Paper-13: CORPORATE LAWS AND COMPLIANCE

SECTION - A
Answer Q No. 1 (Compulsory) and any 4 from the rest of Section A

Question 1:

(a) The issued, subscribed and paid-up share capital of Zeeshan Ltd. is ₹10 lakhs consisting of 90,000 equity shares of ₹10 each fully paid up and 10,000 preference shares of 10 each fully paid up. Out of members of company, 400 members holding one preference share each and 50 members holding 500 equity shares applied for relief under sections 397 and 398 of the Companies Act, 1956. As on the date of petition, the company had 600 equity shareholders and 5,000 preference shareholders.
Examine whether the above petition under sections 397 and 398 is maintainable. Will your answer be different, if preference shareholders have subsequently withdrawn their consent? [6]

(b) X Co. Ltd., a closely held company comprised of two groups of shareholders – one foreign and the other Indian. The foreign group holds 60% and the Indian 40% of the shares of the company. As per Articles of Association of the company both groups had equal managerial powers. The relationship between the two groups soured and the operations of the company reached a deadlock. The Indian group, therefore, approached the Company Law Board for action against the foreign group for oppression. Referring to the provisions of the Companies Act, 1956 and/or the decided case laws, discuss -

(i) Whether the contention of oppression against the foreign group by the India group is tenable?

(ii) What are the powers of the Company Law Board in this regard? [2+3]

(c) Arjun buys 500 shares in a company from Nishant on the faith of a share certificate issued by the company. Arjun tenders to the company a transfer deed, duly executed, along with Nishant's share certificate for transferring the shares in his name. The company discovers that the certificate in the name of Nishant has been fraudulently obtained and refuses to register the transfer. Advise Arjun. Is Arjun entitled to get the shares transferred in his name? [4]

Answer:

(a)

As per section 399, in the case of a company having a share capital, members eligible to apply for oppression and mismanagement shall be lowest of the following:
(i) 100 members; or
(ii)1/10th of the total number of members; or
(iii)Members holding not less than 1/10th of the issued share capital of the company
It must be noted that the term member includes an equity shareholder as well as preference shareholder.
The consent to be given by shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by shareholder during the course of proceedings does not affect the maintainability of the application **[Rajahmundri electric Supply Corporation v Nageshwara Rao AIR 1956 SC 213].**
In the present case, the shareholding pattern of the company is as follows:
(i) ₹ 9,00,000 equity share capital held by 600 members
(ii) ₹ 1,00,000 preference share capital held by 5,000 members
(iii) ₹10,00,000 total share capital held by 5,600 members
The application alleging oppression and mismanagement has been made by the members as

follows :

Number of members making the application:	
Preference shareholders	400
Equity shareholders	50
Total members	450

Amount of share capital held by the members making the application:

Preference share capital	4,000 (400 preference shares of RS. 10 each)
Equity share capital	5,000 (500 equity shares of Rs. 10 each)
Total capital	9,000

The application shall be valid if it has been made by the lowest of the following :
(i)100 members
(ii)560 members (being 1/10th of 5,600)
(iii) Members holding Rs. 1,00,000 share capital (being 1/10th of Rs. 10,00,000)
As is evident, the application made by 450 members meets the eligibility criteria specified under section 399, and therefore the application is maintainable.
Such application shall remain valid despite the fact that some of the applicants have subsequently withdrawn their consents **[Rajahmundri electric Supply Corporation v Nageshwara Rao AIR 1956 SC 213].**
It has been assumed that the members making the application have paid all the calls due on their shares.

(b) An application seeking relief from the Company Law Board must make out a prima facie case that the degree of oppression is so severe that there is just and equitable ground for winding up of the company. The answer to the given problem is as follows:

(i) Both the India group and foreign groups are equally strong, and one is unable to oppress the other. As such, there may be a deadlock, but not oppression. It is not a case for winding up of the company and so relief under section 397 is not available [Gnanasambandam (CP) v Tamiland Transports (Coimbatore) Pvt. Ltd. (1971) 41 Comp Cas 26]. Thus, the contention of the Indian group that the foreign group is acting in a manner oppressive to the Indian group is not tenable.

(ii) The powers of the Company Law Board under section 397 are discretionary in character. Company Law Board may order the foreign group to buy out the minority group shareholding at the fair price with necessary permission as was held in Yashovardhan Saboo v Groz Beckert Saboo Ltd. (1993) 1 Comp LJ 20. However, where there was deadlock in the management of private limited company and both the parties failed to buy the other group, the company was wound up under just and equitable clause [Kishan Lal Ahuja v Surech Kumar Ahuja]. Thus, in the given case, if both the groups fail to exercise the option to buy the other group, Company Law Board may order the company to be wound up.

(c) The facts of the problem are similar to the case of Re, Otto Kopie Diamond Mills (1893) 1 Ch. 618.
In this case, A bought from B 4,000 shares in a company on the faith of share certificate issued by the company. A tendered to the company a transfer deed from B to himself duly executed, together with the share certificate. The company discovered that the certificate in the name of B had been fraudulently obtained and refused to register the transfer. It was held that although the certificate was not a warranty of title upon which A could maintain an action against the company, it stopped the company from disputing A's right to be registered. A could claim

damages from the company to the extent of the value of the shares at the time of the refusal to register the transfer.
Thus, in the given problem as the circumstances are similar to the case cited above, Arjun is entitled to get the shares registered in this name and claim damages from the company to the extent of the value of shares at the time of the refusal to register the transfer by the company.

