies Act, 1956 was in enforcement as the section 428 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.11

Power to Seek Assistance of Chief Metropolitan Magistrate, etc.

429. (1) Tribunal to take the possession: The Tribunal may, in any proceeding relating to a sick company or winding up of any other company, in order to take into custody or under its control all property, books of account or other documents, request, in writing, the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector within whose jurisdiction any such property, books of account or other documents of such sick or other company, are situate or found, to take possession thereof, and the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector, as the case may be, shall, on such request being made to him,—

- (a) take possession of such property, books of account or other documents; and
- (b) cause the same to be entrusted to the Tribunal or other person authorised by it.

(2) Steps for securing compliances: For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector may take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be necessary.

(3) **No act of magistrate shall be called in question:** No act of the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector done in pursuance of this section shall be called in question in any court or before any authority on any ground whatsoever.

Earlier Law- Corresponding Section 10FP of the Companies Act, 1956 was in enforcement as the section 429 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.8

Civil court not to have jurisdiction

430. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

Earlier Law- Corresponding Section 10 & 10 GB of the Companies Act, 1956 was in enforcement as the section 430 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.12

Vacancy in Tribunal or Appellate Tribunal Not to Invalidate Acts or Proceedings

431. No act or proceeding of the Tribunal or the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Tribunal or the Appellate Tribunal, as the case may be.

Earlier Law- Corresponding Section 10 GC of the Companies Act, 1956 was in enforcement as the section 431 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.13

Right to Legal Representation

432. A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal or the Appellate Tribunal, as the case may be.

Earlier Law- Corresponding Section 10 GD of the Companies Act, 1956 was in enforcement as the section 432 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.13

Limitation

433. The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.

Earlier Law- Corresponding Section 10 GE of the Companies Act, 1956 was in enforcement as the section 433 of the 2013 Act was not notified.

Reference of Page number of relevant section in the study material - 15.13

Transfer of Certain Pending Proceedings.

This section was notified consequent to enforcement of section 255 of the Insolvency and Bankruptcy Code, 2016 vide notification dated 15th November 2016 and the Companies(Removable of difficulties) Fourth Order dated 7th December, 2016.

434. (1) On such date as may be notified by the Central Government in this behalf,—

- (a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board) constituted under sub-section (1) of section 10E of the Companies Act, 1956, immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;
- (b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days;

- (c) all proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by the Central Government.

Provided also that only such proceedings relating to cases other than winding-up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal: Provided further that – (i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or (ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts; shall be dealt with in

accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959".

"Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959."

(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.

Earlier Law- Corresponding Section 647A of the Companies Act, 1956 was in enforcement as the section 434 of the 2013 Act was not notified.

Transfer of matters and proceeding pending before CLB to NCLT to dispose of in accordance with the provisions of the Companies Act, 2013 or Companies Act, 1956.

Vide Ministry of Corporate Affairs Notification S.O.1936 (E) dated 1st June 2016 read with section 434(1) (a) of the Companies Act, 2013, the Central Government hereby appoints the 01st day of June, 2016, on which all matters or proceedings or cases pending before the Board of Company Law Administration (Company Law Board) shall stand transferred to the National Company Law Tribunal and it shall dispose of such matters or proceedings or cases in accordance with the provisions of the Companies Act, 2013 or the Companies Act, 1956

Earlier Law- Corresponding Section 647A of the Companies Act, 1956 was in enforcement as the section 434 of the 2013 Act was not notified.

16

SPECIAL COURTS

The Ministry of Corporate Affairs vide Notification S.O.1795 (E) dated 18th May 2016 notifies the provisions of **Clause (iv) of Sub-section (29) of section 2, sections 435 to 438 and section 440** of the Companies Act, 2013.

These provisions deals with the law regulating special courts. These section came into effect from 18th May 2016.

Definition of Special Court

Clause (iv) of Sub-section (29) of section 2 defines that court means the special court established under section 435.

Earlier Law- This section was not notified. It is a newly inserted definition in the Companies Act, 2013

Establishment of Special Court

435. (1) Establishment of number of special court: The Central Government may, for the purpose of providing speedy trial of offences punishable under this Act with imprisonment of two years or more, by notification, establish or designate as many Special Courts as may be necessary.

Provided that all other offences shall be tried, as the case may be, by a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law.

(2) **Appointment of judge:** A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) **Eligibility:** A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge.

Earlier Law- This section was not notified. It is a newly inserted section in the Companies Act, 2013

Offences Triable by Special Courts

436. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—

(a) **Offences triable by the special court:** all offences specified under sub-section (1) of section 435 shall be triable only by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;

(b) **Authorise for detention of an accused in the custody:** where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

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

(c) **Vested with same power as that provided under the Cr. P.C:** the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 in relation to an accused person who has been forwarded to him under that section; and

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

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

(3) **Summary Trial:** Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Special Court may, if it thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years:

Provided that in the case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding one year shall be passed:

Provided further that when at the commencement of, or in the course of, a summary trial, it appears to the Special Court that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial.

Earlier Law- This section was not notified. It is a newly inserted section in the Companies Act, 2013

Appeal and Revision

437. The High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973 on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

Earlier Law- This section was not notified. It is a newly inserted section in the Companies Act, 2013

Application of Code to Proceedings before Special Court

438. Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

Earlier Law- This section was not notified. It is a newly inserted section in the Companies Act, 2013

Transitional provisions

440. Any offence committed under this Act, which is triable by a Special Court shall, until a Special Court is established, be tried by a Court of Session exercising jurisdiction over the area, notwithstanding anything contained in the Code of Criminal Procedure, 1973:

Provided that nothing contained in this section shall affect the powers of the High Court under section 407 of the Code to transfer any case or class of cases taken cognizance by a Court of Session under this section.

Earlier Law- This section was not notified. It is a newly inserted section in the Companies Act, 2013

Compounding of certain offences

The Ministry of Corporate Affairs vide notification S.O.1934 (E) dated 1st June 2016 notified section 441 of the Companies Act, 2013. This section deals with the compounding of certain offences.

441. Who may compound the offence: (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under this Act (whether committed by a company or any officer thereof) with fine only, may, either before or after the institution of any prosecution, be compounded by—

- (a) the Tribunal; or
- (b) where the maximum amount of fine which may be imposed for such offence does not exceed five lakh rupees, by the Regional Director or any officer authorised by the Central Government, on payment or credit, by the company or, as the case may be, the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, may specify:

Provided that the sum so specified shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded:

Provided further that in specifying the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any, paid by way of additional fee under sub-section (2) of section 403 shall be taken into account:

Provided also that any offence covered under this sub-section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act.

(2) **Restriction:** Nothing in sub-section (1) shall apply to an offence committed by a company or its officer within a period of three years from the date on which a similar offence committed by it or him was compounded under this section.

Explanation.—For the purposes of this section,—

- (a) any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence;
- (b) “Regional Director” means a person appointed by the Central Government as a Regional Director for the purposes of this Act.
- (3) **Filing of application to Registrar:**
 - (a) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Tribunal or

the Regional Director or any officer authorised by the Central Government, as the case may be.

- (b) **Intimation of compounding of offence:** Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given by the company to the Registrar within seven days from the date on which the offence is so compounded.
 - (c) **No prosecution shall be instituted:** Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom the offence is so compounded.
 - (d) **Compounding of any offence to be brought to the notice of the court:** Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which the prosecution is pending and on such notice of the compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.
- (4) **Central Government to authorise for dealing with a proposal for compounding of offence:** The Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, while dealing with a proposal for the compounding of an offence for a default in compliance with any provision of this Act which requires a company or its officer to file or register with, or deliver or send to, the Registrar any return, account or other document, may direct, by an order, if it or he thinks fit to do so, any officer or other employee of the company to file or register with, or on payment of the fee, and the additional fee, required to be paid under section 403, such return, account or other document within such time as may be specified in the order.
- (5) **In case of failure in compliance:** Any officer or other employee of the company who fails to comply with any order made by the Tribunal or the Regional Director or any officer authorised by the Central Government under sub-section (4) shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding one lakh rupees, or with both.
- (6) **Offences which can be compounded:** Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—
- (a) any offence which is punishable under this Act, with imprisonment or fine, or with imprisonment or fine or with both, shall be compoundable with the permission of the Special Court, in accordance with the procedure laid down in that Act for compounding of offences;

- (b) any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.
- (7) **Restriction:** No offence specified in this section shall be compounded except under and in accordance with the provisions of this section.

Earlier Law- Corresponding Section 621A of the Companies Act, 1956 was in enforcement as the section 434 of the 2013 Act was not notified.
--

Reference of Page number of relevant section in the study material - 17.31

17

MISCELLANEOUS PROVISIONS

Removal of Names of Companies from the Register of Companies

Provisions relating to the removal of names of companies from the register of companies are covered from Section 248 to 252 of the Companies Act, 2013.

Important aspect of this chapter are as follows:

- (i) Registrar has *suo moto* powers to remove the name of companies after compliance with desired requirements as prescribed in this chapter.
- (ii) Company has a right to apply for the striking off its name from the register of companies on the grounds specified in this chapter.
- (iii) With the publish of notice in the official gazette related to striking of name, the respective company shall stand dissolved.
- (iv) This chapter also ensures that the liabilities and obligations of the company are met and even after the striking name of the company, assets are made available for meeting the liabilities of the company.
- (v) Chapter prescribes the conditions on making of an application under section 248 which entitles a company to apply for its removal from the registrar of companies. This restriction have been devised to protect the public interest.
- (vi) Chapter also enumerates effect of company on being notified as dissolved. Such type of company cease to operate and certificate of incorporation is deemed to be cancelled from the date on which notice was issued. However, for the purpose of realising the amount due to the company and for payment or discharge of its liabilities/obligations, company continued in existence.
- (vii) This chapter also discusses on the issue where the company fraudulently apply for the striking off its name to evade the liabilities or to deceive its creditors or nay persons.
- (viii) Provision has been incorporated with respect to filing of appeal to tribunal by any aggrieved person.

Following are the relevant provisions-

(I) Power of Registrar to Remove Name of Company from Register of Companies [Section 248]

- (1) **Power of registrar:** Where the Registrar has reasonable cause to believe that—
- (a) a company has failed to commence its business within one year of its incorporation, or;
 - (b) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455,
- he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.
- (2) **Filing of application to registrar by company for removal of name:** A company may, after extinguishing all its liabilities, by-

- a special resolution, or
- consent of seventy-five per cent. members in terms of paid-up share capital,

file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner:

Approval of the regulatory body, in case of a company regulated under a special Act: Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

- (3) **Exemption to section 8 companies:** Nothing in sub-section (2) shall apply to a company registered under section 8.
- (4) **Publishing of notice for general public:** A notice issued under sub-section (1) or sub-section (2) shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.
- (5) **Strike off of names from register of companies:** At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.
- (6) **Provisions for realisation of amount:** The Registrar, before passing an order

under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company:

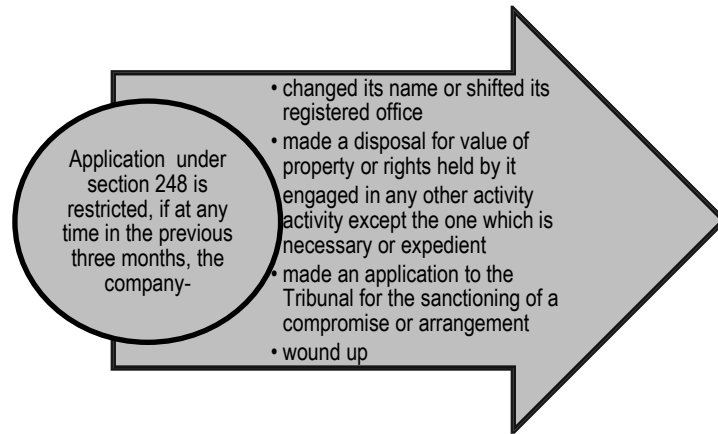
Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

- (7) **Persistence of the liability:** The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.
- (8) **Not affecting on the power of tribunal:** Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies.

(II) Restrictions on making application under section 248 in certain situations [Section 249]

- (1) An application under sub-section (2) of section 248 on behalf of a company shall not be made if, at any time in the previous three months, the company—
 - (a) has changed its name or shifted its registered office from one State to another;
 - (b) has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business;
 - (c) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement;
 - (d) has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or
 - (e) is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016.
- (2) **Violation of above conditions on filing of application:** If a company files an application under sub-section (2) of section 248 in violation of sub-section (1), it shall be punishable with fine which may extend to one lakh rupees.
- (3) **Rights of registrar on non-compliance of conditions by the company:** An

application filed under sub-section (2) of section 248 shall be withdrawn by the company or rejected by the Registrar as soon as conditions under sub-section (1) are brought to his notice.



(III) Effect of Company Notified as Dissolved [Section 250]

Where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice –

- cease to operate as a company, and
- the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date.,

For the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company, this sub-section shall not effect. The company shall be continued in existence.

(IV) Fraudulent Application for Removal of Name [Section 251]

(1) **Intention of filing application:** Where it is found that an application by a company has been made with the-

- object of evading the liabilities of the company, or
- with the intention to deceive the creditors, or
- to defraud any other persons,

the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved—

- (a) be **jointly and severally liable** to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and
- (b) be **punishable for fraud** in the manner as provided in section 447.

- (2) **Recommendation for prosecution:** The Registrar may also recommend prosecution of the persons responsible for the filing of an application.

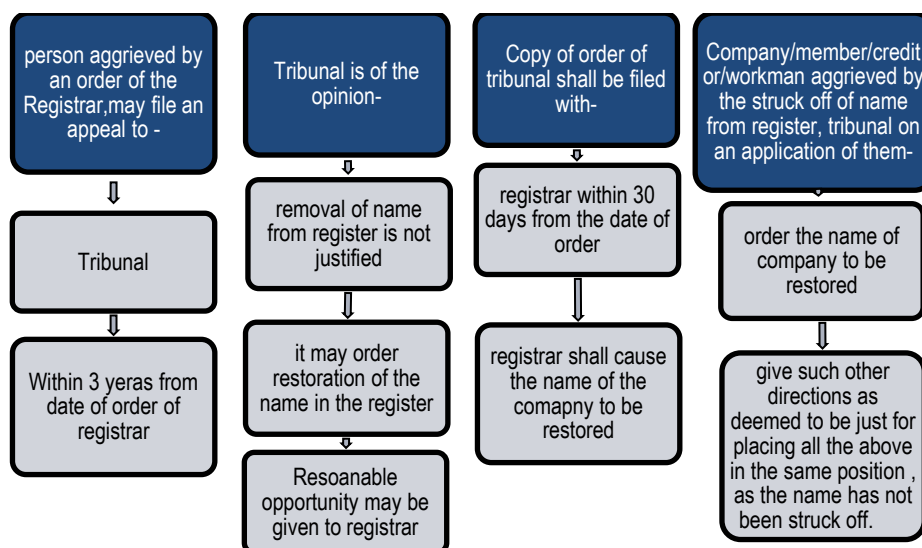
(V) Appeal to Tribunal [252]

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

Reasonable opportunity of representations given to registrar: Provided that before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to the Registrar, the company and all the persons concerned:

Restoration of name of company: Provided further that if the Registrar is satisfied, that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished by the company or its directors, which requires restoration in the register of companies, he may within a period of three years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company.

- (2) **Order of tribunal to be filed with register:** A copy of the order passed by the Tribunal shall be filed by the company with the Registrar within thirty days from the date of the order and on receipt of the order, the Registrar shall cause the name of the company to be restored in the register of companies and shall issue a fresh certificate of incorporation.
- (3) **Order of tribunal as it may deem just:** If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by the company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248 may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.



Reference of word tribunal in sub-section 2 to section 399 has been notified

The Ministry of Corporate Affairs vide Notification S.O. 1934(E) dated 1st June 2016 hereby notifies the use of the word tribunal in sub-section 2 to section 399 of the Companies Act, 2013.

Section 399 deals with the **Inspection, Production and Evidence of Documents Kept by Registrar**. This section have been notified on 1st April, 2014 except of reference of the word Tribunal in sub-section 2 to section 399.

This above amendment have been notified with effect from 1st June 2016.

Earlier Law- Reference of word tribunal in sub-section 2 to section 399 was not notified.

Reference of Page number of relevant section in the study material - 17.9

Notification of Section 466

The Ministry of Corporate Affairs vide Notification S.O. 1934(E) dated 1st June 2016 hereby notifies section 466 of the Companies Act, 2013. This section deals with the Dissolution of company law board and consequential provisions.

466. (1) Dissolution of company law board and consequential provisions: Consequences of dissolution of CLB: notwithstanding anything contained in section 465, the Board of Company Law Administration constituted under the Companies Act, 1956

(hereafter in this section referred to as the Company Law Board) shall stand dissolved on the constitution of the Tribunal and the Appellate Tribunal:

Provided that until the Tribunal and the Appellate Tribunal is constituted, the Chairman, Vice-Chairman and Members of the Company Law Board immediately before the constitution of the Tribunal and the Appellate Tribunal, who fulfil the qualifications and requirements provided under this Act regarding appointment as President or Chairperson or Member of the Tribunal or the Appellate Tribunal, shall function as President, Chairperson or Member of the Tribunal or the Appellate Tribunal:

Provided further that every officer or other employee, who had been appointed on deputation basis to the Company Law Board, shall, on such dissolution,—

- (i) become officer or employee of the Tribunal or the Appellate Tribunal, if he fulfils the qualifications and requirements under this Act; and
- (ii) stand reverted to his parent cadre, Ministry or Department, in any other case.

Provided also that every officer and the other employee of the Company Law Board, employed on regular basis by that Board, shall become, on and from such dissolution the officer and other employee, respectively, of the Tribunal or the Appellate Tribunal with the same rights and privileges as to pension, gratuity and other like benefits as would have been admissible to him if he had continued to serve that Board and shall continue to do so unless and until his employment in the Tribunal or the Appellate Tribunal is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the Tribunal or the Appellate Tribunal, as the case may be:

Provided also that notwithstanding anything contained in the Industrial Disputes Act, 1947 or in any other law for the time being in force, any officer or other employee who becomes an officer or other employee of the Tribunal or the Appellate Tribunal under the preceding proviso shall not be entitled to any compensation under this Act or under any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority:

Provided also that where the Company Law Board has established a provident fund, superannuation fund, welfare fund or other fund for the benefit of the officers and other employees employed in that Board, the monies relatable to the officers and other employees who have become officers or employees of the Tribunal or the Appellate Tribunal shall, out of the monies standing to the credit of such provident fund, superannuation fund, welfare fund or other fund, stand transferred to, and vest in, the Tribunal or the Appellate Tribunal, as the case may be, and such monies which stand so transferred shall be dealt with by the Tribunal or the Appellate Tribunal in such manner as may be prescribed.

(2) **Vacation of respective offices:** The persons holding the offices of Chairman, Vice-Chairman and Members, and officers and other employees of the Company Law Board immediately before the constitution of the Tribunal and the Appellate Tribunal who are not

covered under proviso to sub-section (1) shall vacate their respective offices on such constitution and no such Chairman, Vice Chairman and Members and officers or other employees shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service, if any.

Earlier Law- This section corresponds to section 10FA of the Companies Act, 1956. This Section deals with the Dissolution of Company Law Board. This was inserted by the Companies (Second Amendment) Act, 2002 and which were not notified.