Question 2:

(a) Smart Technologies Ltd. has been wound up and the Official Liquidator has been asked to take charge of the Company. Briefly explain the relevant provisions regarding filing of Statement of Affairs in relation to the Company in liquidation. [8]

(b) "Life Policy cannot be questioned after the expiry of 2 years from the date on which it was effected". Explain with reference to Section 45 of the act. [4]

(c) The object clause of the Memorandum of a company empowers it to carry on distillery business and any other business that is allied to it. The company wants to alter its Memorandum so as to include the cinema business in its objects clause. Advise the company. [3]

Answer:
(a)
Sec. 454 deals with Statement of Affairs to be made to Official Liquidator, in a compulsory winding - up. The provisions are summarized as under:

1. Situations:
A Statement of Affairs of the Company shall be made out and submitted to the Official Liquidator, where the Court has:
(a) made a winding-up order, or
(b) appointed the Official Liquidator as Provisional Liquidator.

2. Contents:
The Statement of Affairs shall be in the prescribed form, with the following particulars:
(a) Assets of the Company [Cash balance in Hand and at Bank, and Negotiable Securities, if any, held by the Company, should be separately stated]
(b) Debts and Liabilities of the Company,
(c) Names, Residences and Occupations of its Creditors, with break -up of Secured and Unsecured Debts, [In case of Secured Debts, particulars of securities given, whether by Company or an Officer thereof, their value and dates on which they were given, should be stated.]
(d) Debts due to the Company, and the Names, Residences and Occupations of the persons from whom they are due and the amount likely to be realised on account thereof,
(e) Such further or other information as may be prescribed, or as the Official Liquidator may require.

3. Verification:
The Statement shall submitted and verified (by an affidavit) by one or more Directors, Manager, Secretary or other Chief Officer of the Company, on the relevant date. Further, the Official Liquidator may require any of the following persons to verify the statement:
(a) Present or Past Officers of the Company,
(b) Persons who have taken part in the formation of the Company at any time within preceding 1 year,

(c) Present or Past Employees of the Company within preceding 1 year, and are, in the opinion of the Official Liquidator, capable of giving the information required,
(d) Present or Past Officers / Employees of any other Company, which is an Officer of the Company to which the statement relates.

4. Time Limit:
The statement shall be submitted within 21 days from the relevant date. The Official Liquidator or the Court may, for special reasons, extend this time upto 3 months.
Note: For this purpose, "Relevant Date" means:

Where Provisional Liquidator	Relevant Date
is appointed	Date of appointment of Provisional Liquidator
is not appointed	Date of winding-up order

5. Reimbursement of Cost:
Any person making, or concurring in making, the Statement and Affidavit u/s 454 shall be entitled to receive the costs and expenses incurred in preparation of the Statement. The amount, as considered reasonable by him, shall be paid by the Official / Provisional Liquidator, out of the assets of the Company.

6. Default:
Default in complying with Sec.454, without reasonable excuse, is punishable with imprisonment upto 2 years, and /or fine upto ₹1,000 for every day during which the default continues.

7. Inspection:
Any Creditor or Contributory shall be entitled to inspect the Statement of Affairs and to a copy thereof or extract there from, on payment of the prescribed fee. Any person untruthfully so stating himself to be a Creditor or Contributory shall be guilty of an offence u/s 182 of Indian Penal Code, and shall be punishable accordingly.

8. Application of Sec.454 to voluntary winding - up [Sec. 511A]:
Provisions of Sec. 454 shall, so far as may be, apply to every voluntary winding -up as they apply to winding-up by the Court except that reference to:
(a) the Court shall be omitted,
(b) the Official Liquidator or Provisional Liquidator shall be construed as reference to the Liquidator, and
(c) the "Relevant Date" shall be construed as reference to the date of commencement of winding- up.

(b)
Inaccurate or false particulars: An insurer shall not call in question a Life Insurance Policy after the expiry of 2 years from the date on which it was effected on the ground that –

(a) A statement made in the proposal for insurance, or
(b) In any report of a Medical Officer, or Referee, or Friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false. [Sec. 45]

Exception: The above provision does not apply if the Insurer shows that such statement was on –
(a) A material matter or suppressed facts which it was material to disclose, and
(b) That it was fraudulently made by the policy -holder, and
(c) That the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose.
Only if all the 3 conditions are satisfied conjointly the insurer can repudiate after 2 years –**LIC Vs. G.M.Chennabasamma.**

LIC challenged a policy after 2 years after its issue. It was in evidence that the assured fraudulently suppressed facts. It was held that the LIC was not liable – **Mithoolal Vs. LIC (SC 1962).** Held that "If a period of 2 years has expired from the date on which the policy of life insurance was effected, that policy cannot be called in question by an insurer on the ground that a statement made in the proposal for insurance or on any report of a medical officer or referee, or a friend of the insured, or in any other document leading to the assure of the policy, was inaccurate or false." – **LIC Vs. Janaki Ammal (Mad HC 1968).**

Note:

(a) Policies issued in India shall be subject to law in force in India.
(b) The insurer can notify the Policyholder of the options available to him in case of non-payment of premiums.
(c) The Life Policy Holders have the right to seek for Medical Reports procured by the Insurer.

(c) Section 17(1) of the Companies Act, 1956 permits alteration of Memorandum by passing a special resolution to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company.
Thus section 17(1) does not prohibit a company to diversify in areas other than those specified in the Memorandum. But, the business sought to be added must be such which can conveniently or advantageously be combined with the business of the company. The Punjab High Court in Punjab Distilling Industries Ltd. V. Registrar of Companies [1963] 83 Comp. Cas. 811 held that the cinema business could not be either conveniently or advantageously combined with the distillery business and, therefore, disallowed change of objects. Accordingly, alteration shall not be allowed.