Overview of Insolvency and Bankruptcy Code 2016

(I) Introduction

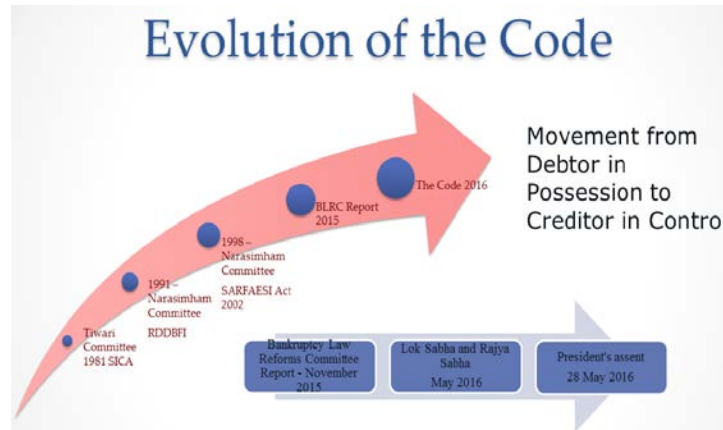
The Insolvency and Bankruptcy Code, 2016 is one of the major economic reform Code initiated by the Government in the year 2015. There were multiple overlapping laws and adjudicating forums dealing with financial failure and insolvency of companies and individuals in India.

The existing laws also were not aligned with the market realities, had several problems and were inadequate. As per that legal framework, provisions relating to insolvency and bankruptcy for companies could be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. Resolution and jurisdiction vesting with multiple agencies with overlapping powers was leading to delays and complexities in the process.

To facilitate easy and time bound closure of business in India and to overcome these challenges, a strong bankruptcy law was required.

The Insolvency and Bankruptcy Code, 2015 was introduced in the Lok Sabha on 21st December, 2015 and referred to the Joint Committee on the Insolvency and Bankruptcy Code, 2016. The Committee had presented its recommendations in the modified Bill based on its suggestions.

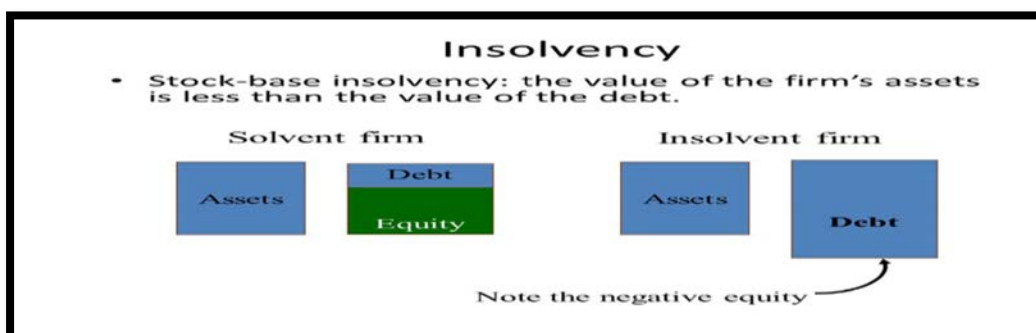
Further, the Insolvency and Bankruptcy Code, 2016 was passed by both the Houses of Parliament and notified in May 2016. Being one of the major economic reforms it paves the way focussing on creditor driven insolvency resolution.



What is Insolvency and Bankruptcy?

- ◆ The term insolvency is used for both individuals and organizations. For individuals, it is known as bankruptcy and for corporate it is called corporate insolvency. Both refer to a situation when an individual or company are not able to pay the debt in present or near future and the value of assets held by them are less than liability.
- ◆ Insolvency in this Code is regarded as a “state” where assets are insufficient to meet the liabilities. If untreated, insolvency will lead to bankruptcy for non-corporates and liquidation of corporates.
- ◆ While insolvency is a situation which arises due to inability to pay off the debts due to insufficient assets, bankruptcy is a situation wherein application is made to an authority declaring insolvency and seeking to be declared as bankrupt, which will continue until discharge.

From the above, it is evident that insolvency is a state and bankruptcy is a conclusion. A bankrupt would be a conclusive insolvent whereas all insolvencies will not lead to bankruptcies. Typically insolvency situations have two options – resolution and recovery or liquidation



Relationship between Bankruptcy, Insolvency & Liquidation

Bankruptcy is a legal proceeding involving a person or business that is unable to repay outstanding debts. The bankruptcy process begins with a petition filed by the debtor, or by the creditors. All of the debtor's assets are measured and evaluated, and then these assets may be used to repay a portion of outstanding debt.

In lucid language, if any person or entity is unable to pay off the debts, it owes to its creditors, on time or as and when they became due and payable, then such person or entity is regarded as “insolvent”.

Liquidation is the winding up of a corporation or incorporated entity. There are many entities that can initiate proceedings that will lead to Liquidation, those being:-

- ◆ The Regulatory Bodies;
- ◆ The Directors of a Company;
- ◆ The Shareholders of a Company; and
- ◆ An Unpaid Creditor of a Company

In nut shell, insolvency is common to both bankruptcy and liquidation. Not being able to pay debts as and when they became due and payable is the leading cause for Liquidation and is the only way that can cause a natural person to become a bankrupt.

Purpose behind enactment of Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 is intended to strike the right balance of interests of all stakeholders of the business enterprise so that the corporates and other business entities enjoy availability of credit and at the same time the creditor do not have to bear the losses on account of default. As per the Preamble to the Code, the purpose of this Act is as under:-

- (a) To consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals.
- (b) To fix time periods for execution of the law in a time bound manner.
- (c) To maximize the value of assets of interested persons.
- (d) To promote entrepreneurship
- (e) To increase availability of credit.
- (f) To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues.
- (g) To establish an Insolvency and Bankruptcy Board of India as a regulatory body for insolvency and bankruptcy law.

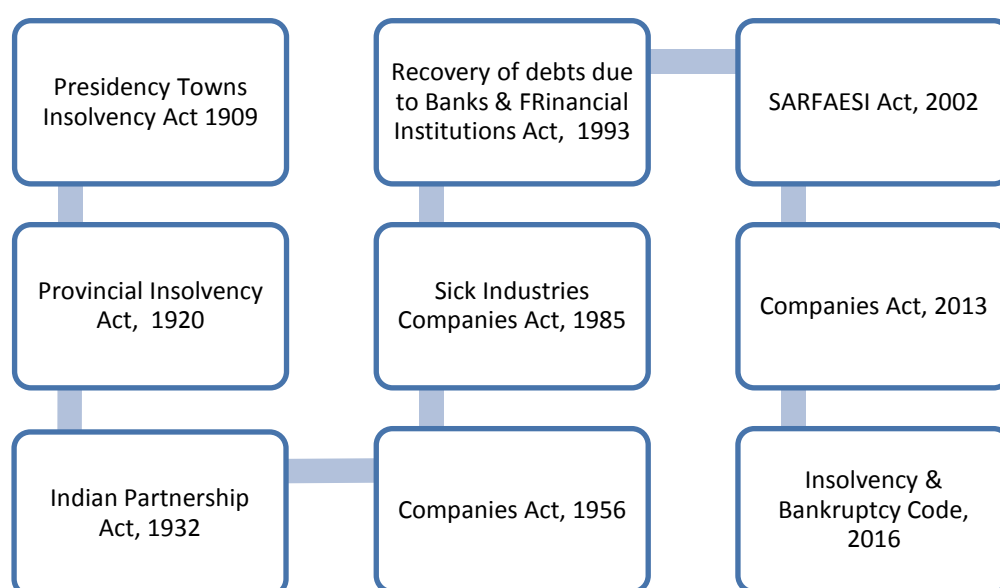
Distinguishing features of Code

- (i) **Comprehensive Law:** Insolvency Code is a comprehensive law which envisages and regulates the process of insolvency and bankruptcy of all persons including corporates, partnerships, LLPs and individuals.
- (ii) **Withering away of Multiplicity of Laws:** The Code has withered away the multiple laws covering the recovery of debts and insolvency and liquidation process and presents singular platform for all the reliefs relating to recovery of debts and insolvency.
- (iii) **Low Time Resolution :** The Code provides a low time resolution and defines fixed time frames for insolvency resolution of companies and individuals. The process is mandated to be completed within 180 days, extendable by maximum of 90 days. Further, for a speedier process there is provision for fast-track resolution of corporate insolvency within 90 days. If insolvency cannot be resolved, the assets of the borrowers may be sold to repay creditors.
- (iv) **One Window Clearance:** The Code has been drafted to provide one window clearance to the applicant whereby he gets the appropriate relief by the same authority unlike the earlier position of law wherein case the company is not able to revive the procedure for winding up and liquidation, has to be initiated under separate laws governed by separate authorities.
- (v) **Clarity in Process:** There is a clear and unambiguous process to be followed by all stakeholders. There is also shift of control from shareholders and promoters to creditors.
- (vi) **One Chain of Authority:** There is one chain of authority under the Code. It does not even allow the Civil Courts to interfere with the application pending before the adjudicating authority, thereby reducing the multiplicity of litigations. The National Company Law Tribunal (NCLT) will adjudicate insolvency resolution for companies. The Debt Recovery Tribunal (DRT) will adjudicate insolvency resolution for individuals.
- (vii) **Protects the Interests of Workmen and Employees :** The Code also protects the interests of workman and employees. It excludes dues payable to workmen under provident fund, pension fund and gratuity fund from the debtor's assets during liquidation.
- (viii) **New Regulatory Authority :** It provides for constitution of a new regulatory authority, 'Insolvency and Bankruptcy Board of India' to regulate professionals, agencies and information utilities engaged in resolution of insolvencies of companies, partnership firms and individuals. The Board has already been established and has started functioning.
- (ix) **Establishment of Information Utilities (IUs):** A unique feature of code is establishment of Information Utilities (IUs) which are intended to function as a databank to collect, collate and disseminate financial information and to facilitate insolvency resolution. It is envisioned that in the long run, IUs will have data on debts and credits of all the business houses and it will be able to create an automatic trigger in case of default by any debtor and the authority may initiate the insolvency process as required. Such a system will reduce the risk of credit in the economy

Need for a New Law

According to the Ease of Doing Business Report of the World Bank, it takes an average of four to five years in insolvency resolution process in India. The main reason behind such delay in the legal process is the existence of overlapping legislations and adjudicating authorities dealing with insolvency of companies and individuals in India.

The Government of India then formulated a plan to refurbish the prevailing bankruptcy laws and replace them with one that will facilitate hassle-free and time-bound revival and closure of businesses.



The framework of law which was in existence earlier had failed to resolve insolvency situations.

- ◆ Financial failure – a persistent mismatch between payments by the enterprise and receivables into the enterprise, even though the business model is generating revenues.
- ◆ Business failure – which is a breakdown in the business model of the enterprise, and is unable to generate sufficient revenues to meet payments.
- ◆ Malfeasance and mismanagement by promoters

The laws which were in existence were not aligned with the market realities and had several inadequacies. There was no single window resolution available and the resolution and jurisdiction was with the multiple agencies with overlapping powers that was leading to delays and complexities in the process. The Companies Act deals with the corporate insolvency law

and the individual insolvency laws were being dealt by a century old two Acts, i.e., The Provincial Towns Insolvency Act and the Presidency Towns Insolvency Act.

- ◆ Multiple laws governing Debt resolution and multiple forums
- ◆ Parallel proceedings by different parties on the same debtor in different forums and Conflicts between laws and over jurisdictions.
- ◆ Multiple laws governing Debt resolution and multiple forums
- ◆ Asymmetry of information

Structure of the Code

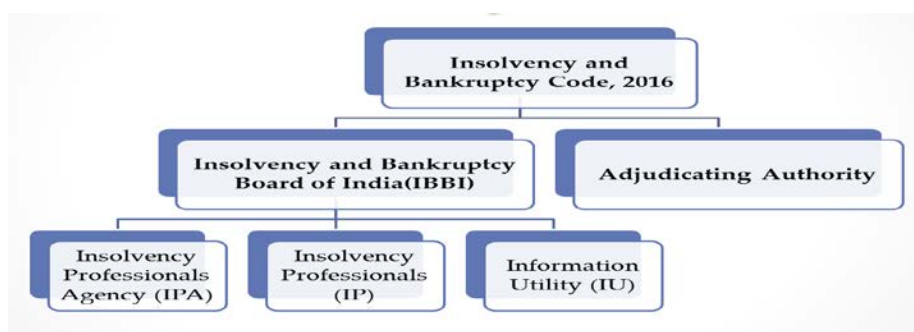
The Code has been divided in to five parts comprising of 255 sections and 11 Schedules. Out of these some sections have been notified by the Ministry of Corporate Affairs. In order to bring clarity and a better understanding, certain Regulations have also been notified by the Government.

Structure of code				
Part I-Preliminary (Section 1-3)	Part II- Insolvency Resolution & Liquidation for Corporate Persons (Section 4-77)	Part III- Insolvency Resolution & Bankruptcy for individuals and Partnership firms (Section 78 – 187)	Part IV- Regulation of Insolvency Professionals, Agencies, & Information Utilities (Section 188 – 223)	Part V- Miscellaneous (Section 224 – 255)

Regulatory Mechanism

The Insolvency and Bankruptcy Code, 2016 provides a new regulatory mechanism with an institutional set-up comprising of five pillars:-

- ◆ Insolvency Professionals
- ◆ Insolvency Professional Agencies
- ◆ Information Utilities
- ◆ Insolvency and Bankruptcy Board of India
- ◆ Adjudicating Authority



1. **Insolvency Professionals-** The Code provides for insolvency professionals as intermediaries who would play a key role in the efficient working of the bankruptcy process. The role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions.

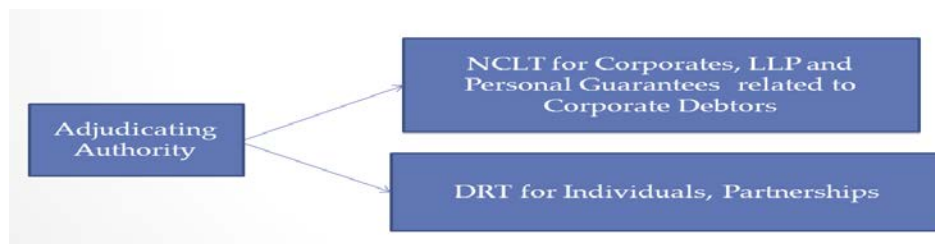
In the resolution process, the insolvency professional verifies the claims of the creditors, constitutes a creditors committee, runs the debtor's business during the moratorium period and helps the creditors in reaching a consensus for a revival plan. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee.

2. **Insolvency Professional Agencies-** The Code provides for establishment of insolvency professionals agencies to enroll and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy Code 2016 and read with regulations.
3. **Information Utilities** - A notable feature of the Code is the creation of information utilities to collect, collate, authenticate and disseminate financial information of debtors in centralised electronic database.

The Code requires creditors to provide financial information of debtors to multiple utilities on an ongoing basis. Such information would be available to creditors, resolution professionals, liquidators and other stakeholders in insolvency and bankruptcy proceedings. The purpose of the same is to remove information asymmetry and dependency on the debtor's management for critical information that is needed to swiftly resolve the state of insolvency.

4. **Insolvency and Bankruptcy Board of India-** The Code provides for establishment of a Regulator who will oversee these entities and to perform legislative, executive and quasi-judicial functions with respect to the Insolvency Professionals, Insolvency Professional Agencies and Information Utilities. The Insolvency and Bankruptcy Board of India was established on October 1, 2016. The head office of the Board is located at New Delhi.
5. **Adjudicating Authority-** The adjudicating authority for corporate insolvency and liquidation is the NCLT. Appeals arising out of NCLT orders lie to the National Company Law Appellate Tribunal and, thereafter, to the Supreme Court of India.

The Code has created one chain of authority for adjudication under the Code. Civil Courts have been prohibited to interfere in the matters related with application pending before the adjudicating authority. No injunction shall be granted by any Court, Tribunal or Authority in respect of any action taken by the NCLT.



For individuals and other persons, the adjudicating authority is the DRT. Appeals arising out of DRT orders lie to the Debt Recovery Appellate Tribunal and thereafter, to the Supreme Court.

In this reading material, we shall be discussing extent of the Code, relevant definitions, Corporate Insolvency Resolution Process and Liquidation Process covered under sections 1-54 of the Insolvency and Bankruptcy Code, 2016.

Extent and Commencement of the Code:

As per section 1 of the Insolvency and Bankruptcy Code, it extends to the whole of India except Part III (Insolvency Resolution and Bankruptcy for Individuals and Partnership Firm) which excludes the state of Jammu and Kashmir.

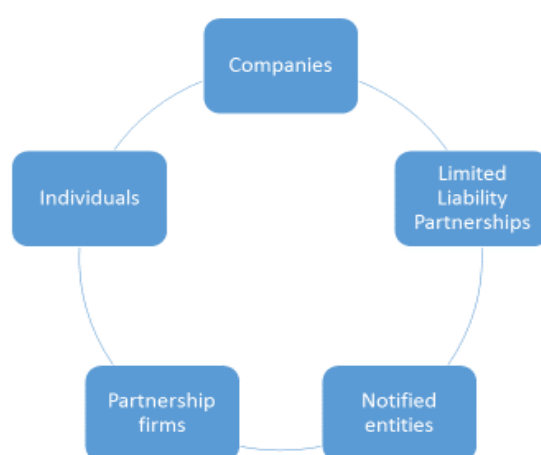
This Code came into an enforcement on 28th May 2016, however, the Central Government appointed different dates for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.

¹Applicability of the Code

The Code shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of the following entities:-

¹ Vide notification S.O. 3594(E) dated 30th November, 2016 issued by Ministry of Corporate Affairs in exercise of the powers conferred by sub-section (3) of section 1 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby appoints the 1st December, 2016 as the date on which the provisions of the following sections of the said Code shall come into force:- (1) clause (a) to clause (d) of section 2 (except with regard to voluntary liquidation or Bankruptcy); Later Vide Notification S.O. 1570(E), dated 15th May, 2017, the Central Government hereby appoints the 1st April, 2017 as the date on which the provisions of clause (a) to clause (d) of section 2 of the Code relating to voluntary liquidation or bankruptcy shall come into force.

- (a) Any company incorporated under the Companies Act, 2013 or under any previous law.
- (b) Any other company governed by any special act for the time being in force, except in so far as the said provision is inconsistent with the provisions of such Special Act.
- (c) Any Limited Liability Partnership under the LLP Act 2008.
- (d) Any other body incorporated under any law for the time being in force, as the Central Government may by notification specify in this behalf.



- (e) Partnership firms and individuals.