Question 3:

(a) A Ltd. and B Ltd. both dealing in Chemicals and Fertilizers have entered into an agreement to jointly promote the sale of their products. A complaint has been received by the CCI stating that the agreement between the two is Anti-Competitive and against the interest of other in the trade. Examine what are the factors the CCI will take into account to determine whether the agreement in question will have any appreciable adverse effect on competition in the market. [5]

(b) Mr. Rahul was appointed as an Additional Director of Conservative Finance Ltd. w.e.f. 1st October 2012 in a casual vacancy by way of a circular resolution passed by the Board of Directors. The next AGM of the Company was due on 31st March 2013 but the same was not held due to delay in the finalization of the accounts. Some of the Shareholders of the Company have questioned the validity of the appointment of Mr. Rahul and his continuation as Additional Director beyond 31st March 2013. Advise the Company on the complaints made by the Shareholders. [6]

(c) Mr. Bibek, a chartered accountant is a director in PQR Limited. The company proposes to appoint or engage the firm Bibek and Co. in which Mr. Bibek is a partner in one or more of the following capacities:

(i) Consultants on regular retainer basis.

(ii) Authorised representative to appear before tribunals.
Discuss whether the provisions of section 314 of the Companies Act are attracted in the above situations. [4]

Answer:
(a)

For determining whether a Combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the CCI shall have due regard to all or any of the following factors:

i) Actual and potential level of competition through imports in the market,
ii) Extent of barriers to entry into the market,
iii) Level of combination in the market,
iv) Degree of countervailing power in the market,
v) Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins,
vi) Extent of effective competition likely to sustain in a market,
vii) Extent to which substitutes are available or are likely to be available in the market,
viii) Market share, in the relevant market, of the persons or enterprise in a combination individually and as a combination,
ix) Likelihood that the combination would result in the removal of a vigorous and effective competitor(s) in the market,
x) Nature and extent of vertical integration in the market,
xi) Possibility of a failing business,
xii) Nature and extent of innovation,
xiii) Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition,
xiv) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

(b) The given problem relates to sections 260 and 262 of the Companies Act, 1956.

The Legal Position Additional Directors (Section 260)

- The Board may appoint the additional directors in pursuance of the provisions of section 260.
- The Board may, in its discretion, appoint the additional directors whenever it deems fit.
- The appointment of additional directors can be made by the Board either by passing a resolution at a Board meeting or by passing a resolution by circulation.
- An additional director holds office upto the date of next annual general meeting. A director appointed as an additional director vacates his office, at the latest, on the last day on which the annual general meeting could have been called as required by section 166, and cannot continue in office thereafter on the ground that the meeting was not or could not be called within the time prescribed under section 166 [Krishna Prasad Pilani v Colaba Land and Mills Co. (1959) 29 Comp Cas 273; Departmental Circular No. 8/3(260)/63-PR, dated 05.02.1963].

Director filling a casual vacancy (Section 262)

- The Board is authorised to fill a casual vacancy arising in the office of a director appointed in general meeting.
- The director filling a casual vacancy shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.
- A casual vacancy cannot be filled by passing a resolution by circulation under section 289.

The given case

- The Board has appointed Mr. Rahul as an additional director in a casual vacancy.
- The appointment of additional director has been made by passing a circular resolution.
- The last date for holding the annual general meeting was 31st March, 2013. The annual general meeting has not been held till 31st March, 2013.
- The issue raised in the given problem is:

  (a) Whether appointment of Mr. Rahul is valid or not; and

  (b) Whether Mr. Rahul can continue after 31st March, 2013.

Analysis of the case

1. Neither section 260 nor section 262 authorises the Board to appoint an additional director to fill the casual vacancy.

- If appointment of Mr. Rahul is made as an additional director, then, the provisions of section 260 apply, and so such appointment cannot amount to filling a casual vacancy.
- If Mr. Rahul is appointed to fill a casual vacancy, then, the provisions of section 262 apply to him, and so Mr. Rahul shall not be an additional director.
- Thus, a combined reading of sections 260 and 262 makes it clear that the appointment of Mr. Rahul as an additional director to fill the casual vacancy is not possible at all.

2. Mr. Rahul has been appointed to fill the casual vacancy by passing a circular resolution. Since, the appointment of a director filling a casual vacancy requires passing of a resolution in a board meeting only, therefore, the appointment of Mr. Rahul is in contravention of section 262, and is therefore, invalid.

Conclusion

- The complaint made by the shareholders is valid.
- The appointment of Mr. Rahul is not valid since it is in contravention of sections 260 and 262.
- Mr. Rahul cannot continue as a director after the date of annual general meeting, since his very appointment is void ab initio.

(c) The restrictions on holding of an office or place of profit under section 314 do not extend to rendering of professional services, such as services rendered by doctor, engineer, architect, chartered accountant, advocate or solicitor [Re, Harper Ticket Issuing and Recording Machines Ltd. (1912) WN 263]. It is considered that an advocate or solicitor appears in a Court of law as an officer of the Court. Such appearance and receiving fees on that account cannot lead to an inference of an office or place of profit, However, if the advocate or solicitor is appointed on a regular retainership basis, section 314 shall apply [Department Circular No. 14/75 98/12/314(1B)/75-CL-V), dated 05.06.1975].