Important Definitions [Sections 3 and 5]

(1) **Corporate Person** means

- (a) a company as defined under section 2(20) of the Companies Act, 2013;
- (b) a Limited Liability Partnership as defined in 2(1)(n) of Limited Liability Act, 2008; or,
- (c) any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider. [Section 3(7)]

(2) **Corporate Debtor** means a corporate person who owes a debt to any person. [Section 3(8)]

(3) **Creditor** means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder. [Section 3(10)]

(4) **Debt** means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. [Section 3(11)]

- (5) **Claim** means a right to payment or right to remedy for breach of contract if such breach gives rise to a right to payment whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. [Section 3(6)]
- (6) **Default** means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be. [Section 3(12)]
- (7) **Financial information**, in relation to a person, means one or more of the following categories of information, namely:—
- (a) records of the debt of the person;
 - (b) records of liabilities when the person is solvent;
 - (c) records of assets of person over which security interest has been created;
 - (d) records, if any, of instances of default by the person against any debt;
 - (e) records of the balance sheet and cash-flow statements of the person; and
 - (f) such other information as may be specified. [Section 3(13)]
- (8) A **person** includes:-
- an individual
 - a Hindu Undivided Family
 - a company
 - a trust
 - a partnership
 - A limited liability partnership, and
 - any other entity established under a Statute.
- And includes a person resident outside India [Section 3(23)]
- (9) **Secured creditor** means a creditor in favour of whom security interest is created; [Section 3(30)]
- (10) **Security Interest** means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person. [Section 3(31)]
- (11) A **transaction** includes an agreement or arrangement in writing for transfer of assets, or funds, goods or services, from or to the corporate debtor. [Section 3(33)]

- (12) **Transfer** includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien. In case of property- transfer of property means transfer of any property. [Section 3(34)]
- (13) **Transfer of property** means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property; [Section 3(35)]
- (14) **Adjudicating Authority**, for the purposes of this Part II (Insolvency Resolution and Liquidation for corporate persons), means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. [Section 5(1)]
- (15) **Corporate applicant** means—
- (a) corporate debtor; or
 - (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
 - (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
 - (d) a person who has the control and supervision over the financial affairs of the corporate debtor;[Section 5(5)]
- (16) **Dispute** includes a suit or arbitration proceedings relating to—
- (a) the existence of the amount of debt;
 - (b) the quality of goods or service; or
 - (c) the breach of a representation or warranty; [Section 5(6)]
- (17) **Financial creditor** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;[section 5(7)]
- (18) **Financial position**, in relation to any person, means the financial information of a person as on a certain date; [Section 5(9)]
- (19) **Initiation date** means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process; [Section 5(11)]
- (20) **Insolvency commencement date** means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;[Section 5(12)]
- (21) **Insolvency resolution process period** means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;[Section 5(14)]

- (22) **Liquidation commencement date** means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be; [Section 5(17)]
- (23) **Operational creditor** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred; [Section 5(20)]
- (24) **Related party**, in relation to a corporate debtor, means—
- (a) **a director or partner or a relative** of a director or partner of the corporate debtor
 - (b) **a key managerial personnel or a relative** of a key managerial personnel of the corporate debtor;
 - (c) **a limited liability partnership or a partnership firm** in which a director, partner, or manager of the corporate debtor or his relative is a partner;
 - (d) **a private company** in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;
 - (e) **a public company** in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
 - (f) **anybody corporate** whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
 - (g) **any limited liability partnership or a partnership firm** whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
 - (h) **any person** on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
 - (i) **a body corporate which is a holding, subsidiary or an associate company** of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;
 - (j) **any person who controls** more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;
 - (k) **any person in whom the corporate debtor controls** more than twenty per cent. of voting rights on account of ownership or a voting agreement;
 - (l) **any person who can control the composition** of the board of directors or corresponding governing body of the corporate debtor;
 - (m) **any person who is associated with the corporate debtor** on account of—
 - (i) participation in policy making processes of the corporate debtor; or

- (ii) having more than two directors in common between the corporate debtor and such person; or
 - (iii) interchange of managerial personnel between the corporate debtor and such person; [Section 5(24)]
- (25) **Resolution plan** means a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern in accordance with Part II; [Section 5(26)]
- (26) **Resolution professional**, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; [Section 5(27)]
- (27) **Voting share** means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.

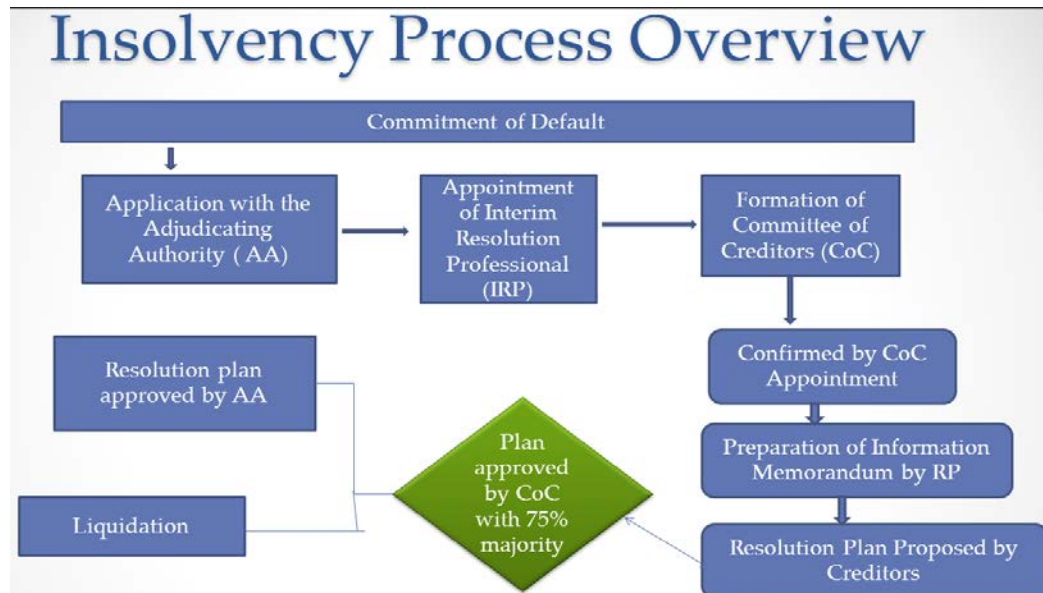
(II) Corporate Insolvency Resolution Process [Sections 4, 6- 32]

Provisions related to Insolvency Resolution and Liquidation process for Corporate Persons are covered in Part II of the Code.

Corporate Insolvency Resolution is a process during which financial creditors assess whether the debtor's business is viable to continue and the options for its rescue and revival. If the insolvency resolution process fails or financial creditors decide that the business of debtor cannot be carried on profitably and it should be wound up, the debtor will undergo liquidation process and the assets of the debtor are realized and distributed by the liquidator.

The Insolvency Resolution Process provides a collective mechanism to lenders to deal with the overall distressed position of a corporate debtor. This is a significant departure from the existing legal framework under which the primary onus to initiate a reorganisation process lies with the debtor, and lenders may pursue distinct actions for recovery, security enforcement and debt restructuring.

PROCESS FLOW: Process of insolvency resolution framework for corporate is given in below flow chart



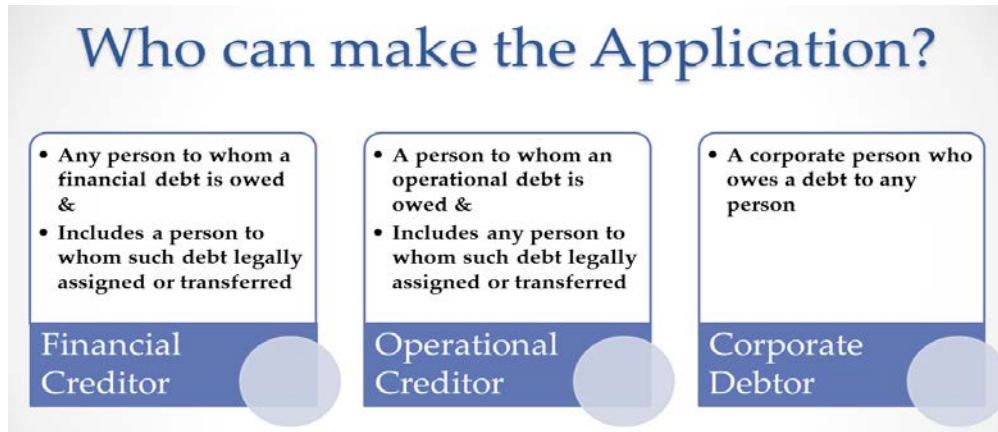
(1) Applicability of this Part II on the commitment of default: The process of insolvency is triggered by occurrence of default. Under Section 3 (12) of the Code says that, default means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor.

The provisions relating to the insolvency and liquidation of corporate debtors shall be applicable only when the amount of the default is one lakh rupees or more. However, the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees. [Section 4]

(2) Persons who may initiate corporate insolvency resolution process: Where any corporate debtor commits a default, following persons:

- (a) a financial creditor,
- (b) an operational creditor, or
- (c) the corporate debtor itself

may initiate corporate insolvency resolution process in respect of such corporate debtor. [Section 6]



(a) Initiation of corporate insolvency resolution process by financial creditor.

- (i) **Filing of application before adjudicating authority:** A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

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.

- (ii) **Furnishing of information:** The financial creditor shall, along with the application furnish—
- record of the default** recorded with the information utility or such other record or evidence of default as may be specified;
 - the name of the resolution professional** proposed to act as an interim resolution professional; and
 - any other information** as may be specified by the Board.
- (iii) **Time period for determination of default:** The Adjudicating Authority shall, within fourteen days of the receipt of the application, ascertain the existence of a default from the records of information utility or on the basis of other evidence furnished by the financial creditor.
- (iv) **Order:** Where the Adjudicating Authority is satisfied that—
- a **default has occurred** and the application is complete and there is no disciplinary proceeding pending against the proposed resolution professional, it may, by order, admit such application; or
 - default has not occurred** or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application, give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

- (v) **Commencement of corporate insolvency resolution process:** The corporate insolvency resolution process shall commence from the date of admission of the application.
- (vi) **Communication of Order:** The Adjudicating Authority shall communicate—
 - (1) the order to the financial creditor and the corporate debtor;
 - (2) the order to the financial creditor, within seven days of admission or rejection of such application, as the case may be. [Section 7]

(b) Insolvency resolution by operational creditor

- (i) **Serving of demand Notice:** On the occurrence of default, an operational creditor shall first send a demand notice and a copy of invoice to the corporate debtor.

"Demand notice" means a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.
- (ii) **On receipt of demand notice by corporate debtor:** The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about—
 - (1) **existence of dispute**, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
 - (2) **repayment of unpaid operational debt**— (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.
[Section 8]

Application for initiation of corporate insolvency resolution process by operational creditor:

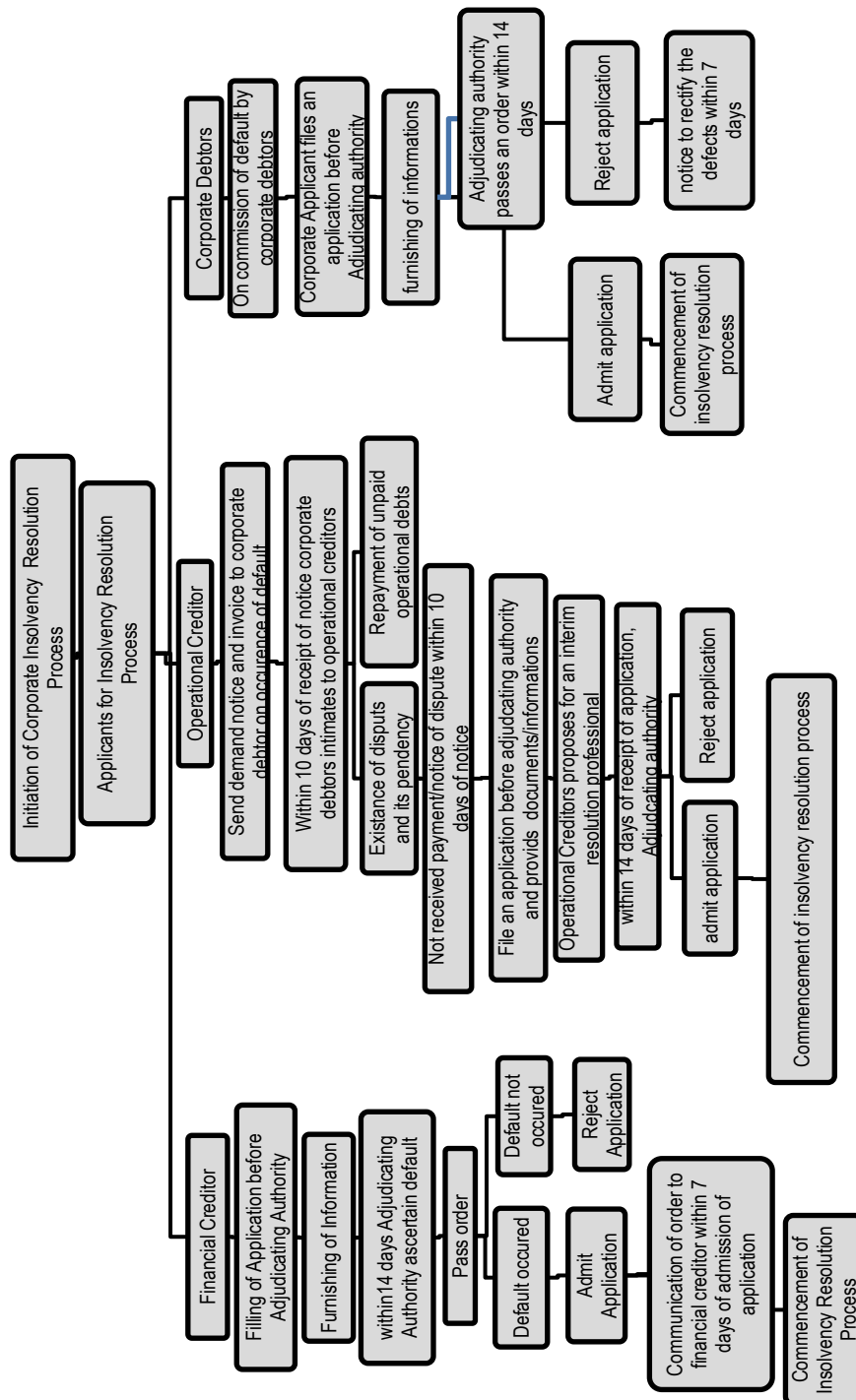
- (i) **Filing of application by operational creditor:** After the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, the operational creditor may file an application before the Adjudicating Authority for initiating corporate insolvency resolution process.
- (ii) **Providing of documents/ information:** The operational creditor shall, along with the application furnish the following documents—
 - (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; and
 - (d) **such other information** as may be specified.
- (iii) **An operational creditor propose for an interim resolution professional during the resolution process:** An operational creditor initiating a corporate insolvency resolution process, may propose a resolution professional to act as an interim resolution professional.
- (iv) **Order of an adjudicating authority:** The Adjudicating Authority shall, within fourteen days of the receipt of the application, by an order—
- (1) **admit the application** and communicate such decision to the operational creditor and the corporate debtor if, (a) the application made is complete; (b) there is no repayment of the unpaid operational debt; (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor; (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and (e) there is no disciplinary proceeding pending against any resolution professional proposed, if any.
 - (2) **reject the application** and communicate such decision to the operational creditor and the corporate debtor, if (a) the application made is incomplete; (b) there has been repayment of the unpaid operational debt; (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor; (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or (e) any disciplinary proceeding is pending against any proposed resolution professional:
- Provided that Adjudicating Authority, shall before rejecting an application which is incomplete, gives a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority.
- (v) **Commencement of insolvency resolution process:** The corporate insolvency resolution process shall commence from the date of admission of the application.
- [Section 9]**
- (c) **Initiation of corporate insolvency resolution process by corporate applicant.**

- (i) **Commission of default:** Where a corporate debtor has committed a default, the corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.
- (ii) **Furnishing of information:** The corporate applicant shall, along with the application furnish the information relating to—
 - (a) its **books of account and such other documents** relating to such period as may be specified; and
 - (b) the **resolution professional** proposed to be appointed as an interim resolution professional.
- (iii) **Admission/rejection of application:** The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—
 - (a) admits the application, if it is complete; or
 - (b) rejects the application, if it is incomplete:

Provided that Adjudicating Authority shall, before rejecting an application, gives 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.
- (iv) **Commencement of insolvency resolution process:** The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section. [Section 10]



(3) Persons not entitled to make application: The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process -

- (a) a corporate debtor undergoing a corporate insolvency resolution process; or
- (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- (d) a corporate debtor in respect of whom a liquidation order has been made.

In this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor. **[Section 11]**

(4) Time-limit for completion of insolvency resolution process:

- (1) **Period for completion of insolvency process:** The corporate insolvency resolution process shall be completed within a period of **one hundred and eighty days** from the date of admission of the application to initiate such process.
- (2) **Filing of application for extension of period:** 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 seventy-five per cent. of the voting shares.
- (3) **Period of extension:** On receipt of an application, if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, **but not exceeding ninety days**: Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once. **[section 12]**

(5) Declaration of moratorium and public announcement: The Adjudicating Authority, after admission of the application, shall, by an order—

- (a) declare a moratorium;
- (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims, and
- (c) appoint an interim resolution professional in the manner as laid down in section 16.

The public announcement as referred above, shall be made immediately after the appointment of the interim resolution professional. **[Section 13]**

Moratorium:

After the commencement of corporate insolvency resolution, a calm period for 180 days is declared, during which all suits and legal proceedings etc. against the Corporate Debtor are kept in abeyance to give time to the entity to resolve its status. It is called the Moratorium Period.

- (i) **Declaration of moratorium period:** According to the section 14 of the Code, on the insolvency commencement date, the Adjudicating Authority shall by order, declare moratorium prohibiting all of the following acts—
 - (a) **the institution of suits or continuation of pending suits or proceedings** against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
 - (b) **transferring, encumbering, alienating or disposing** of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
 - (c) **any action to foreclose, recover or enforce any security interest** created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
 - (d) **the recovery of any property** by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- (ii) **The supply of essential goods or services** to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.
- (iii) **Prohibited Acts:** Acts prohibited during Moratorium period, shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- (iv) **Effect of the order of moratorium:** The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:
- (v) **When Moratorium period shall cease to have effect:** Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan or passes an order for liquidation of corporate debtor, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be. [Section 14]
- (6) **Appointment, tenure and Power of interim resolution professional:** The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date. As per section 16 of the Code, following is the process for the appointment of interim resolution professional-

Process of appointment of Interim resolution professional

- (i) **Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor**, as the case may be, the resolution professional, as proposed in the application shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.
- (ii) **Where the application for corporate insolvency resolution process is made by an operational creditor and—**
 - (a) **no proposal for an interim resolution professional is made**, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;
 - (b) **a proposal for an interim resolution professional is made**, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

The Board shall, within ten days of the receipt of a reference from the Adjudicating Authority, recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending.

Term of appointment

The term of the interim resolution professional shall not exceed thirty days from date of his appointment.

The key roles of an Interim Resolution Professional are:-

- (a) Issuance of public notice of the Corporate Insolvency
- (b) Resolution process
- (c) Collation of claims received
- (d) Constitution of the Committee of Creditors
- (e) Conduct of the first meeting of the Committee of Creditors

Powers of Interim Resolution Professional:

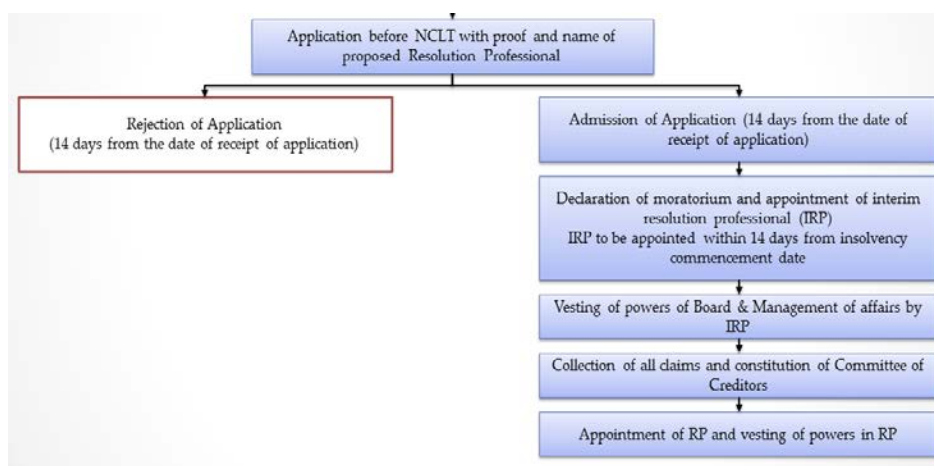
As Per Section 17 of the Code, the interim resolution professional shall have following powers:-

- (a) **Management of Affairs:** The management of the affairs of the corporate debtor shall vest in the interim resolution professional from the date of his appointment.
- (b) **Exercise of Power of BoD/ partners:** The powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional.
- (c) **Reporting of officers/managers:** The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents

and records of the corporate debtor as may be required by the interim resolution professional.

- (d) **Instructions to financial institutions:** The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

The chart below explains the flow of interim resolution professional



- (7) **Public Announcement:** Interim Resolution Professional shall make the Public Announcement immediately after his appointment. “Immediately” refers to not more than three days from the date of appointment of the Interim Resolution Professional.

As per Section 15 of the Code, public announcement shall include the following:-

- Name & Address of Corporate Debtor under the Corporate Insolvency Resolution Process.
- Name of the authority with which the corporate debtor is incorporated or registered.
- Details of interim resolution Professional who shall be vested with the management of the Corporate Debtor and be responsible for receiving claims.
- Penalties for false or misleading Claims.
- The last date for the submission of the claims.
- The date on which the Corporate Insolvency Resolution Process ends.

The expenses of public announcement shall be borne by the applicant which may be reimbursed by the Committee of Creditors, to the extent, it ratifies them.

- (8) **Committee of creditors:** As per the Section 21 of the Code, the interim resolution professional shall after collection of all claims received against the corporate debtor and

determination of the financial position of the corporate debtor, constitute a committee of creditors.

Constitution of Committee of creditors:

- (i) The committee of creditors shall comprise of all financial creditors of the corporate debtor.

Provided that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

- (ii) Where the corporate debtor owes financial debts to **two or more financial creditors** as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.
- (iii) Where any person is a **financial creditor as well as an operational creditor**,—
- (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;
 - (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.
- (iv) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.
- (v) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility or issued as securities provide for a single trustee or agent to act for all financial creditors, each financial creditor may—
- (a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
 - (b) represent himself in the committee of creditors to the extent of his voting share;
 - (c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
 - (d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.
- (vi) The Board may specify the manner of determining the voting share in respect of financial debts issued as securities.
- (vii) All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting share of the financial creditors.

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board.

- (viii) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the corporate insolvency resolution process.
- (ix) The resolution professional shall make available any financial information so required by the committee of creditors within a period of seven days of such requisition.
- (x) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors. (Section 22)

Meeting of committee of creditors.:

Section 24 specifies the conduct of meeting of Committee of creditors.

- (i) **Conduct of meeting:** The members of the committee of creditors may meet in person or by such electronic means as may be specified. All meetings of the committee of creditors shall be conducted by the resolution professional.

The resolution professional shall give notice of each meeting of the committee of creditors to—

- (a) members of Committee of creditors;
- (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
- (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

The directors, partners and one representative of operational creditors, may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings.

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

- (ii) **Appointment of insolvency professional to represent creditor in a meeting of the committee of creditors :** Any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors: Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.
- (iii) **Right to vote to creditor:** Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.

The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.

The meetings of the committee of creditors shall be conducted in such manner as may be specified.

(9) Appointment and functions of resolution professional: According to Section 22 of the Code, the committee of creditors, may, in the first meeting, by a majority vote of not less than 75 % of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Functions of Resolution professional: Section 23 states the following functions of resolution professional-

- (i) The resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period.
- (ii) The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional.
- (iii) In case of any appointment of a resolution professional, the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional.

The Resolution Professional's primary function is to take over the management of the corporate borrower and operate its business as a going concern under the broad directions of committee of creditors.

The thrust of the Code is to allow a shift of control from the defaulting debtor's management to its creditors, where the creditors drive the business of the debtor with the Resolution Professional acting as their agent.

(10) Replacement of resolution professional by committee of creditors:Section 27 provides manner of replacement of resolution professional with another resolution professional by committee of creditors. Process of replacement of resolution professional is as follows:

- (i) **Committee of creditors is of the opinion** that a resolution professional as appointed, is required to be replaced, it may replace him with another resolution professional.
- (ii) **By majority:** The committee of creditors may, at a meeting, by a vote of 75 % of voting shares, propose to replace the resolution professional appointed with another resolution professional.
- (iii) **Forwarding of name to Adjudicating Authority :** The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(iv) **Further forwarding name to Board:** The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

(v) **Continuation of office:** Where any disciplinary proceedings are pending against the proposed resolution professional, the resolution professional appointed shall continue till the appointment of another resolution professional under this section.

(11) Approval of committee of creditors for certain actions of resolution professional, during the corporate insolvency resolution process: The resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors—

- (a) **raise any interim finance** in excess of the amount as may be decided by the committee of creditors in their meeting;
- (b) **create any security interest** over the assets of the corporate debtor;
- (c) **change the capital structure** of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;
- (d) record any change in the ownership interest of the corporate debtor;
- (e) **give instructions to financial institutions** maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;
- (f) **undertake any related party transaction;**
- (g) **amend any constitutional documents** of the corporate debtor;
- (h) **delegate its authority** to any other person;
- (i) dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
- (j) **make any change in the management** of the corporate debtor or its subsidiary;
- (k) transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;
- (l) **make changes in the appointment or terms of contract of such personnel** as specified by the committee of creditors; or
- (m) **make changes in the appointment or terms of contract of statutory auditors or internal auditors** of the corporate debtor.

Approval of the committee of creditors

The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions.

No action shall be approved by the committee of creditors unless approved by a vote of seventy five per cent. of the voting shares. Where any action is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

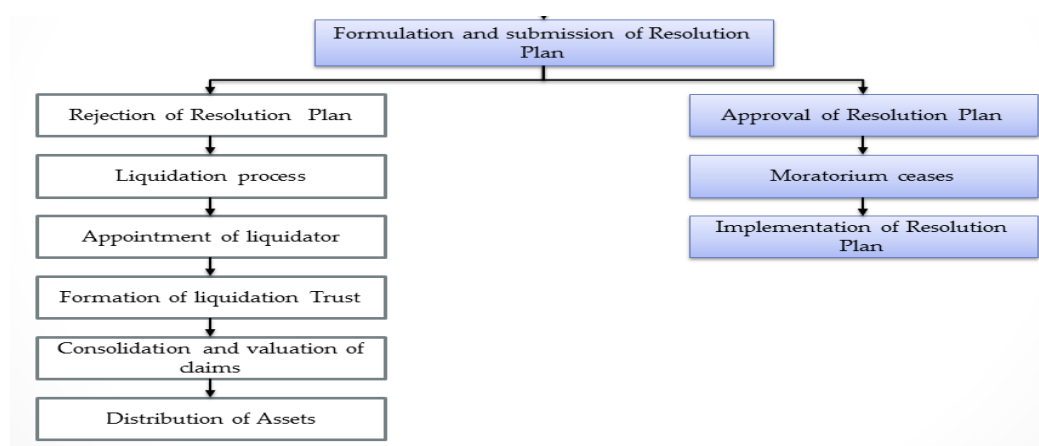
Report the actions of the resolution professional to the Board: The committee of creditors may report the actions of the resolution professional to the Board for taking necessary actions against him under this Code.[Section 28]

(12) Preparation of information memorandum: According to section 29 of the code, the resolution professional shall prepare an information memorandum containing such relevant information as may be specified by the Board for formulating a resolution plan.

The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form.

"Relevant information" means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.

(13) Resolution plan: Section 30 to 31 of the Code deals with resolution plan. Resolution professional shall prepare an Information Memorandum which shall contain information for preparing resolution plan.



Submission of resolution plan: A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

Examination of Resolution Plan: The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

- (a) **provides for the payment of insolvency resolution process costs** in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;
- (b) **provides for the repayment of the debts of operational creditors** in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;
- (c) **provides for the management of the affairs of the Corporate debtor** after approval of the resolution plan;
- (d) the implementation and supervision of the resolution plan;
- (e) **does not contravene any of the provisions of the law** for the time being in force;
- (f) **conforms to such other requirements** as may be specified by the Board.

Approval from Committee of creditors: The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions as mentioned above.

The committee of creditors may approve a resolution plan by a vote of not less than 75 % of voting share of the financial creditors.

Right of resolution applicant to attend the meeting of the committee of creditors: The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

Submission of approved resolution plan to adjudicating authority: The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.

Approval of resolution plan adjudicating authority: If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements, it may, by an order, reject the resolution plan.

After the order of approval of resolution plan—

- (a) the moratorium order passed by the Adjudicating Authority shall cease to have effect; and

- (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(III) Liquidation Process

The Code concerns itself only with those corporate debtors which have defaulted in payment of debts. The corporate debtor, at the first stage, is put into resolution mode. The process is called the corporate insolvency resolution process. However, if attempts to resolve the insolvency of the corporate debtor fail, then only the liquidation provisions of the Code are triggered.

Where no plan is presented or where the plan presented is not approved by the Adjudicating Authority it shall pass an order requiring the Corporate Debtor to be liquidated in the manner as laid down in Chapter III of the Act.

Section 33 to 54 of the Code provides the law related to the liquidation process.

- (i) **Initiation of liquidation:** Section 33 of the Code deals with the initiation of liquidation process. Provisions states that where the Adjudicating Authority —
- (a) **Not received a Resolution plan:** Before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process or the fast track corporate insolvency resolution process, as the case may be, does not receive a resolution plan; or
 - (b) **rejects the resolution plan** for the non-compliance of the requirements specified therein, it shall—
 - (i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;
 - (ii) issue a public announcement stating that the corporate debtor is in liquidation; and
 - (iii) require such order to be sent to the authority with which the corporate debtor is registered.

Intimation of the decision of the committee of creditors to liquidate to Adjudicating authority: Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order .

Contravention of resolution plan as approved by the Adjudicating Authority: Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests

are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order.

Determination of contravention the provisions of the resolution plan: On receipt of an application, if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order.

Bar to filing of suits and legal proceedings: 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.

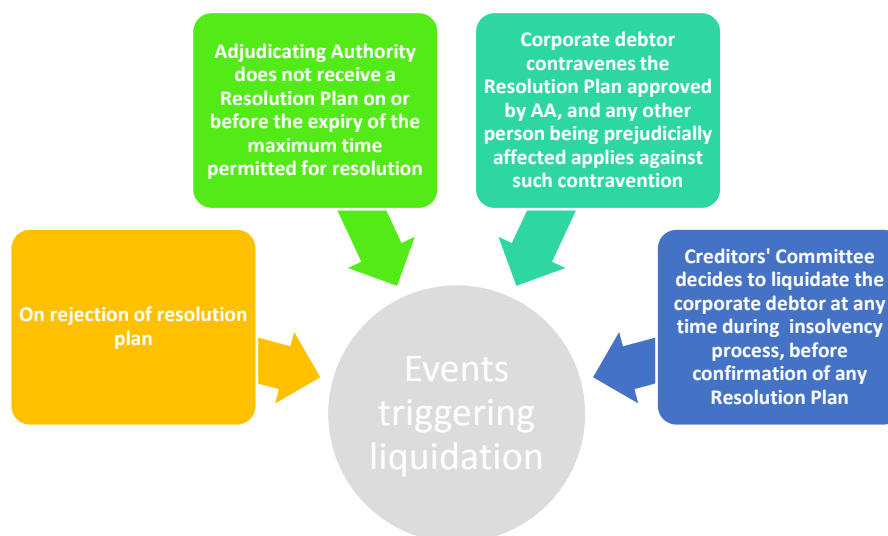
Restrictions on filing of suits and legal proceedings shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

Order to be deemed to be notice of discharge: The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

So, from above it can be concluded that under the Code, a corporate debtor may be put into liquidation in the following scenarios:

- (i) A 75% majority of the creditor's committee resolves to liquidate the corporate debtor at any time during the insolvency resolution process;
- (ii) The creditor's committee does not approve a resolution plan within 180 days (or within the extended 90 days);
- (iii) The NCLT rejects the resolution plan submitted to it on technical grounds; or
- (iv) The debtor contravenes the agreed resolution plan and an affected person makes an application to the NCLT to liquidate the corporate debtor.

Once the NCLT passes an order of liquidation, a moratorium is imposed on the pending legal proceedings against the corporate debtor, and the assets of the debtor (including the proceeds of liquidation) vest in the liquidation estate.



(2) **Appointment of liquidator:** Section 34 of the Code provides for appointment of liquidator.

Resolution professional to act as liquidator: It states that where the Adjudicating Authority passes an order for liquidation of the corporate debtor, the resolution professional appointed for the corporate insolvency resolution process, shall act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority.

Powers of Board of Director (BOD)/ Key Managerial Personnel (KMP) vested with liquidator: On the appointment of a liquidator, all powers of the BOD, KMP and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested with the liquidator.

Personnel to extend cooperation to liquidator: The personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

Order to replace the resolution professional : The Adjudicating Authority shall by order replace the resolution professional, if—

- (a) the resolution plan submitted by the resolution professional **was rejected for failure to meet the requirements**; or
- (b) the **Board recommends the replacement of a resolution professional** to the Adjudicating Authority for reasons to be recorded in writing.

On rejection of resolution plan due to failure to meet the requirements, the Adjudicating Authority may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.

The Board shall propose the name of another insolvency professional within ten days of the direction issued by the Adjudicating Authority.

Adjudicating Authority to appoint insolvency professional as the liquidator: The Adjudicating Authority shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.

Charge of fees for conduct of liquidation proceedings: An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.

Payment of fees: The fees for the conduct of the liquidation proceedings shall be paid to the liquidator from the proceeds of the liquidation estate.

(3) Powers and duties of liquidator: Section 35 of the Code specifies the following power and duties of liquidator-

- (a) to **verify claims** of all the creditors;
- (b) to **take into his custody or control** all the assets, property, effects and actionable claims of the corporate debtor;
- (c) to **evaluate the assets and property** of the corporate debtor in the manner as may be specified by the Board and prepare a report;
- (d) to take such **measures to protect and preserve the assets and properties** of the corporate debtor as he considers necessary;
- (e) to **carry on the business** of the corporate debtor for its beneficial liquidation as he considers necessary;
- (f) to **sell the immovable and movable property and actionable claims** of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;
- (g) to **draw, accept, make and endorse any negotiable instruments** including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;
- (h) to **take out, in his official name, letter of administration to any deceased contributory** and to do in his official name any other act necessary for obtaining

payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;

- (i) to **obtain any professional assistance** from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;
- (j) to **invite and settle claims** of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;
- (k) to **institute or defend any suit, prosecution or other legal proceedings**, civil or criminal, in the name of on behalf of the corporate debtor;
- (l) to **investigate the financial affairs** of the corporate debtor to determine undervalued or preferential transactions;
- (m) to **take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument** and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;
- (n) to **apply to the Adjudicating Authority for such orders or directions** as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and
- (o) to **perform such other functions** as may be specified by the Board.

The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds : Provided that any such consultation shall not be binding on the liquidator: Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board.

Powers of liquidator to access information: The liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor. The creditors may require the liquidator to provide them any financial information relating to the corporate debtor. The liquidator shall provide information to such creditors who have requested for such information within a period of seven days from the date of such request or provide reasons for not providing such information.[Section 37]

(4) Liquidation estate: According to section 36 of the code, for the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor.

The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

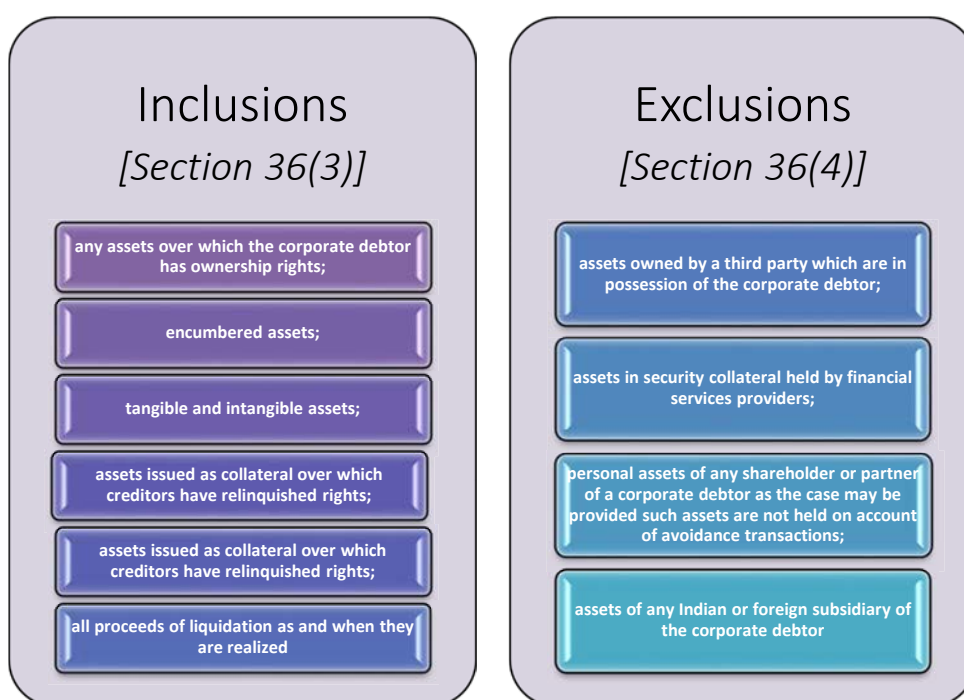
Comprising of liquidation estate: The liquidation estate shall comprise of all liquidation estate assets which shall include the following:—

- (a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;
- (b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;
- (c) tangible assets, whether movable or immovable;
- (d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;
- (e) assets subject to the determination of ownership by the court or authority;
- (f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;
- (g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;
- (h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
- (i) all proceeds of liquidation as and when they are realised.

Exceptions to the assets from inclusion in the liquidation estate assets: The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—

- (a) **assets owned by a third party** which are in possession of the corporate debtor, including—
 - (i) assets held in trust for any third party;
 - (ii) bailment contracts;
 - (iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;
 - (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
 - (v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

- (b) **assets in security collateral held by financial services providers** and are subject to netting and set-off in multi-lateral trading or clearing transactions;
- (c) **personal assets of any shareholder or partner of a corporate debtor** as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;
- (d) **assets of any Indian or foreign subsidiary** of the corporate debtor; or
- (e) **any other assets as may be specified by the Board**, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.



(5) Consolidation of claims: Section 38 of the Code deals with provisions related to the consolidation of claims. Accordingly-

- (1) **Collection of claims by liquidator:** The liquidator shall receive or collect the claims of creditors within a period of thirty days from the date of the commencement of the liquidation process.
- (2) **Submission of claims:** A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility: Provided that where the information relating to the claim is not recorded in the information utility, the financial creditor may submit the claim in the same manner as provided for the submission of claims for the operational creditor.

- (3) **Supportive documents:** An operational creditor may submit a claim to the liquidator in such form and in such manner and along with such supporting documents required to prove the claim as may be specified by the Board.
- (4) **Amount of claims to be submitted:** A creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt and to the extent of his operational debt.
- (5) **Alteration in claim:** A creditor may withdraw or vary his claim under this section within fourteen days of its submission.

Verification of claims.

The liquidator shall verify the claims submitted within such time as specified by the Board. The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim. [Section 39]

Admission or rejection of claims.

The liquidator may, after verification of claims, either admit or reject the claim, in whole or in part, as the case may be: Provided that where the liquidator rejects a claim, he shall record in writing the reasons for such rejection.

The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims. [Section 40]

Determination of valuation of claims: The liquidator shall determine the value of claims admitted in such manner as may be specified by the Board. [Section 41]

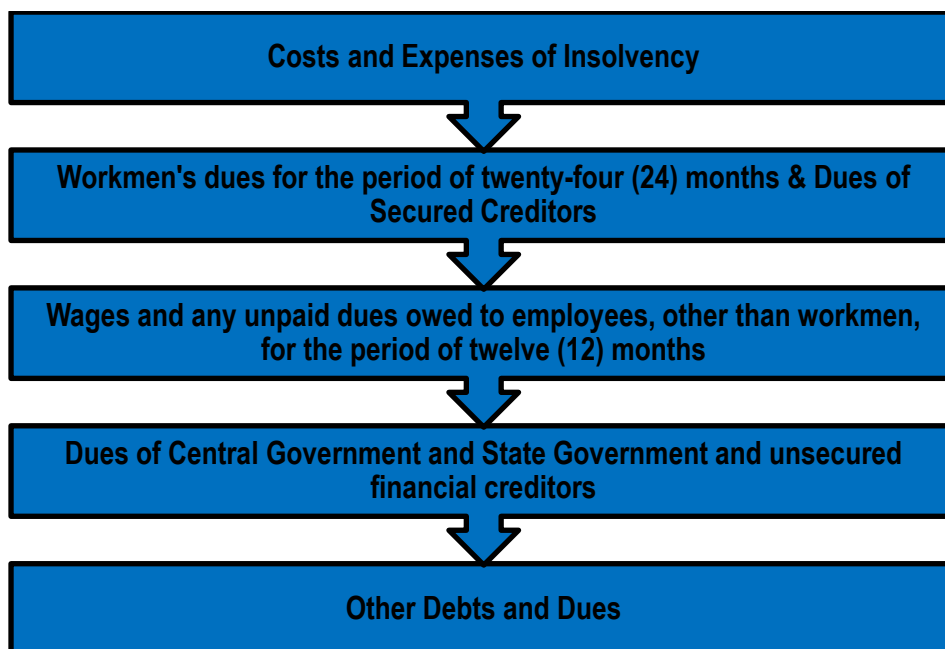
Appeal against the decision of liquidator: A creditor may appeal to the Adjudicating Authority against the decision of the liquidator rejecting the claims within fourteen days of the receipt of such decision. [Section 42]

(6) Secured creditor in liquidation proceedings:

- (i) A secured creditor in the liquidation proceedings may—
 - (a) **relinquish its security interest to the liquidation estate** and receive proceeds from the sale of assets by the liquidator, or
 - (b) **realise its security interest** in the manner specified in this section.
- (ii) **To inform the liquidator about realisation of security interest:** Where the secured creditor realises security interest under clause (b) above, he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.