(i) In the given case, the appointment of Bibek and Co. is made on regular retainership basis and so it amounts to holding of an office or place of profit. Section 314(1) would apply to such appointment if Bibek and Co., draws remuneration of ₹50,000 or more. If Bibek and Co. draws remuneration exceeding ₹2,50,000 per month, section 314(1B) will apply.

(ii) Where a chartered accountant undertakes a particular case and professional fees is paid to him, he renders the services in a professional capacity. Consequently, it does not amount to an office or place of profit and therefore section 314 is not attracted. Engaging a person in a particular case or for undertaking a particular assignment of consultancy, or rendering advice on a specific matter, shall not by itself constitute appointment to an office or place of profit.

However, if the terms of engagement are that he should attend to all the cases or act as adviser in the connected matters, whether generally or in a particular city or town, then, even though he may be paid on a case to case basis, it shall amount to appointment to an 'office or place of profit' under the company.

Question 4:

(a) MR. PURU, who does not hold any shares in his name is appointed as Director in Wonderful Company on 1st April, 2013. His wife holds 10,000 Equity Shares in the company in her name singly. Certain members of the Company objects to MR. PURU's appointment on the ground that since he does not hold any shares in his own name, his appointment is violative of the provisions of the Companies Act, 1956. Articles of the Company are silent on the issue of holding any shares by a Director. Examine the provisions of the Act and decide

(i) Whether contention of the members is tenable?

(ii) Whether MR. PURU's wife's shareholding in the company can be the ground for MR. PURU's continuation as a director in the company?

(iii) What would be your answer in case 'MR. PURU' is one of the subscriber of the Memorandum of Association? [6]

(b) What is a Nidhi company? Explain the procedure to incorporate a Nidhi company. [4]

(c) Adarsh company's Articles of Association do not contain any provision for nomination of directors by a financial institution. The company has borrowed long-term funds from the IDBI and ICICI Ltd. A & B are nominated by said lenders respectively on the Board of the company. Advise whether the company can accept the nominations. [5]

Answer:

(a) The answer to the given problem is as follows:

(i) Mr. Puru has been appointed as a director. The members object to the appointment on the ground that Mr. Puru does not hold any shares in the company.

- As per section 274, a person is disqualified for directorship on 7 grounds specified in the said section. However, the ground of 'not holding any shares in the company' is not contained in the grounds of disqualification specified under section 274.
- Further, as per section 270, a director can continue, without obtaining the qualification shares, for a period of 2 months after his appointment.
- Also, as per section 283, the office of a director becomes vacant only if he fails to obtain the qualification shares within 2 months after his appointment as a director.
- Thus, the contention of the members is not correct in view of the provisions of section 270, 274, and 283.

(ii) Wife of Mr. Puru holds 10,000 equity shares in her own name. The issue in the question is as to whether the shares held in wife's name can be regarded as share qualification for Mr. Puru.

- As per section 270, where the articles require holding of qualification shares, a director must hold the qualification shares within a period of 2 months. The word 'hold' used under section 270 clearly suggests that the director must become the registered holder of shares, i.e. the shares must get registered in the name of the director.
- In other words, the qualification shares are to be held in the name of the director himself. If the shares are held in the name of wife or any other person, the director cannot be said to be a holder of qualification shares.
- Thus, Mr. Puru cannot continue in office after a period of 2 months after his appointment as a director on the ground that wife of Mr. Puru holds the shares in her name.

(iii) In this case, Mr. Puru is a Subscriber to the Memorandum of Association.

- As per section 12, every subscriber to the Memorandum of Association has to subscribe for at least one share.
- Since the articles of Wonderful Company are silent, the share qualification of every director shall be holding of at least 1 share in the company (Regulation 66 of Table A).
- Mr. Puru, being a subscriber to the memorandum of association, must have subscribed to at least one share.
- Therefore, the share(s) subscribed to by Mr. Puru in the capacity of subscriber to the memorandum of association would be the share qualification of Mr. Puru, and would entitle him to continue as a director.

(b)

Nidhi company according to Section 620A of Companies Act 1956 means a company which the Central Government may, by notification in the Official Gazette, declare to be a Nidhi. Nidhi Companies are Companies notified by the Central Government as such under Section 620A of the Companies Act, 1956. These Companies mainly engage in the business of collecting deposits in the form of Savings Deposit, Recurring Deposit etc. And also lend the same to the members of the Company. One of the important feature of a Nidhi Company is that it deals only with members (share holders). Thus if you want to deposit any amount in a Nidhi Company or want to avail a loan from a Nidhi Company, first you have to become a member by subscribing to shares of the Company.

The present procedure to incorporate a Nidhi company is as follows:

- Name of the Company: To get approval of the name by which the company will be known. The promoters propose three names to ROC. After verification the ROC is able to either identify one name or else calls for a panel of fresh names. Following this exercise a name is finally allotted by ROC to the promoters which will be used as the name of the company. But the word „Nidhi" cannot be used as a part of the name at this stage.
- Submission of MOA & AOA: The promoters submit the Memorandum and Articles of Association to ROC who after examination registers the company and issues a Certificate of Incorporation.
- Submission of other documents: The company submits to the ROC documents such as a Statement in lieu of Prospectus, declaration by the promoters etc., specified under Section 149 of the Companies Act. ROC registers these documents after corrections if any and issues a Certificate of Commencement of Business.

At this stage there is no stipulation as to the membership strength of the company nor any restriction regarding capital for doing business. The company can receive deposits and lend without any restriction on rates of interest and for any period of time. Consequently, the functioning of such companies is not restricted or supervised by the authorities.

(c) A company may appoint a nominee director only if the articles of the company authorise it to appoint a nominee director. Further, a nominee director shall be appointed only out of 1/3rd of total number of directors so as to comply with the requirements of sections 255 and 256.
However, in case of some financial institutions (e.g., UTT, LIC and IDBI), the relevant Acts by which they are constituted, empower them to appoint a nominee director at the Board of an assisted company. These special provisions giving right of nomination to the financial institution override the provisions of the Companies Act relating to the appointment, retirement of directors, holding of qualification shares, determination of directors liable to retire by rotation, etc.
IDBI is a financial institution created by a special Act of Parliament, i.e., IDBI Act, 1964. The IDBI Act contains provisions relating to appointment of nominee directors by the IDBI, even if the articles of the company do not contain such a provision in this regard. Therefore, nominee A can be appointed by the company even if no such power is contained in the articles of the company.
However, ICICI Ltd. is a company formed and registered under the Companies Act, 1956. Therefore, a nominee of ICICI Ltd. can be appointed only if a provision in the articles of the company authorise the company to appoint a nominee director. Further, the appointment of nominee director must be made in conformity with the provisions of sections 255 and 256 of Companies Act, 1956, i.e., such a nominee director shall be included in total number of directors, and if he is appointed as a non-rotational director, he must fall within 1/3rd of total number of directors. Also, his appointment should be within the maximum number of directors as specified in the articles of the company. Since, the articles of the company do not contain any provision for nomination of a director by a financial institution, the articles need to be amended first, and only after such amendment, the nominee of ICICI Ltd. can be appointed.

Question 5:

(a) Is the Central Government empowered to supersede the Authority under Insurance Regulatory & Development Authority Act, 1999? Explain. [5]

(b) M/s. Ashis Holding Ltd. has filed the annual accounts for the year ended 31.3.2013 with the Registrar Of Companies, Kolkata. The registrar, after examination of the accounts issued a show cause notice to the company and its directors why prosecution proceedings should not be launched for not disclosing true and fair view of the state of affairs of the company. After careful examination you find that the registrar is justified in issuing the show cause notice. Advise as to how the company and its directors can save themselves from the prosecution proceedings under the provisions if the Companies Act. [4]

(c) M/s X Ltd. and its two directors have received a show cause notice from the Registrar of Companies, Mumbai as to why prosecution proceedings should not be launched against them for violation of the provisions of Section 297 of the Companies Act, 1956 in not obtaining the previous approval of the Central Government in respect of a contract entered into by the company with a firm in which one of the directors of the company is interested as a partner. The company seeks your help. Advise the company the steps that should be taken to avoid prosecution proceedings, assuming that they have committed the offence. [3]

(d) The Directors of Technosoft Industries Ltd, registered in Calcutta, propose to hold the next Board Meeting in May 2014. They seek your advice in respect of the following matters –

(i) Can the Board Meeting be held in Chennai, when all the Directors of the Company reside at Calcutta?
(ii) Can the Board meeting be called on a Public Holiday and that too after business hours as majority of the Directors of the Company have gone to Chennai on vacation?
(iii) Is it necessary that the notice of the Board meeting should specify the nature of business to be transacted? [3]

Answer:

Section 19 empowers the Central Government to supersede the Authority. These provisions may be explained as follows:

1. Reasons for supersession [Section 19(1)] The Central Government may supersede the Authority if it is of the opinion:
(a) That, on account of circumstances beyond the control of the Authority, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or
(b) That the Authority has persistently defaulted in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act and as a result of such default the financial position of the Authority or the administration of the Authority has suffered; or
(c) That circumstances exist which render it necessary in the public interest to supersede the Authority.

2. Conditions for making an order of supersession [Section 19(1) and Proviso to Section 19(1)]
(a) The Central Government shall be required to issue a notification stating therein the reasons for supersession and the period of supersession, which shall not exceed 6 months.
(b) Before issuing any such notification, the Central Government shall give a reasonable opportunity to the Authority to make representations against the proposed supersession and shall consider the representations, if any, of the Authority.
(c) The Central Government shall appoint a person to be the Controller of Insurance under section 2B of the Insurance Act, 1938, if not already done.

3. Effects of supersession [Section 19(2)] Upon the publication of notification under sub-section (1) superseding the Authority, -
(a) the Chairperson and other members shall, as from the date of supersession, vacate their offices as such;
(b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Authority shall, until the Authority is reconstituted under subsection (3), be exercised and discharged by the controller of Insurance; and
(c) all properties owned or controlled by the Authority shall, until the Authority is reconstituted under sub-section (3), vest in the Central Government.

4. Reconstitution of Authority [Section 19(3)] On or before the expiration of the period of supersession specified in the notification issued under subsection (1), the Central Government shall reconstitute the Authority by a fresh appointment of its Chairperson and other members and in such case any person who had vacated his office under clause (a) of sub-section (2) shall not be deemed to be disqualified for reappointment.

5. Laying of documents before the Parliament [Section 19(4)] The Central Government shall cause a copy of the notification issued under sub-section (1) and a full report of any action

taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest.

(b) As per section 621A, following offences can be compounded:
(i) Offences punishable with fine.
(ii) Offence punishable with fine or imprisonment or both.

Offences punishable with fine not exceeding ₹50,000 can be compounded by the Regional Director. Application for compounding of an offence can be made even before the institution of any prosecution. Where an offence is compounded, then no prosecution shall be launched in relation to that offence.