- (iii) **Verification by liquidator of security interest:** Before any security interest is realised by the secured creditor under this section, 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.
- (iv) **Rights of secured creditor related to secured assets:** to A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.
- (v) **Restriction in realising of secured asset:** If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to the Adjudicating Authority to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.
- (vi) **Passing of order by Adjudicating Authority:** The Adjudicating Authority, on the receipt of an application from a secured creditor may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.
- (vii) **Yield of surplus:** 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.
- (viii) **Amount of insolvency resolution process to be included in the liquidation estate:** The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.
- (ix) **Unpaid debts to be paid by liquidator:** Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator.[Section 52]
- (7) **Distribution of assets:** The Code significantly changes the priority waterfall for distribution of liquidation proceeds.

Priority of Claims



- (i) **Distribution of proceeds from the sale of the liquidation assets:** The proceeds from the sale of the liquidation assets shall be distributed in the following order of priority —
- (a) the insolvency resolution process costs and the liquidation costs paid in full;
 - (b) the following debts which shall rank equally between and among the following :—
 - (I) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
 - (II) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
 - (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
 - (d) financial debts owed to unsecured creditors;
 - (e) the following dues shall rank equally between and among the following:—
 - (I) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

- (II) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
 - (f) any remaining debts and dues;
 - (g) preference shareholders, if any; and
 - (h) equity shareholders or partners, as the case may be.
- (ii) **Disregard of order of priority:** Any contractual arrangements between recipients with equal ranking, if disrupting the order of priority shall be disregarded by the liquidator.
- (iii) **Fees to liquidator:** The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients, and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section— (i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and (ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.[Section 53]

(8) Dissolution of corporate debtor

Application by liquidator dissolution: Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.

Date of dissolution: The Adjudicating Authority shall on application filed by the liquidator orders that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

Submission of order copy: A copy of an order shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered.

SECTION B: ALLIED LAW

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI) ACT, 1992 & SEBI (ICDR) REGULATIONS, 2009

Amendment to SEBI Act, 1992

Given below are the amendments which were inserted by the Finance Act, 2017 vide Gazette Notification dated March 31, 2017. This came into force from April 26, 2017.

(I) Inclusions of new definitions under section 2 of the SEBI Act:

- (i) **(da) Insurance Regulatory and Development Authority** means the Insurance Regulatory and Development Authority of India established under sub-section (1) of section 3 of the Insurance Regulatory and Development Authority Act, 1999;
- (ii) **(db) Judicial Member** means a Member of the Securities Appellate Tribunal appointed under sub-section (1) of section 15MA and includes the Presiding Officer;
- (iii) **(fa) Pension Fund Regulatory and Development Authority** means the Pension Fund Regulatory and Development Authority established under subsection (1) of section 3 of the Pension Fund Regulatory and Development Authority Act, 2013;
- (iv) **(j) Technical Member** means a Technical Member appointed under sub-section (1) of section 15MB.

(II) Penalties:

Factors to be taken into account by the adjudicating officer (section 15J) - This Explanation was added to the section—For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section.

Earlier Law: No explanation was there in the section.

Reference of Page number of earlier existing section in the study material- 19.15

(III) Establishment, Jurisdiction, Authority and Procedure of Securities Appellate Tribunal**(i) Establishment of Securities Appellate Tribunal (Section 15K) –**

- (1) The Central Government shall, by notification, establish a Tribunal to be known as the Securities Appellate Tribunal to exercise the jurisdiction, powers and authority conferred on it by or under this Act or any other law for the time being in force.
- (2) The Central Government shall also specify in the notification referred to in sub-section (1), the matters and places in relation to which the Securities Appellate Tribunal may exercise jurisdiction.

(ii) Composition of Securities Appellate Tribunal (Section 15L)-

- (1) The Securities Appellate Tribunal shall consist of a Presiding Officer and such number of Judicial Members and Technical Members as the Central Government may determine, by notification, to exercise the powers and discharge the functions conferred on the Securities Appellate Tribunal under this Act or any other law for the time being in force.
- (2) Subject to the provisions of this Act,— (a) the jurisdiction of the Securities Appellate Tribunal may be exercised by Benches thereof; (b) a Bench may be constituted by the Presiding Officer of the Securities Appellate Tribunal with two or more Judicial or Technical Members as he may deem fit: Provided that every Bench constituted shall include at least one Judicial Member and one Technical Member; (c) the Benches of the Securities Appellate Tribunal shall ordinarily sit at Mumbai and may also sit at such other places as the Central Government may, in consultation with the Presiding Officer, notify.
- (3) Notwithstanding anything contained in sub-section (2), the Presiding Officer may transfer a Judicial Member or a Technical Member of the Securities Appellate Tribunal from one Bench to another Bench.

(iii) Qualification for appointment as presiding officer or member of Securities Appellate Tribunal (Section 15M) –

A person shall not be qualified for appointment as the Presiding Officer or a Judicial Member or a Technical Member of the Securities Appellate Tribunal, unless he— (a) is, or has been, a Judge of the Supreme Court or a Chief Justice of a High Court or a Judge of High Court for at least seven years, in the case of the Presiding Officer; and (b) is, or has been, a Judge of High Court for at least five years, in the case of a Judicial Member; or (c) in the case of a Technical Member— (i) is, or has been, a Secretary or an Additional Secretary in the Ministry or Department of the Central Government or any equivalent post in the Central Government or a State Government; or (ii) is a person of proven ability, integrity and standing having special knowledge and professional experience, of not less than fifteen years, in financial sector including securities market or pension funds or commodity derivatives or insurance.

(iv) Insertion of sections 15MA , 15MB & 15 MC-

15MA-The Presiding Officer and Judicial Members of the Securities Appellate Tribunal shall be appointed by the Central Government in consultation with the Chief Justice of India or his nominee.

15MB- (1) The Technical Members of the Securities Appellate Tribunal shall be appointed by the Central Government on the recommendation of a Search-cum-Selection Committee consisting of the following, namely:— (a) Presiding Officer, Securities Appellate Tribunal—Chairperson; (b) Secretary, Department of Economic Affairs—Member; (c) Secretary, Department of Financial Services—Member; and (d) Secretary, Legislative Department or Secretary, Department of Legal Affairs—Member. (2) The Secretary, Department of Economic Affairs shall be the Convener of the Search-cum Selection Committee. (3) The Search-cum-Selection Committee shall determine its procedure for recommending the names of persons to be appointed under sub-section (1).

15MC- (1) No appointment of the Presiding Officer, a Judicial Member or a Technical Member of the Securities Appellate Tribunal shall be invalid merely by reason of any vacancy or any defect in the constitution of the Searchcum- Selection Committee. (2) A member or part time member of the Board or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, or any person at senior management level equivalent to the Executive Director in the Board or in such Authorities, shall not be appointed as Presiding Officer or Member of the Securities Appellate Tribunal, during his service or tenure as such with the Board or with such Authorities, as the case may be, or within two years from the date on which he ceases to hold office as such in the Board or in such Authorities. (3) The Presiding Officer or such other member of the Securities Appellate Tribunal, holding office on the date of commencement of Part VIII of Chapter VI of the Finance Act, 2017 shall continue to hold office for such term as he was appointed and the other provisions of this Act shall apply to such Presiding Officer or such other member, as if Part VIII of Chapter VI of the Finance Act, 2017 had not been enacted.

(v) Tenure of office of Presiding Officer and other Members of Securities Appellate Tribunal (Section 15N)-

The Presiding Officer or every Judicial or Technical Member of the Securities Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office, and shall be eligible for reappointment for another term of maximum five years:

Provided that no Presiding Officer or the Judicial or Technical Member shall hold office after he has attained the age of seventy years.

(vi) Appeal to the Securities Appellate Tribunal (Section 15T)- Following are the amendments in this section:

- (1) In sub-section 1, Clause (b) word [or] has been added in the last.

- (2) This is a newly inserted clause in sub-section 1, stating that “**Clause (c)** by an order of the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority,”
- (3) **In sub-section 3:** Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Board or the Adjudicating Officer [**or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority**], as the case may be, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:
- (4) In sub-section 5: The Securities Appellate Tribunal shall send a copy of every order made by it to the Board, [or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be] the parties to the appeal and to the concerned Adjudicating Officer.

Reference of Page number of earlier existing section in the study material- 19.16- 19.17

SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009

Following are the relevant amendments made under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009:

(I) The SEBI (Issue of Capital and Disclosure Requirements) (Seventh Amendment) Regulations, 2012, w.e.f. 1.12.2015.

No. SEBI/ LAD-NRO/GN/2015-16/025 dated 27th of October, 2015 the Board through the SEBI (ICDR) Regulations (Seventh Amendment) Regulations, 2012 further amend the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 with effect from 1st December 2015.

In Regulation 58 which deals with the abridged prospectus, abridged letter of offer and ASBA, following are the amendments in the Principal regulations–

In sub-regulation (1)-

The words, symbols and numbers "of the memorandum prescribed under sub-section (3) of section 56 of the Companies Act, 1956 and additional disclosures" shall be **omitted**.

Earlier Law : 58. (1) The abridged prospectus shall contain the disclosures **of the memorandum prescribed under sub-section (3) of section 56 of the Companies Act, 1956 and additional disclosures** as specified in Part D of Schedule VIII.

Reference of Page number of earlier existing section in the study material- 19.61

(II) The SEBI (Issue of Capital and Disclosure Requirements) (Fifth Amendment) Regulations, 2015, w.e.f. 01.01.2016

Vide Notification No. SEBI/LAD-NRO/GN/2015-16/012 dated 14th August, 2015, the Board notifies the SEBI (Issue of Capital and Disclosure Requirements) (Fifth Amendment)

Regulations, 2015 to further amend the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, with effect from first day of January, 2016.

In the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 following are the amendments:-

- (I) **In regulation 12** which deals with the Dispatch of issue material, following is the change- after the words and symbol “syndicate members,” and before the word “underwriters”, the words and symbols “**registrar to issue and share transfer agents, depository participants, stock brokers,**” shall be inserted.
- (II) **In regulation 58** which deals with the Abridged prospectus, abridged letter of offer and ASBA, sub-regulation (5) shall be substituted with the following, namely:-

“(5) In all, -

 - (i) **Public issues**, the issuer shall accept bids using only ASBA facility in the manner specified by the Board;
 - (ii) **Rights issues**, where not more than one payment option is given, the issuer shall provide the facility of ASBA in accordance with the procedure and eligibility criteria specified by the Board: Provided that in case of qualified institutional buyers and non-institutional investors the issuer shall accept bids using ASBA facility only.”
- (III) **In regulation 65** which deals with the post- issue reports, sub-regulation (1) and (2) shall be substituted with the following, namely:-

“(1) In public issue, the lead merchant banker shall submit final post-issue report as specified in Part C of Schedule XVI, within seven days of the date of finalization of basis of allotment or within seven days of refund of money in case of failure of issue.

(2) In rights issue, the lead merchant banker shall submit post-issue reports as follows:-

 - (a) initial post issue report as specified in Part B of Schedule XVI, within three days of closure of the issue;
 - (b) final post issue report as specified in Part D of Schedule XVI, within fifteen days of the date of finalization of basis of allotment or within fifteen days of refund of money in case of failure of issue.”

Earlier Law- Following are the regulations given in the principal Regulation 2009-

Dispatch of issue material

12. The lead merchant bankers shall dispatch the offer document and other issue material including forms for ASBA to the designated stock exchange, syndicate members, underwriters, bankers to the issue, investors' associations and Self Certified Syndicate Banks in advance.

Abridged prospectus, abridged letter of offer and ASBA.

58. (5) In all public issues and rights issues, where not more than one payment option is given, the issuer shall provide the facility of ASBA in accordance with the procedure and eligibility criteria specified by the Board.

“Provided that in case of qualified institutional buyers and non-institutional investors the issuer shall accept bids using ASBA facility only.”

Post-issue reports.

65. (1) The lead merchant banker shall submit post-issue reports to the Board in accordance with sub-regulation (2).

(2) The post-issue reports shall be submitted as follows:

- (a) initial post issue report as specified in Parts A and B of Schedule XVI, within three days of closure of the issue
- (b) final post issue report as specified in Parts C and D of Schedule XVI, within fifteen days of the date of finalisation of basis of allotment or within fifteen days of refund of money in case of failure of issue.

(3) The lead merchant banker shall submit a due diligence certificate as per the format specified in **Form G of Schedule VI**, along with the final post issue report.

Reference of Page numbers of relevant regulations in the study material – 19.37, 19.62 & 19.66**(III) The SEBI (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2016 w.e.f. 17.02.2016**

The Securities Exchange Board of India through publication in the Official Gazette vide Notification No. SEBI/ LAD-NRO/GN/2015- 16/036, inserted by the SEBI (Issue of Capital and Disclosure Requirements) (Second Amendment) Regulations, 2016, w.e.f. 17th February, 2016 the following amendments in the SEBI (ICDR) Regulations, 2009 -

In the SEBI (ICDR) Regulation, 2009 after chapter VI, chapter VI-A shall be inserted. This chapter is to read with section 13(8) and section 27(2) of the Companies Act, 2013.

Section 13(8) of the Companies Act, 2013 deals with the company which has raised money from public through prospectus and still have un-utilised amount out of the money so raised.

Section 27(2) deals with the dissenting shareholders who have not agreed to the proposal to vary the terms of contracts or objects and given to them an exit offer in such manner and conditions as may be prescribed by the SEBI in the regulation.

CHAPTER VI-A

CONDITIONS AND MANNER OF PROVIDING EXIT OPPORTUNITY TO DISSENTING SHAREHOLDERS**Applicability.**

69A. (1) The provisions of this Chapter shall apply to an exit offer made by the promoters or shareholders in control of an issuer to the dissenting shareholders in terms of section 13(8) and section 27(2) of the Companies Act, 2013, in case of change in objects or variation in the terms of contract referred to in the prospectus.

(2) The provisions of this Chapter shall not apply where there are neither identifiable promoters nor shareholders in control of the listed issuer.

Definitions.

69B. For the purpose of this Chapter:

- (a) dissenting shareholders^{II} means those shareholders who have voted against the resolution for change in objects or variation in terms of a contract, referred to in the prospectus of the issuer;
- (b) frequently traded shares^{II} shall have the same meaning as assigned to it in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
- (c) relevant date^{II} means date of the board meeting in which the proposal for change in objects or variation in terms of a contract, referred to in the prospectus is approved, before seeking shareholders' approval.

Conditions for exit offer.

69C. The promoters or shareholders in control shall make the exit offer in accordance with the provisions of this Chapter, to the dissenting shareholders, if:

- (a) the public issue has opened after April 1, 2014; and
- (b) the proposal for change in objects or variation in terms of a contract, referred to in the prospectus is dissented by at least ten per cent of the shareholders who voted in the general meeting; and
- (c) the amount to be utilized for the objects for which the prospectus was issued is less than seventy five per cent of the amount raised (including the amount earmarked for general corporate purposes as disclosed in the offer document).

Eligibility of shareholders for availing the exit offer

69D. Only those dissenting shareholders of the issuer who are holding shares as on the relevant date shall be eligible to avail the exit offer made under this Chapter.

Exit offer price.

69E. The exit price payable to the dissenting shareholders shall be the highest of the following:

- (a) the volume-weighted average price paid or payable for acquisitions, whether by the promoters or shareholders having control or by any person acting in concert with them, during the fifty-two weeks immediately preceding the relevant date;
- (b) the highest price paid or payable for any acquisition, whether by the promoters or shareholders having control or by any person acting in concert with them, during the twenty-six weeks immediately preceding the relevant date;
- (c) the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the relevant date as traded on the recognised stock exchange where the maximum volume of trading in the shares of the issuer are recorded during such period, provided such shares are frequently traded;
- (d) where the shares are not frequently traded, the price determined by the promoters or shareholders having control and the merchant banker taking into account valuation parameters including book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such issuers.

Manner of providing exit to dissenting shareholders.

69F. (1) The notice proposing the passing of special resolution for changing the objects of the issue and varying the terms of contract, referred to in the prospectus shall also contain information about the exit offer to the dissenting shareholders.

(2) In addition to the disclosures required under the provisions of section 102 of the Companies Act, 2013 read with rule 32 of the Companies (Incorporation) Rules, 2014 and rule 7 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 and any other applicable law, a statement to the effect that the promoters or the shareholders having control shall provide an exit opportunity to the dissenting shareholders shall also be included in the explanatory statement to the notice for passing special resolution.

(3) After passing of the special resolution, the issuer shall submit the voting results to the recognised stock exchange(s), in terms of the provisions of regulation 44(3) of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

(4) The issuer shall also submit the list of dissenting shareholders, as certified by its compliance officer, to the recognised stock exchange(s).

(5) The promoters or shareholders in control, shall appoint a merchant banker registered with the Board and finalize the exit offer price in accordance with these regulations.

- (6) The issuer shall intimate the recognised stock exchange(s) about the exit offer to dissenting shareholders and the price at which such offer is being given.
- (7) The recognised stock exchange(s) shall immediately on receipt of such intimation disseminate the same to public within one working day.
- (8) To ensure security for performance of their obligations, the promoters or shareholders having control, as applicable, shall create an escrow account which may be interest bearing and deposit the aggregate consideration in the account at least two working days prior to opening of the tendering period.
- (9) The tendering period shall start not later than seven working days from the passing of the special resolution and shall remain open for ten working days.
- (10) The dissenting shareholders who have tendered their shares in acceptance of the exit offer shall have the option to withdraw such acceptance till the date of closure of the tendering period.
- (11) The promoters or shareholders having control shall facilitate tendering of shares by the shareholders and settlement of the same through the recognised stock exchange mechanism as specified by SEBI for the purpose of takeover, buy-back and delisting.
- (12) The promoters or shareholders having control shall, within a period of ten working days from the last date of the tendering period, make payment of consideration to the dissenting shareholders who have accepted the exit offer.
- (13) Within a period of two working days from the payment of consideration, the issuer shall furnish to the recognised stock exchange(s), disclosures giving details of aggregate number of shares tendered, accepted, payment of consideration and the post-offer shareholding pattern of the issuer and a report by the merchant banker that the payment has been duly made to all the dissenting shareholders whose shares have been accepted in the exit offer.

Offer not to exceed maximum permissible non-public shareholding.

69G. In the event, the shares accepted in the exit offer were such that the shareholding of the promoters or shareholders in control, taken together with persons acting in concert with them pursuant to completion of the exit offer results in their shareholding exceeding the maximum permissible non-public shareholding, the promoters or shareholders in control, as applicable, shall be required to bring down the non-public shareholding to the level specified and within the time permitted under Securities Contract (Regulation) Rules, 1957.

Earlier Law- In SEBI (ICDR) Regulation, 2009 no such regulation was there. It is a newly inserted regulations providing the conditions and manner of exit opportunity to dissenting shareholders.