Case (i)- M/s Ashis Holdings: In the given case the offence relates to non-disclosure of true and fair view of the state of affairs as required under section 211(1) of the Act. The offence is punishable with fine not exceeding ₹10,000 or imprisonment upto 6 months or both. Therefore such offence can be compounded by the Regional Director. The Regional Director has the power to give directions to the company to make good the default.

(c)
Case (ii)- M/s X Ltd. In the given case the offence relates to contravention of the provisions of section 297. However, no specific penalty has been provided either in section 297 or in any other section of the Act contravention of section 297. Accordingly, the penalty for contravention of section 297 shall be levied per the residuary penalty provision, i.e. section 629A, which is fine upto ₹5,000 plus a fine upto ₹500 per day where the offence is of continuing nature. Since the offence is punishable with fine only, it can be compounded. The contravention of section 297 cannot be said to be of continuing nature. Accordingly, the maximum amount of fine shall be ₹5,000. Therefore, such offence can be compounded by the Regional Director. Thus, to avoid prosecution, the company or any of the directors, who are officer in default, may make an application to the Registrar for compounding of offence, in accordance with the provisions of section 621A. The Registrar shall forward the application to the Regional Director. It is the discretion of the Regional Director whether or not to compound the offence. If the Regional Director makes an order for compounding, the company and every officer in default shall pay such amount as may be specified by the Regional Director. Where an offence is compounded, no prosecution shall be launched in relation to that offence.

(d)
1. Place: Board Meeting need not be held only at the "Registered Office". It can be held at any convenient place, different from the Registered Office also. Also Directors can hold a Board Meeting in a foreign Country, if circumstances justify it.
2. Time: Sec. 166 requires that AGM shall be held during business hours, and on a day this is not a Public Holiday. There is no similar provision for Board Meetings, and hence Board Meetings may also be held on Public Holidays or after business hours. So, Board Meeting can also be held on a Public holidays unless AOA provides otherwise.
3. Agenda: Law does not require an agenda for a Board Meeting, and any business whatsoever can be transacted at the Board Meeting. The Board can transact business even without a formal agenda.

Question 6:

(a) The Board of Directors of M Limited propose to donate ₹3,00,000 to a school established exclusively for the benefit of children of employees and also donate ₹50,000 to a political party during the Financial year ending 31st March, 2013. The average net profits determined in

accordance with the provisions of Sections 349 and 350 of the Companies Act, 1956 during the three immediately preceding financial years is ₹40,00,000.
Examine with reference to the provisions of the Companies Act, 1956 whether the proposed donations are within the powers of the Board of Directors of the Company. [5]

(b) A government company holds 49% of the subscribed share capital in Shaheen & Co. Ltd. Mr. Rishi has been appointed as the auditor at the Annual General Meeting of Shaheen & Co. Ltd. through an ordinary resolution. Certain members of the company object to this appointment on the ground that the appointment of auditors is violative of the provisions of the Companies Act, 1956. Examine the legal position with reference to the relevant provisions of the Companies Act, 1956. [6]

(c) Board of Directors of M/s. ABee Ltd, in its meeting held on 29th May 2013, declared an interim dividend payable on paid up Equity Share Capital of the Company. In the Board Meeting Scheduled for 10th June 2013, the Board wants to revoke the said declaration. You are required to state with reference to the provisions of the Companies Act, 1956 whether the Board of Directors can do so. [4]

Answer:
(a)
As per section 293(1)(e), without the prior consent of the shareholders in general meeting, the Board shall not contribute to charitable and other funds not directly relating to the business of the company or the welfare of its employees, if the amounts contributed in a financial year will exceed:
(i) ₹50,000; or
(ii) 5% of average net profits (as determined under sections 349 and 350) during 3 immediately preceding financial years, whichever is greater.

In the given case, donation of ₹3,00,000 to a school run exclusively for the benefit of children of employees amounts to welfare expenses for the employees by which the employees are likely to receive benefits, and there will be an inducement on the part of the employees to increase the effort. As such, the donation of ₹3,00,000 is outside the purview of charitable donations. Therefore, donations of ₹3,00,000 to the school established exclusively for the benefit of children of employees is within the powers of the Board, and so the approval of members in general meeting is not required. As per section 293A, a company shall not make a political contribution unless all the following conditions are satisfied.
(i) The company is not a Government company.
(ii) The company has been in existence for 3 or more financial years.
(iii) The aggregate amount of political contribution in a financial year shall not exceed 5% of average net profits (as determined under sections 349 and 350) during 3 immediately preceding financial years.
(iv) The Board shall make a political contribution only by passing a resolution at a Board meeting.
(v) The company shall disclose in its profit and loss account the amount of political contribution and the name of the political party or the person to whom such amount has been contributed.

In the given case, the company fulfills all the conditions prescribed under section 293A. Accordingly, it can make political donations upto ₹2,00,000 (being 5% of ₹40,00,000). As in the given case, the Board has donated only ₹50,000, the donation is well within the limits and is in accordance with section 293A. The Board shall make such political contribution only by passing a resolution at a Board meeting. Further, adequate disclosure shall be made in the profit and loss account.

(b) The given problem relates to Section 224A of the Companies Act, 1956.

The legal position:

1. Requirement of special resolution for appointment or reappointment of auditors

The appointment or reappointment of an auditor shall be made by a special resolution if not less than 25% of the subscribed share capital, whether singly or in any combination is held, by:
(i) A Public Financial Institution;
(ii) A Government Company;
(iii) The Central Government;
(iv) Any State Government;
(v) Any financial or other institution established by any Provincial or State Act in which a State Government holds not less than 51% of the subscribed share capital;
(vi) A nationalised bank;
(vii) An insurance company carrying on general insurance business.

2. Consequences of failure to pass the special resolution
Where a company to which this section applies omits or fails to pass a special resolution it shall be deemed that no auditor or auditors had been appointed by the company and thereupon the company shall, within 7 days, give notice of that fact to the Central Government and the Central Government may appoint a person to fill the vacancy.

The given case
A Government Company holds 49% of the subscribed share capital in Shaheen & Co. Ltd. Therefore, the provisions of section 224A must be complied with for appointing the auditors. However, Mr. Rishi has been appointed as the auditor at the Annual General Meeting by passing an ordinary resolution.

Conclusion
The appointment of Mr. Rishi as an auditor in the annual general meeting is violative of the provisions of section 224A. This is so because a Government Company holds more than 25% of the subscribed share capital of Shaheen & Co. Ltd., and therefore, the appointment of auditors requires a special resolution. Accordingly, the contention of the shareholders that appointment of auditors is violative of the certain provisions of the Companies Act, 1956 (viz. Section 224A) is correct, and so it shall be deemed that no auditors were appointed by Shaheen & Co. Ltd. In this case, Shaheen & Co. Ltd. is required to intimate to the Central Government the fact that no auditors were appointed in the Annual General Meeting. Such intimation shall be given within 7 days of conclusion of the Annual General Meeting. Thereafter, the Central Government shall fill the vacancy.

(c)
As per Sec. 2(14A), Dividend includes any Interim Dividend. Therefore, all the provisions applicable to final dividend shall equally apply to interim dividend.

Principle:
Interim Dividend, once declared, like Final Dividend, is a debt due from the Company. Accordingly, once declared, Interim Dividend cannot be revoked except under the same circumstances in which the final dividend can be revoked. The amount of Interim Dividend is to be compulsorily deposited in a separate bank account, within 5 days of passing the Board Resolution declaring the Interim Dividend [Sec. 205(1A)].

Conclusion:
As per Sec.207, dividend must be paid within 30 days of its declaration. Thus, Interim Dividend must also be paid within 30 days of its declaration, i.e. within 30 days of date of passing the Board Resolution declaring the Interim Dividend. In the instant case, on declaration of Interim Dividend by the Board in a Board Meeting held on 29th May 2013, the liability of the Company to pay the Interim Dividend has become certain, and the payment of Interim Dividend must be made within next 30 days, viz. on or before 28th June 2013. Therefore, revocation of Interim Dividend in the Board Meeting held on 10th June is not possible.

SECTION B
[Answer any five questions from Q.No.7 (a) to (f)]

Question 7:

(a) What is the role of SEBI in promoting Corporate Governance?
(b) What is Project Governance? What are the benefits of Project Governance?
(c) "Corporate Social Responsibility is to be considered as an investment and not as a charity" – Discuss.
(d) "The concept of Memorandum of Understanding (MoU) has been designed to provide flexibility and autonomy to CPSEs such that it facilitates them in pursuing the objectives and purposes, for which the enterprises have been set up."In the light of the above statement, explain the concept of MoU in India.
(e) What is Corporate Citizenship? Is this fundamentally different from Corporate Social Responsibility?
(f) Triple Bottom Line Approach of Corporate Social Responsibility (CSR).

[5×5]

Answer:

(a) The role of SEBI in promoting Corporate Governance:

Good Governance in capital market has always been high on the agenda of SEBI. This is evident from the continuous updation of guidelines, rules and regulations by SEBI for ensuring transparency and accountability. In the process, SEBI had constituted a Committee on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla.

Based on the recommendations of the Committee, the SEBI had specified principles of Corporate Governance and introduced a new clause 49 in the Listing agreement of the Stock Exchanges in the year 2000. These principles of Corporate Governance were made applicable in a phased manner and all the listed companies with the paid up capital of ₹3 crores and above or net worth of ₹25 crores or more at any time in the history of the company, were covered as of March 31, 2003.

SEBI, as part of its endeavour to improve the standards of corporate governance in line with the needs of a dynamic market, constituted another Committee on Corporate Governance under the Chairmanship of Shri N. R. Narayana Murthy to review the performance of Corporate Governance and to determine the role of companies in responding to rumour and other price sensitive information circulating in the market in order to enhance the transparency and integrity of the market.

With a view to promote and raise the standards of Corporate Governance, SEBI on the basis of recommendations of the Committee and public comments received on the report and in exercise of powers conferred by Section 11(1) of the Securities and Exchange Board of India Act, 1992 read with section 10 of the Securities Contracts (Regulation) Act 1956, revised the existing clause 49 of the Listing agreement vide its circular SEBI/MRD/SE/31/2003/26/08 dated

August 26, 2003. It clarified that some of the sub -clauses of the revised clause 49 shall be suitably modified or new clauses shall be added following the amendments to the Companies Act 1956 by the Companies (Amendment) Bill/Act 2003, so that the relevant provisions of the clauses on Corporate Governance in the Listing Agreement and the Companies Act remain harmonious with one another.

(b) Project Governance extends the principle of Governance into both the management of individual projects via Governance structures, and the management of projects at the business level, for example via Business Reviews of Projects. Today, many organisations are developing models for 'Project Governance Structures', which can be different to a traditional Organisation Structure in that it defines accountabilities and responsibilities for strategic decision-making across the project. This can be particularly useful to project management processes such as change control and strategic (project) decision-making. When implemented well, it can have a significantly positive effect on the quality and speed of decision making on significant issues on projects.