Reference of Page number where these regulations may be incorporated in the study material – 19.68

(IV) The SEBI(ICDR)(Third Amendment)Regulations, 2016 w.e.f. 25.05.2016

The Securities Exchange Board of India through publication in the Official Gazette vide notification No. SEBI/ LAD-NRO/GN/2016- 17/003, inserted by the issue of SEBI (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2016, w.e.f. 25th May, 2016 the following amendments in the SEBI(ICDR)Regulations, 2009-

(1) In regulation 2, in sub-regulation(1),-

After clause (zm), the following shall be inserted-

(zn) “**wilful defaulter**” means an issuer who is categorized as a wilful defaulter by any bank or financial institution or consortium thereof, in accordance with the guidelines on wilful defaulters issued by the Reserve Bank of India and includes an issuer whose director or promoter is categorized as such.

Earlier Law- This is a newly inserted definition in the regulation.
--

Reference of Page number of relevant regulations in the study material – 19.28

(2) In regulation 4-

(i) in sub-regulation (2), **Clause (c) omitted** by SEBI (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2016, w.e.f. 25th May, 2016.

Earlier Law- Prior to its omission, clause (c) read as under: —(c) if the issuer of convertible debt instruments is in the list of wilful defaulters published by the Reserve Bank of India or it is in default of payment of interest or repayment of principal amount in respect of debt instruments issued by it to the public, if any, for a period of more than six months;.
--

Reference of Page number of existing regulation in the study material – 19.29

(ii) After sub-regulation (4), the following **sub-regulations (5), (6) & (7) shall be inserted-**

(5) No issuer shall make,

- a public issue of equity securities, if the issuer or any of its promoters or directors is a wilful defaulter; or
- b. a public issue of convertible debt instruments if,
 - i. the issuer or any of its promoters or directors is a wilful defaulter, or
 - ii. it is in default of payment of interest or repayment of principal amount in respect of debt instruments issued by it to the public, if any, for a period of more than six months.

(6) An issuer making a rights issue of specified securities, shall make disclosures as specified in Part G of Schedule VIII, in the offer document and abridged letter of offer, if the issuer or any of its promoters or directors is a wilful defaulter.

(7) In case of a rights issue of specified securities referred to in sub-regulation (6) above, the promoters or promoter group of the issuer, shall not renounce their rights except to the extent of renunciation within the promoter group.

Earlier Law-These are newly inserted sub-regulations in regulation 4 which deals with the general conditions for the Public issues and Rights issues.

Reference of Page number of relevant regulation in the study material – 19.29

(iii) In **regulation 73**, in sub-regulation (1), after clause (g) the following shall be inserted, namely-

“(h) disclosures, similar to disclosures specified in Part G of Schedule VIII, if the issuer or any of its promoters or directors is a wilful defaulter.”

Earlier Law-This is newly inserted clause in regulation 73 which deals with the disclosures required in section 173 of the Companies Act, 1956 (i.e. 102 of the Companies Act, 2013)

Reference of Page number of relevant regulation in the study material – 19.71

(iv) In **regulation 84**, in sub-regulation (1), after the word Schedule XVIII, the following words shall be added-

(1) The qualified institutions placement shall be made on the basis of a placement document which shall contain all material information, including those specified in Schedule XVIII **and disclosures similar to disclosures specified in Part G of Schedule VIII shall be made, if applicable.**

Earlier Law- Regulation 84 sub-regulation (1) was as follows:

The qualified institutions placement shall be made on the basis of a placement document which shall contain all material information, including those specified in Schedule XVIII.

Reference of Page number of relevant regulation in the study material – 19.78

(V) The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fourth Amendment) Regulations, 2016, vide Notification dated 30th November 2016

The Board hereby amended the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 through the enforcement of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fourth Amendment) Regulations, 2016-

In regulation 42, which deals with the Reservation on competitive basis, in sub-regulation (4), after clause (g), the following proviso shall be inserted,-

Provided that in the event of under-subscription in the employee reservation portion, the unsubscribed portion may be allotted on a proportionate basis, for a value in excess of two lakhs rupees, subject to the total allotment to an employee not exceeding five lakhs rupees.

Earlier Law- Earlier no proviso was there to clause (g) to sub-regulation (4) of the Regulation 42.

Reference of Page number of relevant regulation in the study material – 19.53

(VI) The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2017, Vide Notification dated 15th February, 2017

The Board hereby amends the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 by enforcing the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2017.

Following are the relevant amendments:

(I) In regulation 70 –

(a) in sub-regulation (1),-

(i) in clause (a)- after the numerics “1956”, the words and symbols “or subsection (3) and (4) of section 62 of the Companies Act, 2013, whichever applicable” shall be inserted;

(ii) in clause (b)-

(a) for the symbol “;” the words and symbols “or a Tribunal under sections 230 to 234 of the Companies Act, 2013, whichever applicable” shall be substituted;

(b) after clause (b), the following proviso shall be inserted,- “Provided that the pricing provisions of this Chapter shall apply to the issuance of shares under schemes mentioned in clause (b) in case of allotment of shares only to a select group of shareholders or shareholders of unlisted companies pursuant to such schemes;”

(iii) in clause (c)- after the numerics “1985”, the words and symbols “or the Tribunal under the Insolvency and Bankruptcy Code, 2016, whichever applicable” shall be inserted;

(b) in sub-regulation (3)- after the numerics “1997”, the words and symbols “or regulation 11 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, whichever applicable,” shall be inserted;

Earlier Law- 70. (1) The provisions of this Chapter shall not apply where the preferential issue of equity shares is made:

(a) pursuant to conversion of loan or option attached to convertible debt instruments in terms of sub-sections (3) and (4) of sections 81 of the Companies Act, 1956;

(b) pursuant to a scheme approved by a High Court under section 391 to 394 of the

Companies Act, 1956;

- (c) in terms of the rehabilitation scheme approved by the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985:
- (3) The provisions of regulation 73 and regulation 76 shall not apply to a preferential issue of equity shares and compulsorily convertible debt instruments, whether fully or partly, where the Board has granted relaxation to the issuer in terms of regulation 29A of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, if adequate disclosures about the plan and process proposed to be followed for identifying the allottees are given in the explanatory statement to notice for the general meeting of shareholders.

Reference of Page number of relevant regulation in the study material – 19.68- 19.69

(II) after regulation 111- the following regulations shall be inserted, namely,-

“Liability for contravention of the Act, rules or the regulations.

111A. (1) The listed entity or any other person thereof who contravenes any of the provisions of these regulations, shall, in addition to the liability for action in terms of the securities laws, be liable for the following actions by the respective stock exchange(s), in the manner specified in the circulars or guidelines issued by the Board:

- (a) Imposition of fines;
 - (b) Suspension of trading;
 - (c) Freezing of promoter/promoter group holding of designated securities, as may be applicable, in coordination with depositories;
 - (d) Any other action as may be specified by the Board from time to time.
- (2) The manner of revocation of actions specified in clauses (b) and (c) of sub regulation (1), shall be as specified in the circulars or guidelines issued by the Board.

Failure to pay fine.

111B. If the listed entity fails to pay any fine imposed upon it by the recognised stock exchange(s), within the period as specified from time to time, the stock exchange may initiate such other action in accordance with law, after giving a notice in writing.

Earlier Law- These are the newly inserted regulations.

Reference of Page number of relevant chapter in this regulation is inserted in the study material – 19.99- 19.100

Note: Chapter XI (regulations 107 to 110) which dealt with the listing of securities on stock exchanges was inserted by SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, w.e.f. 01.12.2015 This regulations of the SEBI(ICDR)Regulations , 2009 are not applicable for May 2018 examination.

However, Chapter XI of the SEBI(ICDR)Regulations , 2009 were renumbered as Chapter XII by SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, w.e.f. 01.12.2015. Regulation 107 to 111 of the SEBI(ICDR)Regulations , 2009 (Principal regulations) have been renumbered as Regulations 111 to 115 by the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, w.e.f.01.12.2015. This is applicable for May 2018 examination.

20

THE SECURITIES CONTRACTS (REGULATIONS) ACT, 1956

Amendment inserted by Part V of Chapter VI of the Finance Act, 2017, w.e.f. 01.04.2017 vide Gazette Notification dated March 31, 2017

In the Securities Contracts (Regulation) Act, 1956, in section 23J, the following Explanation has been inserted by the Finance Act, 2017, namely:—

“Explanation—For the removal of doubts, it is clarified that the power of an adjudicating officer to adjudge the quantum of penalty under sections 23A to 23C shall be and shall always be deemed to have exercised under the provisions of this section.”

Earlier Law- There was no explanation to section 23J.

Reference of Page number of relevant chapter in this regulation is inserted in the study material – 20.23

21

FOREIGN EXCHANGE MANAGEMENT ACT, 1999

Definition of currency

Vide notification no. FEMA 15(R)/2015- RB, dated 29th December 2015 issued by the Reserve Bank of India, in pursuance of clause (h) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in supersession of Notification No. FEMA 15/2000-RB dated May 3, 2000, as amended from time to time, the Reserve Bank notifies debit cards, ATM cards or any other instrument by whatever name called that can be used to create a financial liability, as 'currency'.

They shall come into force from the date of their publication in the Official Gazette.

Earlier Law- Section 2 (h) "Currency" includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank;

Reference of Page numbers of relevant section in the study material- 21.2

The Foreign Exchange Management (Permissible Capital Account Transactions) (Fourth Amendment) Regulations, 2015 w.e.f 16th November, 2015

Vide Notification FEMA. 345/2015-RB, Dated November 16, 2015, Reserve Bank of India , in exercise of the powers conferred by sub-section (2) of Section 6, sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), makes, in consultation with the Central Government, the following amendments in the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

In Regulation 4, in sub-regulation (b), the existing Explanation (i) shall be substituted by the following namely:

"(i) For the purpose of 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”

Earlier Law- Explanation: In real estate business (the term shall not include developments of townships, construction of residential or commercial premises, roads or bridges) or construction of farm houses;

Reference of Page numbers of relevant regulation in the study material- 21.18

Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015 w.e.f. 21.01.2016

Vide Notification FEMA 7(R)/ 2015-RB dated January 21, 2016, Reserve bank of India, in exercise of the powers conferred by clause (h) of sub-section (3) of Section 6, sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in supersession of Notification No. FEMA 7/2000-RB dated May 3, 2000, as amended from time to time, hereby amend regulations relating to acquisition and transfer of immovable property outside India, namely:

Acquisition and Transfer of Immovable Property outside India:-

- (1) A person resident in India may acquire immovable property outside India, -
 - (a) by way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the Act, or referred to in clause (b) of regulation 4 (acquired by a person resident in India on or before 8th July 1947 and continued to be held by him with the permission of the Reserve Bank.)
 - (b) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency accounts by a person resident in India) Regulations, 2015;
 - (c) jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India;
- (2) A person resident in India may acquire immovable property outside India, by way of inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
- (3) A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

Explanation:

For the purposes of these regulations, 'relative' in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

Earlier Law- Acquisition and Transfer of Immovable Property Outside India.

A person resident in India may acquire immovable property outside India,—

(a) by way of gift or inheritance from a person referred to in sub-section (4) of section 6 of the Act, or referred to in clause (b) of regulation 4; (b) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000;

A person resident in India, who has acquired immovable property outside India under sub-regulation (1) of this regulation, may transfer it by way of gift to his relative who is a person resident in India.

A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time

Reference of Page numbers of relevant regulation in the study material- 21.21

Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 w.e.f. 12.01.2016

Vide Notification No. FEMA 23(R)/2015-RB, dated 12th January, 2016, Reserve Bank of India amended the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 Regulations by notifying the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 with effect from January 12th, 2016.

Accordingly, in exercise of the powers conferred by clause (a) of sub-section (1), sub-section (3) of Section 7 and sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999) and in supersession of its Notification No. FEMA.23/2000-RB dated May 3, 2000 as amended from time to time, Reserve Bank of India makes the following Regulations in respect of Export of Goods and Services from India, namely:

1. Short title and commencement:-

- (i) These Regulations may be called the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015.
- (ii) They shall come into force from the date of their publication in the Official Gazette.

2. Definitions:- Some definitions:

In these Regulations, unless the context requires otherwise, -

- (i) 'export' includes the taking or sending out of goods by land, sea or air, on consignment or by way of sale, lease, hire-purchase, or under any other

arrangement by whatever name called, and in the case of software, also includes transmission through any electronic media;

- (ii) 'export value' in relation to export by way of lease or hire-purchase or under any other similar arrangement, includes the charges, by whatever name called, payable in respect of such lease or hire-purchase or any other similar arrangement;
- (iii) 'form' means form annexed to these Regulations;
- (iv) 'software' means any computer programme, database, drawing, design, audio/video signals, any information by whatever name called in or on any medium other than in or on any physical medium ;
- (v) 'specified authority' means the person or the authority to whom the declaration as specified in Regulation 3 is to be furnished;

3. Declaration of exports:-

- (1) In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing –
 - (i) the full export value of the goods or software; or
 - (ii) if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.
- (2) Declarations shall be executed in sets of such number as specified.
- (3) For the removal of doubt, it is clarified that, in respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.
- (4) Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

4. Exemptions:-

Notwithstanding anything contained in Regulation 3, export of goods / software may be made without furnishing the declaration in the following cases, namely:

- (a) trade samples of goods and publicity material supplied free of payment;

- (b) personal effects of travellers, whether accompanied or unaccompanied;
- (c) ship's stores, trans-shipment cargo and goods supplied under the orders of Central Government or of such officers as may be appointed by the Central Government in this behalf or of the military, naval or air force authorities in India for military, naval or air force requirements;
- (d) by way of gift of goods accompanied by a declaration by the exporter that they are not more than five lakh rupees in value
- (e) aircrafts or aircraft engines and spare parts for overhauling and/or repairs abroad subject to their reimport into India after overhauling /repairs, within a period of six months from the date of their export;
- (f) goods imported free of cost on re-export basis;
the following goods which are permitted by the Development Commissioner of the Special Economic Zones, Electronic Hardware Technology Parks, Software Technology Parks or Free Trade Zones to be re-exported, namely:
 - (1) imported goods found defective, for the purpose of their replacement by the foreign suppliers/collaborators;
 - (2) goods imported from foreign suppliers/collaborators on loan basis;
 - (3) goods imported from foreign suppliers/collaborators free of cost, found surplus after production operations.
- (ga) goods listed at items (1), (2) and (3) of clause (i) to be re-exported by units in Special Economic Zones, under intimation to the Development Commissioner of Special Economic Zones / concerned Assistant Commissioner or Deputy Commissioner of Customs
- (h) replacement goods exported free of charge in accordance with the provisions of Foreign Trade Policy in force, for the time being.
- (i) goods sent outside India for testing subject to re-import into India;
- (j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.
- (k) exports permitted by the Reserve Bank, on application made to it, subject to the terms and conditions, if any, as stipulated in the permission.

5. Indication of importer-exporter code number:-

The importer-exporter code number allotted by the Director General of Foreign Trade under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992 (22 of 1992) shall be indicated on all copies of the declaration forms submitted by the exporter to the

specified authority and in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

6. Authority to whom declaration is to be furnished and the manner of dealing with the declaration:-

A. Declaration in Form EDF

- (i) The declaration in form EDF shall be submitted in duplicate to the Commissioner of Customs.
- (ii) After duly verifying and authenticating the declaration form, the Commissioner of Customs shall forward the original declaration form/data to the nearest office of the Reserve Bank and hand over the duplicate form to the exporter for being submitted to the authorised dealer.

B. Declaration in Form SOFTEX

- (i) The declaration in Form SOFTEX in respect of export of computer software and audio/video/ television software shall be submitted in triplicate to the designated official of Ministry of Information Technology, Government of India at the Software Technology Parks of India (STPIs) or at the Free Trade Zones (FTZs) or Special Economic Zones (SEZs) in India.
- (ii) After certifying all three copies of the SOFTEX form, the said designated official shall forward the original directly to the nearest office of the Reserve Bank and return the duplicate to the exporter. The triplicate shall be retained by the designated official for record.

C. Duplicate Declaration Forms to be retained with Authorised Dealers

On the realisation of the export proceeds, the duplicate copies of export declaration forms viz. EDF and SOFTEX shall be retained by the Authorised Dealers.

7. Evidence in support of declaration:-

The Commissioner of Customs or the postal authority or the official of Department of Electronics, to whom the declaration form is submitted, may, in order to satisfy themselves of due compliance with Section 7 of the Act and these regulations, require such evidence in support of the declaration as may establish that –

- (a) the exporter is a person resident in India and has a place of business in India;
- (b) the destination stated on the declaration is the final place of the destination of the goods exported;
- (c) the value stated in the declaration represents –
 - (i) the full export value of the goods or software; or
 - (ii) where the full export value of the goods or software is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing

market conditions expects to receive on the sale of the goods in the overseas market.

Explanation:

For the purpose of this regulation, 'final place of destination' means a place in a country in which the goods are ultimately imported and cleared through Customs of that country.

8. Manner of payment of export value of goods:-

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.

9. Period within which export value of goods/software/ services to be realised:-

- (1) The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months from the date of export, provided
 - (a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods;
 - (b) further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.
- (2) (a) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months from the date of export.

Provided further that the Reserve Bank, or subject to the directions issued by

the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months.

- (b) The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by sub-regulation (2);

Provided that no such direction shall be given unless the unit has been given a reasonable opportunity to make a representation in the matter.

- (c) On such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.'

Explanation:

For the purpose of this regulation, the "date of export" in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

10. Submission of export documents:-

The documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, within 21 days from the date of export, or from the date of certification of the SOFTEX form:

Provided that, subject to the directions issued by the Reserve Bank from time to time, the authorised dealer may accept the documents pertaining to export submitted after the expiry of the specified period of 21 days, for reasons beyond the control of the exporter.

11. Transfer of documents:-

Without prejudice to Regulation 3, an authorised dealer may accept, for negotiation or collection, shipping documents including invoice and bill of exchange covering exports, from his constituent (not being a person who has signed the declaration in terms of Regulation 3) :

Provided that before accepting such documents for negotiation or collection, the authorised dealer shall –

- (a) where the value declared in the declaration does not differ from the value shown in the documents being negotiated or sent for collection, or
- (b) where the value declared in the declaration is less than the value shown in the documents being negotiated or sent for collection, require the constituent concerned also to sign such declaration and thereupon such constituent shall be bound to comply with such requisition and such constituent signing the declaration shall be considered to be the exporter for the purposes of these Regulations to the extent of the full value shown in the documents being negotiated or sent for collection and shall be governed by these Regulations accordingly.

12. Payment for the Export:-

In respect of export of any goods or software for which a declaration is required to be furnished under Regulation 3, no person shall except with the permission of the Reserve Bank or, subject to the directions of the Reserve Bank, permission of an authorised dealer, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing –

- (i) that the payment for the goods or software is made otherwise than in the specified manner; or
- (ii) that the payment is delayed beyond the period specified under these Regulations; or
- (iii) that the proceeds of sale of the goods or software exported do not represent the full export value of the goods or software subject to such deductions, if any, as may be allowed by the Reserve Bank or, subject to the directions of the Reserve Bank, by an authorised dealer;

Provided that no proceedings in respect of contravention of these provisions shall be instituted unless the specified period has expired and payment for the goods or software representing the full export value, or the value after deductions allowed under clause (iii), has not been made in the specified manner within the specified period.

- (iv) Export of services to which no Form specified in these Regulations apply, the exporter may export such services without furnishing any declaration, (i), (ii) & (iii) above shall apply.

13. Certain Exports requiring prior approval:- Exports under trade agreement/rupee credit etc.

- (i) Export of goods under special arrangement between the Central Government and Government of a foreign state, or under rupee credits extended by the Central Government to Govt. of a foreign state shall be governed by the terms and conditions set out in the relative public notices issued by the Trade Control Authority in India and the instructions issued from time to time by the Reserve Bank.
- (ii) An export under the line of credit extended to a bank or a financial institution operating in a foreign state by the Exim Bank for financing exports from India, shall be governed by the terms and conditions advised by the Reserve Bank to the authorised dealers from time to time.

14. Delay in Receipt of Payment:-

Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or

software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,

- (a) the payment therefor if the goods or software has been sold and
- (b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf ;

Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

15. Advance payment against exports:-

- (1) Where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –
 - (i) the shipment of goods is made within one year from the date of receipt of advance payment;
 - (ii) the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
 - (iii) the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

- (2) Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

16. Issue of directions by Reserve Bank in certain cases:-

- (1) Without prejudice to the provisions of Regulation 3 in relation to the export of goods or software which is required to be declared, the Reserve Bank may, for the purpose of ensuring that the full export value of the goods or, as the case may be, the value which the exporter having regard to the prevailing market conditions expects to receive on the sale of goods or software in the overseas market, is received in proper time and without delay, by general or special order, direct from time to time that in respect of export of goods or software to any destination or any class of export transactions or any class of goods or software or class of exporters,

the exporter shall, prior to the export, comply with the conditions as may be specified in the order, namely ;

- (a) that the payment of the goods or software is covered by an irrevocable letter of credit or by such other arrangement or document as may be indicated in the order ;
 - (b) that any declaration to be furnished to the specified authority shall be submitted to the authorised dealer for its prior approval, which may, having regard to the circumstances, be given or withheld or may be given subject to such conditions as may be specified by the Reserve Bank by directions issued from time to time.
 - (c) that a copy of the declaration to be furnished to the specified authority shall be submitted to such authority or organisation as may be indicated in the order for certifying that the value of goods or software specified in the declaration represents the proper value thereof.
- (2) No direction under sub-regulation (1) shall be given by the Reserve Bank and no approval under clause (b) of that sub-regulation shall be withheld by the Authorised Dealer, unless the exporter has been given a reasonable opportunity to make a representation in the matter.

17. Project exports:-

(1) Where an export of goods or services is proposed to be made on deferred payment terms or in execution of a turnkey project or a civil construction contract, the exporter shall, before entering into any such export arrangement, submit the proposal for prior approval of the approving authority, which shall consider the proposal in accordance with the guidelines issued by the Reserve Bank of India from time to time.

(2) In case a guarantee is required to be given prior to post award approval, the same may be issued by an authorized dealer bank/ a person resident in India being an exporting company, for performance of a project outside India, or for availing of credit facilities, whether fund-based or non-fund based, from a bank or a financial institution outside India in connection with the execution of such project, provided that the contract / Letter of Award stipulates such requirements. Explanation:

For the purpose of this Regulation, 'approving authority' means the EXIM Bank of India or the authorised dealer

Earlier Law- This Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 was to be read with section 7 of the FEMA, 2000. The procedural part contained and regulated by the aforesaid regulations. For details of the regulation see the study material.

Reference of the page numbers of relevant regulations of the study material- 21.22 – 21.27

Foreign Exchange Management (Realisation, repatriation and surrender of foreign exchange) Regulations, 2015 w.e.f. 29.12.2015

Reserve Bank of India vide Notification FEMA 9 (R)/2015-RB, dated December 29, 2015 in exercise of the powers conferred by Section 8, sub-section (6) of Section 10, clause (c) of sub-section (2) of Section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), and in supersession of Notification No. FEMA 9/2000-RB dated May 3, 2000, as amended from time to time the Reserve Bank makes the following regulations relating to the manner of, and the period for, realisation of foreign exchange, repatriation of realised foreign exchange to India and its surrender.

Following are the relevant amendments to the principal regulations-

Period for surrender of realised foreign exchange:-

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person under clause (a) of sub-regulation (1) of regulation 4, within the period specified below:-

1. foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;
2. in all other cases within a period of ninety days from the date of its receipt.

Period for surrender in certain cases :-

1. Any person not being an individual resident in India who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to an authorised person under sub-section (5) of Section 10 of the Act does not use it for such purpose or for any other purpose for which purchase or acquisition of foreign exchange is permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder, shall surrender such foreign exchange or the unused portion thereof to an authorised person within a period of sixty days from the date of its acquisition or purchase by him.
2. Notwithstanding anything contained in sub-regulation (1), where the foreign exchange acquired or purchased by any person not being an individual resident in India from an authorised person is for the purpose of foreign travel, then, the unspent balance of such foreign exchange shall, save as otherwise provided in the regulations made under the Act, be surrendered to an authorised person -
 - (a) within ninety days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of currency notes and coins; and

- (b) within one hundred eighty days from the date of return of the traveller to India, when the unspent foreign exchange is in the form of travellers cheques.

Period for surrender of received/ realised/ unspent/ unused foreign exchange by Resident individuals.-

A Person being an individual resident in India shall surrender the received/realised/unspent/unused foreign exchange whether in the form of currency notes, coins and travellers cheques, etc. to an authorised person within a period of 180 days from the date of such receipt/realisation/purchase/acquisition or date of his return to India, as the case may be.

Earlier Law- Regulation dealt with the period for surrender of realized foreign exchange and period for surrender in certain cases: A person shall sell the realised foreign exchange to an authorised person within 7 days if he has received such exchange as due or accrued remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation or an income on assets held outside India, or as inheritance, settlement or gift and in all other cases within 90 days of its receipt.

A person shall also surrender such unused portion of foreign exchange to an authorised person within 60 days from the date of its acquisition or purchase by him. Also any unspent balance on foreign exchange acquired for the purpose of foreign travel should be surrendered within 90 days from the date of return of the travel to India if the unspent amount is in the form of foreign currency notes and coins and within 180 days if it is in the form of travellers' cheque.

Reference of the page numbers of relevant regulation of the study material- 21.28

22

THE COMPETITION ACT, 2002

Revised Thresholds under section 5

On March 4, 2016, the Central Government issued notifications pertaining to the Statutory thresholds for the purposes of “combinations” under Section 5 of the Competition Act, 2002 (“Act”).

1. **Increase in thresholds:** Pursuant to Notification No. S.O. 675 (E) dated March 4, 2016 the value of assets and the value of turnover has been enhanced by 100% for the purposes of Section 5 of the Act. Accordingly, the revised thresholds for notification to the Competition Commission of India (“**Commission**”) are:

THRESHOLDS FOR FILING NOTICE				
		<u>Assets</u>		<u>Turnover</u>
Enterprise Level	India	> 2000 INR crore	OR	>6000 INR Crore
	Worldwide with India leg	>USD 1 bn with at least >1000 INR crore in India		>USD 3 bn With at least >3000 INR crore in India
			OR	
Group Level	India	>8000 INR crore	OR	>24000 INR Crore
	Worldwide with India leg	>USD 4 bn with at least >1000 INR crore in India		>USD 12 bn With at least >3000 INR crore in India

2. **Increase in thresholds of De Minimis Exemption:** Pursuant to Notification No. S.O. 674 (E) dated March 4, 2016. Acquisitions where enterprises whose control, shares, voting rights or assets are being acquired have assets of not more than Rs. 350 crore in India or turnover of not more than Rs. 1000 crore in India, are exempt from Section 5 of the Act for a period of 5 years. Accordingly, the revised thresholds for availing of the *DE Minimis* exemption for acquisitions are:

THRESHOLDS FOR AVAILING OF DE MINIMIS EXEMPTION FOR ACQUISITIONS			
		<u>Assets</u>	<u>Turnover</u>
Target Enterprise	In India	≤ 350 INR	OR ≤ 1000 INR Crore

3. **Definition of Group:** As per Notification No. S.O. 634 (E) dated March 4, 2016. The exemption to the “group” exercising less than fifty per cent of voting rights in other enterprise from the provisions of Section 5 of the Act under Notification No. S.O. 481 (E) dated March 4, 2011, has been continued for a further period of 5 years.

Earlier Law- As per the Combination regulation given in Section 5 of the Competition Act, 2002, the thresholds limits for enterprise and person were as follows:

	APPLICABLE TO	ASSETS		TURNOVER	
In India	Individual	₹ 1,500 cr.		₹ 4,500 cr.	
	Group	₹ 6,000 cr.		₹ 18,000 cr.	
In India and outside		ASSETS		TURNOVER	
		Total	Minimum Indian Component	Total	Minimum Indian Component
	Individual parties	\$ 750 m	₹ 750 cr	\$ 2,250 m	₹ 2,250 cr
	Group	\$ 3 bn.	₹ 750 cr.	\$ 9 bn.	₹ 2,250 cr.

Exemptions to the Enterprises under section 5 of the Competition Act, 2002

in Vide Notification dated 27th March, 2017, in exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, (1) the Central Government, hereby exempts the enterprises being parties to —

- any acquisition referred to in clause (a) of section 5 of the Competition Act;
- acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of section 5 of the Competition Act; and
- any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act,

Where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees

one thousand crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette.

2. Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act.

The value of the said portion or division or business shall be determined by taking the book value of the assets as shown, in the audited books of accounts of the enterprise or as per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government, in public interest, hereby rescinds the notification of the Government of India in the Ministry of Corporate Affairs, S.O. 674(E), dated the 4th March, 2016, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), dated the 4th March, 2016, except as respects things done or omitted to be done before such rescission.

Reference of the page numbers of relevant section of the study material- 22.12- 22.14

23

THE SECURITIES AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002

Amendment in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) vide the enforcement of the Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016.

Ministry of Law and Justice on 16th August, 2016 hereby published for general information in the Official Gazette, the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016.

It is an Act further to amend four laws: (i) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), (ii) Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI), (iii) Indian Stamp Act, 1899 and (iv) Depositories Act, 1996, and for matters connected therewith or incidental thereto.

Chapter II, of this amendment Act deals with the amendments to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

This amendment Act is "an act to regulate securitisation and reconstruction of financial assets and enforcement of security interest and to provide for a central database of security interests created on property rights, and for matters connected therewith or incidental thereto."

Following are the relevant amendments in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI)

Substitution of references to certain expressions by other expressions.

Throughout the principal Act,—

- (i) for the words "securitisation company", "reconstruction company", "securitisation or reconstruction company" , "securitisation company or the reconstruction company"

- or "securitisation company or a reconstruction company", wherever they occur, the words **"asset reconstruction company" shall be substituted;**
- (ii) for the words "securitisation companies or reconstruction companies", wherever they occur, the words **"asset reconstruction companies" shall be substituted;**
 - (iii) for the words "qualified institutional buyer", wherever they occur, the words **"qualified buyer" shall be substituted;**
 - (iv) for the words "qualified institutional buyers", wherever they occur, the words **"qualified buyers" shall be substituted.**

Amendment of section 2 containing relevant definitions.
--

Vide this amendment many new definitions have been added and the existing definitions have been modified in section 2. These are follows are-

- (i) after clause (b), the following clause containing the definition **asset reconstruction company** shall be inserted, namely:—

'(ba) **"asset reconstruction company"** means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitisation, or both;'
- (ii) in clause (f), which deals with **definition of borrower**, after the words "financial institution in relation to such financial assistance", the words **"or who has raised funds through issue of debt securities"** shall be inserted;
- (iii) for clause (ha) which dealt with the **definition of debt**, the following clause shall be substituted, namely:—

'(ha) "debt" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and includes—

 - (a) unpaid portion of the purchase price of any tangible asset given on hire or financial lease or conditional sale or under any other contract;
 - (b) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable any borrower to acquire the intangible asset or obtain licence of such asset;'
- (iv) for clause (j) containing the **definition of default**, the following clause shall be substituted, namely:—

'(j) "default" means—

 - (a) non-payment of any debt or any other amount payable by the borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured

creditor; or

- (b) non-payment of any debt or any other amount payable by the borrower with respect to debt securities after notice of ninety days demanding payment of dues served upon such borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of such debt securities;';
- (v) in clause (l) containing the **definition of financial asset**, after sub-clause (v), the following sub-clauses shall be inserted, namely:—
 - "(va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or
 - (vb) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset; or";
- (vi) clause (v) containing the definition of **reconstruction company**, shall be omitted.
- (vii) **Definition of secured creditor** contained in the clause (zd) of the Principal Act shall be substituted with the following:
 - '(zd) "secured creditor" means—
 - (i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);
 - (ii) debenture trustee appointed by any bank or financial institution; or
 - (iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
 - (iv) debenture trustee registered with the Board appointed by any company for secured debt securities; or
 - (v) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance.'
- (viii) **Definition of security interest** contained in the clause (zf) of the Principal Act shall be substituted with the following:

'(zf) "security interest" means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes—

- (i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or
- (ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset;.

Earlier law- For the relevant definitions given in the principal Act, refer the study material.

Reference of the page numbers of relevant sections of the study material- 23.30 – 23.32

Amendment in Section 3

Section 3 of the respective Act deals with the Registration of securitisation companies or reconstruction companies.

In the principal Act, in section 3, -

- (i) **in sub-section (1), for clause (b),** the following clause shall be substituted, namely-
 "(b) having net owned fund of not less than two crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify:";
- (ii) **in sub-section (3),—**
 - (a) **for clause (f), the** following clause shall be substituted, namely:—
 "(f) that a sponsor of an asset reconstruction company is a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the Reserve Bank for such persons;";
 - (b) **clause (d)** shall be omitted.
- (iii) **in sub-section (6),—**
 - (a) after the words "any substantial change in its management", the words "including appointment of any director on the board of directors of the asset reconstruction company or managing director or chief executive officer thereof" shall be inserted;

- (b) in the *Explanation*, after the words "by way of transfer of shares or", the words "change affecting the sponsorship in the company by way of transfer of shares or" shall be inserted.

Earlier Law- Following were the laws for Sub-sections (1)(b), (3)(f), (3)(d) & (6) to section 3 of the Principal Act-

Section 3(1)(b)- "having the owned fund of not less than two crore rupees or such other amount not exceeding fifteen per cent of total financial assets acquired or to be acquired by the securitisation company or reconstruction company, as the Reserve Bank may, by notification, specify:

PROVIDED that the Reserve Bank may, by notification, specify different amounts of owned fund for different class or classes of securitisation companies or reconstruction companies:

PROVIDED FURTHER that a securitisation company or reconstruction company, existing on the commencement of this Act, shall make an application for registration to the Reserve Bank before the expiry of six months from such commencement and notwithstanding anything contained in this sub-section may continue to carry on the business of securitisation or asset reconstruction until a certificate of registration is granted to it or, as the case may be, rejection of application for registration is communicated to it".

Section 3(3)(f)- "that a sponsor, is not a holding company of the securitisation company or reconstruction company, as the case may be, or, does not otherwise hold any controlling interest in such securitisation company or reconstruction company;"

Section 3(3)(d)- "that the board of directors of such securitisation company or reconstruction company does not consist of more than half of its total number of directors who are either nominees of any sponsor or associated in any manner with the sponsor or any of its subsidiaries;"

Section 3(6) – "Every securitisation company or reconstruction company, shall obtain prior approval of the Reserve Bank for any substantial change in its management or change of location of its registered office or change in its name: PROVIDED that the decision of the Reserve Bank, whether the change in management of a securitisation company or a reconstruction company is a substantial change in its management or not, shall be final.

Explanation: For the purposes of this section, the expression "substantial change in management" means the change in the management by way of transfer of shares or amalgamation or transfer of the business of the company."

Reference of the page numbers of relevant sections of the study material- 23.32 – 23.33

Amendment in section 5

Section 5 of the Act deals with the Acquisition of rights or interest in financial assets.

In the principal Act, in section 5,—

(i) **after sub-section (1)**, the following sub-section shall be inserted, namely:—

"(1A) Any document executed by any bank or financial institution under sub-section (1) in favour of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitisation shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899:

Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitisation.";

(ii) **after sub-section (2)**, the following sub-section shall be inserted, namely:—

"(2A) If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire the tangible asset or assignment or licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets under sub-section (1)."

Earlier Law- These are newly inserted sub-sections vide this amendment Act.

Reference of section 5 in the study material- 23.34 – 23.35

Substitution of new section for section 9

Section 9 of the Act deals with Measures for assets reconstruction.

(1) **In the principal Act, for section 9, the following section shall be substituted, namely:—**

"9.(1) Without prejudice to the provisions contained in any other law for the time being in force, an asset reconstruction company may, for the purposes of asset reconstruction, provide for any one or more of the following measures, namely:—

- (a) the proper management of the business of the borrower, by change in, or takeover of, the management of the business of the borrower;
- (b) the sale or lease of a part or whole of the business of the borrower;
- (c) rescheduling of payment of debts payable by the borrower;
- (d) enforcement of security interest in accordance with the provisions of this Act;

- (e) settlement of dues payable by the borrower;
- (f) taking possession of secured assets in accordance with the provisions of this Act;
- (g) conversion of any portion of debt into shares of a borrower company:

Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times.

(2) The Reserve Bank shall, for the purposes of sub-section (1), determine the policy and issue necessary directions including the direction for regulation of management of the business of the borrower and fees to be charged.

(3) The asset reconstruction company shall take measures under sub-section (1) in accordance with policies and directions of the Reserve Bank determined under sub-section (2)."

Earlier Law- Section 9 stated - Without prejudice to the provisions contained in any other law for the time being in force, a securitisation company or reconstruction company may, for the purposes of asset reconstruction, having regard to the guidelines framed by the Reserve Bank in this behalf, provide for any one or more of the following measures, namely:-- (a) the proper management of the business of the borrower, by change in, or take over of, the management of the business of the borrower; (b) the sale or lease of a part or whole of the business of the borrower; (c) rescheduling of payment of debts payable by the borrower; (d) enforcement of security interest in accordance with the provisions of this Act; (e) settlement of dues payable by the borrower; (f) taking possession of secured assets in accordance with the provisions of this Act.

Reference of page number of relevant section in the study material- 23.36

Amendment of section 13

Section 13 of the Act deals with the Enforcement of security interest.

In the principal Act, in section 13,—

- (i) **in sub-section (2)**, the following proviso shall be inserted, namely:—

"Provided that—

- (i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and
- (ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as

may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;"

(ii) **for sub-section (8)**, the following sub-section shall be substituted, namely:—

"(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—

- (i) the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and
- (ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets."

Earlier Law- Following are the sub-section (2) and sub-section (8) to section 13 of the Principal Act-

sub-section (2) - Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

sub-section (8) - If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

Reference of page number of relevant sections in the study material- 23.37 & 23.39

Amendment of section 15

This section of the Act is related to manner and effect of takeover of management.

In the principal Act, in section 15, in sub-section (4), the following proviso shall be inserted, namely:—

"Provided that if any secured creditor jointly with other secured creditors or any asset reconstruction company or financial institution or any other assignee has converted part of its debt into shares of a borrower company and thereby acquired controlling interest in the

borrower company, such secured creditors shall not be liable to restore the management of the business to such borrower."

Earlier Law- Sub-section (4) to section 15 states that where the management of the business of a borrower had been taken over by the secured creditor, the secured creditor shall, on realisation of his debt in full, restore the management of the business of the borrower to him.

No proviso was there in the principal Act to sub-section (4).

Reference of page number of relevant section in the study material- 23.41

Amendment of section 17

Section 17 of the Act deals with Right to appeal (now the heading is "Application against measures to recover secured debts")

In the principal Act, in **section 17**,—

(i) for the marginal heading "Right to appeal", **the words "Application against measures to recover secured debts" shall be substituted;**

(ii) **after sub-section (1)**, the following sub-sections shall be inserted, namely:—

"(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

- (a) the cause of action, wholly or in part, arises;
- (b) where the secured asset is located; or
- (c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being."

(iii) **for sub-section (3)**, the following **sub-section shall be substituted**, namely-

"(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

- (a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and
- (b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

- (c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.";

(iv) after sub-section (4), the following sub-section shall be inserted, namely:—

"(4A) Where—

- (i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—
 - (a) has expired or stood determined; or
 - (b) is contrary to section 65A of the Transfer of Property Act, 1882 or
 - (c) is contrary to terms of mortgage; or
 - (d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and
- (ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act."

Earlier Law- Following is the section 17 in the Principal Act-

Sub-sections (1A) and (4A) to section 17 are newly inserted.

sub-section (3)- If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

Reference of page number of relevant section in the study material- 23.42

Amendment of section 19

Section 19 of the Act provides of Right of borrower to receive compensation and costs in certain cases.

In the principal Act, in section 19, for the words "concerned borrowers, such borrowers", the words **"concerned borrowers or any other aggrieved person, who has filed the application under section 17 or section 17A or appeal under section 18 or section 18A, as the case may be, the borrower or such other person" shall be substituted.**

Earlier law- Section 19 of the principal Act provides that if the Debts Recovery Tribunal or the Court of District Judge, on an application made under section 17 or section 17A or the Appellate Tribunal or the High Court on an appeal preferred under section 18 or section 18A, holds that the possession of secured assets by the secured creditor is not in accordance with the provisions of this Act and rules made thereunder and directs the secured creditors to return such secured assets to the concerned borrowers, such borrower shall be entitled to the payment of such compensation and costs as may be determined by such Tribunal or Court of District Judge or Appellate Tribunal or the High Court referred to in section 18B.

Reference of page number of relevant section in the study material- 23.45

Insertion of new sections 20A and 20B

These are newly inserted sections. These deals with the provisions related to central registry.

(i) In the principal Act, after section 20, the following sections shall be inserted, namely:—

(i) **Integration of registration systems with Central Registry**

"20A. (1) The Central Government may, for the purpose of providing a Central database, in consultation with State Governments or other authorities operating registration system for recording rights over any property or creation, modification or satisfaction of any security interest on such property, integrate the registration records of such registration systems with the records of Central Registry established under section 20, in such manner as may be prescribed.

Explanation—For the purpose of this sub-section, the registration records includes records of registration under the Companies Act, 2013, the Registration Act, 1908, the Merchant Shipping Act, 1958, the Motor Vehicles Act, 1988, the Patents Act, 1970, the Designs Act, 2000 or other such records under any other law for the time being in force.

(2) The Central Government shall after integration of records of various registration systems referred to in sub-section (1) with the Central Registry, by notification, declare the date of integration of registration systems and the date from which such integrated records shall be available; and with effect from such date, security interests over

properties which are registered under any registration system referred to in sub-section (1) shall be deemed to be registered with the Central Registry for the purposes of this Act."

(ii) Delegation of powers.

"20B. The Central Government may, by notification, delegate its powers and functions under this Chapter, in relation to establishment, operations and regulation of the Central Registry to the Reserve Bank, subject to such terms and conditions as may be prescribed."

Earlier Law- These provisions were not there in the Principal Act. It is newly inserted provisions vide amendment Act.

Reference of page number of relevant section in the study material- 23.45

Amendment to Section 23

Section 23 of the Act deals with the filing of transactions of securitisation, reconstruction and creation of security interest.

Amendment Act led to the following amendment in the principal Act,—

- (i) section 23 shall be numbered as sub-section (1), and in sub-section (1) as so re-numbered,—**
- (a) the words "within thirty days after the date of such transaction or creation of security, by the securitisation company or reconstruction company or the secured creditor, as the case may be" shall be omitted;
 - (b) the first proviso shall be omitted;
 - (c) in the second proviso, the word "further" shall be omitted;
- (ii) in section 23, after sub-section (1) so renumbered, the following sub-sections shall be inserted, namely:—**
- "(2)** The Central Government may, by notification, require the registration of transaction relating to different types of security interest created on different kinds of property with the Central Registry.
- (3)** The Central Government may, by rules, prescribe forms for registration for different types of security interest under this section and fee to be charged for such registration."

Earlier Law - Following is the section 23 in the Principal Act- The particulars of every transaction of securitisation, asset reconstruction or creation of security interest shall be filed, with the Central Registrar in the manner and on payment of such fee as may be prescribed, within thirty days after the date of such transaction or creation of security, by the securitisation company or reconstruction company or the secured creditor, as the case may be:

PROVIDED that the Central Registrar may allow the filing of the particulars of such transaction or creation of security interest within thirty days next following the expiry of the said period of thirty days on payment of such additional fee not exceeding ten times the amount of such fee.

Reference of page number of relevant section in the study material- 23.46

Insertion of new chapter IV A

In the principal Act, after section 26A, the following chapter shall be inserted, namely:

"CHAPTER IVA

Registration by Secured Creditors and Other Creditors

(i) **Registration of Secured creditors and other creditors**

26B. (1) The Central Government may by notification, extend the provisions of Chapter IV relating to Central Registry to all creditors other than secured creditors as defined in clause (zd) of sub-section (1) of section 2, for creation, modification or satisfaction of any security interest over any property of the borrower for the purpose of securing due repayment of any financial assistance granted by such creditor to the borrower.

(2) From the date of notification under sub-section (1), any creditor including the secured creditor may file particulars of transactions of creation, modification or satisfaction of any security interest with the Central Registry in such form and manner as may be prescribed.

(3) A creditor other than the secured creditor filing particulars of transactions of creation, modification and satisfaction of security interest over properties created in its favour shall not be entitled to exercise any right of enforcement of securities under this Act.

(4) Every authority or officer of the Central Government or any State Government or local authority, entrusted with the function of recovery of tax or other Government dues and for issuing any order for attachment of any property of any person liable to pay the tax or Government dues, shall file with the Central Registry such attachment order with particulars of the assessee and details of tax or other Government dues from such date as may be notified by the Central Government, in such form and manner as may be prescribed.

(5) If any person, having any claim against any borrower, obtains orders for attachment of property from any court or other authority empowered to issue attachment order, such person may file particulars of such attachment orders with Central Registry in such form and manner on payment of such fee as may be prescribed.

(ii) **Effect of the registration of transactions, etc.**

26C. (1) Without prejudice to the provisions contained in any other law, for the time being in force, any registration of transactions of creation, modification or satisfaction of security

interest by a secured creditor or other creditor or filing of attachment orders under this Chapter shall be deemed to constitute a public notice from the date and time of filing of particulars of such transaction with the Central Registry for creation, modification or satisfaction of such security interest or attachment order, as the case may be.

(2) Where security interest or attachment order upon any property in favour of the secured creditor or any other creditor are filed for the purpose of registration under the provisions of Chapter IV and this Chapter, the claim of such secured creditor or other creditor holding attachment order shall have priority over any subsequent security interest created upon such property and any transfer by way of sale, lease or assignment or licence of such property or attachment order subsequent to such registration, shall be subject to such claim:

Provided that nothing contained in this sub-section shall apply to transactions carried on by the borrower in the ordinary course of business.

(iii) Right of enforcement of securities.

26D. Notwithstanding anything contained in any other law for the time being in force, from the date of commencement of the provisions of this Chapter, no secured creditor shall be entitled to exercise the rights of enforcement of securities under Chapter III unless the security interest created in its favour by the borrower has been registered with the Central Registry.

(iv) Priority to secured creditors.

26E. Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Explanation.—For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

Earlier law- This is a newly inserted chapter after chapter IV. This chapter deals with the Registration by secured creditors and other creditors.

Amendment to Section 27

Section 27 of the Act deals with the penalties.

In section 27, the following **proviso shall be inserted**, namely:—

"Provided that provisions of this section shall be deemed to have been omitted from the date of coming into force of the provisions of this Chapter and section 23 as amended by the

Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016."

Earlier Law- Section 27 lays down the penalties as follows: If a default is made-

- (a) in filing under section 23, the particulars of every transaction of any securitisation or asset reconstruction or security interest created by a securitisation company or reconstruction company or secured creditors; or
- (b) in sending under section 24, the particulars of the modification referred to in that section; or
- (c) in giving intimation under section 25,

then, every company and every officer of the company or the secured creditors and every officer of the secured creditor who is in default shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues.

Reference of page number of relevant section in the study material- 23.46

Omission of Section 28

In the principal Act, section 28 which deals with the penalties for non-compliance of directions issued by RBI, **shall be omitted**.

Earlier Law- Section 28 states that if any securitisation company or reconstruction company fails to comply with any direction issued by the Reserve Bank under section 12 or section 12A, such company and every officer of the company who is in default, shall be punishable with fine which may extend to five lakh rupees and in the case of a continuing offence, with an additional fine which may extend to ten thousand rupees for every day during which the default continues.

Reference of page number of relevant section in the study material- 23.46

Insertion of new Sections 30A, 30B, 30C and 30D.

(1) Power of adjudicating authority to impose penalty

"30A. (1) Where any asset reconstruction company or any person fails to comply with any direction issued by the Reserve Bank under this Act the adjudicating authority may, by an order, impose on such company or person in default, a penalty not exceeding one crore rupees or twice the amount involved in such failure where such amount is quantifiable, whichever is more, and where such failure is a continuing one, a further penalty which may extend to one lakh rupees for every day, after the first, during which such failure continues.

(2) For the purpose of imposing penalty under sub-section (1), the adjudicating authority shall serve a notice on the asset reconstruction company or the person in default requiring such company or person to show cause why the amount specified in the notice should not be imposed as a penalty and a reasonable opportunity of being heard shall be given to such person.

(3) Any penalty imposed under this section shall be payable within a period of thirty days from the date of issue of notice under sub-section (2).

(4) Where the asset reconstruction company fails to pay the penalty within the specified period under sub-section (3), the adjudicating authority shall, by an order, cancel its registration:

Provided that an opportunity of being heard shall be given to such asset reconstruction company before cancellation of registration.

- (2) No complaint shall be filed against any person in default in any court pertaining to any failure under sub-section (1) in respect of which any penalty has been imposed and recovered by the Reserve Bank under this section.
- (3) Where any complaint has been filed against a person in default in the court having jurisdiction no proceeding for imposition of penalty against that person shall be taken under this section.

Explanation.—For the purposes of this section and sections 30B, 30C and 30D,—

- (i) "adjudicating authority" means such officer or a committee of officers of the Reserve Bank, designated as such from time to time, by notification, by the Central Board of Reserve Bank;
- (ii) "person in default" means the asset reconstruction company or any person which has committed any failure, contravention or default under this Act and any person incharge of such company or such other person, as the case may be, shall be liable to be proceeded against and punished under section 33 for such failure or contravention or default committed by such company or person

(2) Appeal against penalties

30B. A person in default, aggrieved by an order passed under sub-section (4) of section 30A, may, within a period of thirty days from the date on which such order is passed, prefer an appeal to the Appellate Authority:

Provided that the Appellate Authority may entertain an appeal after the expiry of the said period of thirty days, if it is satisfied that there was sufficient cause for not filing it within such period.

(3) Appellate Authority

30C. (1) The Central Board of Reserve Bank may designate such officer or committee of officers as it deems fit to exercise the power of Appellate Authority.

(2) The Appellate Authority shall have power to pass such order as it deems fit after providing a reasonable opportunity of being heard to the person in default.

(3) The Appellate Authority may, by an order stay the enforcement of the order passed by the adjudicating authority under section 30A, subject to such terms and conditions, as it deems fit.

(4) Where the person in default fails to comply with the terms and conditions imposed by order under sub-section (3) without reasonable cause, the Appellate Authority may dismiss the appeal.

(4) Recovery of penalties

30D. (1) Any penalty imposed under section 30A shall be recovered as a "recoverable sum" and shall be payable within a period of thirty days from the date on which notice demanding payment of the recoverable sum is served upon the person in default and, in the case of failure of payment by such person within such period, the Reserve Bank may, for the purpose of recovery,—

(a) debit the current account, if any, of the person in default maintained with the Reserve Bank or by liquidating the securities, if any, held to the credit of such person in the books of the Reserve Bank;

(b) issue a notice to the person from whom any amount is due to the person in default, requiring such person to deduct from the amount payable by him to the person in default, such amount equivalent to the amount of the recoverable sum, and to make payment of such amount to the Reserve Bank.

(2) Save as otherwise provided in sub-section (4), a notice issued under clause (b) of sub-section (1) shall be binding on every person to whom it is issued, and, where such notice is issued to a post office, bank or an insurance company, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry or endorsement thereof before payment is made, notwithstanding any rule, practice or requirement to the contrary.

(3) Any claim in respect of any amount, arising after the date of issue of notice under sub-section (1) shall be void as against the demand contained in such notice.

(4) Any person, to whom the notice is sent under sub-section (1), objects to such notice by a statement on oath that the sum demanded or any part thereof is not due to the person in default or that he does not hold any money for or on account of the person in default, then nothing contained in this section shall be deemed to require, such person to pay such sum or part thereof, as the case may be.

(5) Where it is found that statement made by the person under sub-section (4) is false in material particulars, such person shall be personally liable to the Reserve Bank to the extent of his own liability to the person in default on the date of the notice, or to the extent

of the recoverable sum payable by the person in default to the Reserve Bank, whichever is less.

(6) The Reserve Bank may, at any time, amend or revoke any notice issued under sub-section (1) or extend the time for making the payment in pursuance of such notice.

(7) The Reserve Bank shall grant a receipt for any amount paid to it in compliance with a notice issued under this section and the person so paying shall be fully discharged from his liability to the person in default to the extent of the amount so paid.

(8) Any person discharging any liability to the person in default after the receipt of a notice under this section shall be personally liable to the Reserve Bank—

(a) to the extent of his own liability to the person in default so discharged; or

(b) to the extent of the recoverable sum payable by the person in default to the Reserve Bank,

whichever is less.

(9) Where the person to whom the notice is sent under this section, fails to make payment in pursuance thereof to the Reserve Bank, he shall be deemed to be the person in default in respect of the amount specified in the notice and action or proceedings may be taken or instituted against him for the realisation of the amount in the manner provided in this section.

(10) The Reserve Bank may enforce recovery of recoverable sum through the principal civil court having jurisdiction in the area where the registered office or the head office or the principal place of business of the person in default or the usual place of residence of such person is situated as if the notice issued by the Reserve Bank were a decree of the Court.

(11) No recovery under sub-section (10) shall be enforced, except on an application made to the principal civil court by an officer of the Reserve Bank authorised in this behalf certifying that the person in default has failed to pay the recoverable sum.

Earlier law- These are newly inserted sections in furtherance to cognizance of offence

Reference of page number of relevant section in the study material- 23.47

Amendment of Section 31

Section 31 of the Act deals with the Provisions of this Act that shall not to apply in certain cases.

In the principal Act, in section 31, clause (e) shall be omitted.

Earlier Law- Clause (e) to section 31 in the principal Act is as follows- any conditional sale, hire-purchase or lease or any other contract in which no security interest has been created;

Reference of page number of relevant section in the study material- 23.47

Amendment of Section 31A

Section 31A of the Act specifies the certain institutions on which this Act shall not apply.

In the principal Act, in section 31A, **for sub- section (2)**, the following sub-sections shall be substituted, namely:—

"(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days, and if, both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

(3) In reckoning any such period of thirty days as is referred to in sub-section (2), no account shall be taken of any period during which the House referred to in sub-section (2) is prorogued or adjourned for more than four consecutive days.

(4) The copies of every notification issued under this section shall, as soon as may be after it has been issued, be laid before each House of Parliament."

Earlier law- A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

Reference of page number of relevant section in the study material- 23.48

Amendment of Section 32

Section 32 of the Act deals with the Protection of action taken in good faith.

In the principal Act, in section 32, for the words "any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower", **the words "the Reserve Bank or the Central Registry or any secured creditor or any of its officers" shall be substituted.**

Earlier Law- No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act.

Reference of page number of relevant section in the study material- 23.48

Amendment of Section 38

Section 38 of the Act deals with Power of Central Government to make rules.

In the principal Act, in section 38, in sub-section (2),—

- (i) **clause (a) shall be numbered as clause (aa)** and before clause (aa) as so renumbered, the following clause shall be inserted, namely:—
 "(a) other business or commercial rights of similar nature under clause (t) of section 2;"
- (ii) **after clause (bc), the following clauses shall be inserted**, namely:—
 "(bca) the manner of integration of records of various registration systems with the records of Central Registry under sub-section (1) of section 20A;
 (bcb) the terms and conditions of delegation of powers by the Central Government to the Reserve Bank under section 20B.";
- (iii) **after clause (d), the following clauses shall be inserted**, namely:—
 "(da) the form for registration of different types of security interests and fee thereof under sub-section (3) of section 23;"
- (iv) **after clause (f), the following clauses shall be inserted**, namely:—
 "(fa) the form and the manner for filing particulars of transactions under sub-section (2) of section 26B;
 (fb) the form and manner of filing attachment orders with the Central Registry and the date under sub-section (4) of section 26B;
 (fc) the form and manner of filing particulars of attachment order with the Central Registry and the fee under sub-section (5) of section 26B."

Earlier Law- Section 38 of the principal act deals with the following Power of Central Government to make rules- (1) The Central Government may, by notification and in the Electronic Gazette as defined in clause (s) of section 2 of the Information Technology Act, 2000 (21 of 2000), make rules for carrying out the provisions of this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

- (a) the form and manner in which an application may be filed under sub-section (10) of section 13;
- (b) (b) the manner in which the rights of a secured creditor may be exercised by one or more of his officers under sub-section (12) of section 13;
 (ba) the fee for making an application to the Debts Recovery Tribunal under sub-section (1) of section 17; (bb) the form of making an application to the Appellate Tribunal under sub-section (6) of section 17;

- (bc) the fee for preferring an appeal to the Appellate Tribunal under sub-section (1) of section 18;
- (c) the safeguards subject to which the records may be kept under sub-section (2) of section 22;
- (d) the manner in which the particulars of every transaction of securitisation shall be filed under section 23 and fee for filing such transaction;
- (e) the fee for inspecting the particulars of transactions kept under section 22 and entered in the Central Register under sub-section (1) of section 26;
- (f) the fee for inspecting the Central Register maintained in electronic form under sub-section (2) of section 26;
- (g) any other matter which is required to be, or may be, prescribed, in respect of which provision is to be, or may be, made by rules.

Reference of page number of relevant section in the study material- 23.49

Vide RBI Notification dated 28th April, 2017

In exercise of the powers conferred by clause (b) of sub-section (1) of section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, Reserve Bank of India hereby specifies that the Net Owned Fund (NOF) for Asset Reconstruction Companies (ARCs) shall be minimum Rupees One Hundred Crore on an ongoing basis with effect from the date of this Notification.

In the principal Act, in section 3, -

Earlier Law: In section 3 to sub-section (1), clause (b), dealt with - "(b) having net owned fund of not less than two crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify:"

Refer section 3 of this chapter in this publication which was amended by the Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016.

Amendment consequent to enforcement of Insolvency and Bankruptcy Code, 2016

According to **section 251 of the Insolvency and Bankruptcy Code, 2016**, amendment is made in the section 13(9) of the SARFAESI Act, 2002. For the words "In the case of", the words and figures "**Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of**" shall be substituted.

Earlier Law: In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors. [Section 13(9)]

Reference of page number of relevant section in the study material- 23.39

24

PREVENTION OF MONEY LAUNDERING ACT, 2002

Amendment to the Prevention of Money-Laundering Act, 2002 through the Finance Act, 2016 notified on 14th May 2016 w.e.f 1.06.2016.

These are the relevant amendments made in the Prevention of Money-laundering Act, 2002 with effect from the 1st day of June, 2016 -

(a) **for section 25, the following section shall be substituted, namely:—**

“25. The Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act.”;

Earlier Law- Section 25 of the Principal Act empowers the Central Government to establish an Appellate Tribunal to hear appeals against the orders of the Adjudicating Authority and the authorities under this Act.

Reference of page number of relevant section in the study material- 24.11

(b) **sections 27, 28, 30, 31, 32, 33 and 34 of the Principal Act shall be omitted;**

Earlier Law- For reference of these omitted sections, see the Study Material

Reference of page number of relevant section in the study material- 24.12

(c) **in sections 36, 37, 38 and 40, for the word “Chairperson” wherever it occurs, the word “Chairman” shall be substituted;**

Earlier Law- In section 37, 38 and 40 of the Principal Act, word “Chairperson” have been used

Reference of page number of relevant section in the study material- 24.12