Benefits of Project governance:

Project governance will:

i) Outline the relationships between all internal and external groups involved in the project.
ii) Describe the proper flow of information regarding the project to all stakeholders.
iii) Ensure the appropriate review of issues encountered within each project.
iv) Ensure that required approvals and direction for the project is obtained at each appropriate stage of the project.

(c) The originally defined concept of CSR needs to be interpreted and dimensionalised in the broader conceptual framework of how the corporate embed their corporate values as a new strategic asset, to build a basis for trust and cooperation within the wider stakeholder community.

Though there have been evidences that record a paradigm shift from charity to a long-term strategy, yet the concept still is believed to be strongly linked to philanthropy. There is a need to bring about an attitudinal change in people about the concept.

By having more coherent and ethically driven discourses on CSR, it has to be understood that CSR is about how corporates place their business ethics and behaviors to balance business growth and commercial success with a positive change in the stakeholder community.

Several corporates today have specific departments to operationalise CSR. There are either foundations or trusts or a separate department within an organisation that looks into implementation of practices.

Being treated as a separate entity, there is always a flexibility and independence to carry out the tasks

But often these entities work in isolation without creating a synergy with the other departments of the corporate. There is a need to understand that CSR is not only a pure management directive but it is something that is central to the company and has to be embedded in the core values and principles of the corporate.

Whatever corporates do within the purview of CSR has to be related to core business. It has to utilise things at which corporates are good; it has to be something that takes advantage of the core skills and competencies of the companies. It has to be a mandate of the entire organisation and its scope does not simply begin and end with one department in the organisation.

Charity means the act of donating money, goods, time or effort to support a charitable cause in regard to a defined objective. Charity can be equated with benevolence and

charity for the poor and needy. It can be any selfless giving towards any kind of social need that is not served, underserved, or perceived as unserved or underserved. Charity can be by any individual or by a corporate.

Corporate Social Responsibility is about how a company aligns their values to social causes by including and collaborating with their investors, suppliers, employees, regulators and the society as a whole. The investment in CSR may be on people centric issues and/or planet issues. A CSR initiative of a corporate is not a selfless act of giving; companies derive long-term benefits from the CSR initiatives and it is this enlightened self interest which is driving the CSR initiatives in companies.

(d) The Memorandum of Understanding (MoU) System in India was introduced in the year 1986, after the recommendations of the Arjun Sengupta Committee Report (1984). Twenty six years after its inception, the MoU system has evolved and is being strengthened, through regular reviews, to become a management tool that helps in performance evaluation as well as performance enhancement of CPSEs in the country.

The concept of Memorandum of Understanding (MoU) has been designed to provide flexibility and autonomy to Central Public Sector Enterprises (CPSEs) such that it facilitates them in pursuing the objectives and purposes, for which the enterprises have been set up.

Accountability has to be understood in a wider sense by associating it with answerability for the performance of the tasks and the achievement of targets negotiated mutually between the Government and the CPSE. The rationale for MoU could be derived from principal/agent theory. The principal (administrative ministry on behalf of real owners - the people) can only observe outcomes and cannot measure accurately the efforts expended by the agent (CPSE managers). Also the Principal can only, to a limited extent, distinguish the effects of influences from other factors, which affect the performance. Therefore extensive intervention by administrators, who might not be too knowledgeable about the nature of problems confronting the enterprises, not only impacts productivity and profitability but also makes it impossible to fix accountability for non-achievement of targets.

A negotiated incentive contract (MoU), hence, is viewed as a device to reveal information and motivate managers to exert effort. Notwithstanding the spectacular performance of CPSEs in several areas, there has been a sense of disillusionment with some aspects of CPSE performance such as low profitability and lack of competitiveness. The extensive regulation of CPSEs by government had stifled the initiative and growth of public sector. The Economic Administration Reforms Commission (Chairman: L. K. Jha) had dwelt on issue of autonomy and accountability. The Commission had recommended a careful re-consideration of extant concepts and instrumentalities relating to the accountability of public enterprises with a view to ensuring (a) that they do not erode the autonomy of public enterprises and thus hampers the very objectives and purposes for which these enterprises have been set up and given corporate shape and for which they are to be accountable; and (b) accountability has to be secured in the wider sense of answerability for the performance of tasks and achievements of results. The adoption of MoU system in India could be seen as an attempt to operationalize this very vital recommendation.

In the backdrop of the dynamic external environment, "world - wide competition" and globalization, it is critical that the MoU system is strengthened such that it facilitates the CPSEs in becoming economically viable through efficient management and control. Hence, the MoU system aims at offering autonomy to CPSEs and is designed such that it can aid in the assessment of the extent to which mutually agreed objectives (Mandal, 2012) are achieved. This section of the report traces the evolution of the MoU system through various committee reports and highlights the major observations, along with the actions taken thereafter. This would act as an indicator of the developments that have happened in the MoU system in India and, through the study of extant literature, would also highlight the areas of concern raised after each study.

The various committees formed over the years are:
1. Arjun Sengupta Committee Report (1984)
2. National Council of Applied Economic Research (2004)
3. Report of the Working Group (2008)
4. S.K. Roongta Committee Report (2011)
5. Mankad Committee and Task Force (2012)

(e) A new terminology that has been gaining grounds in the business community today is Corporate Citizenship. Corporate citizenship is defined by the Boston College Centre for Corporate Citizenship, as the business strategy that shapes the values underpinning a company's mission and the choices made each day by its executives, managers and employees as they engage with society.

According to this definition, the four key principles that define the essence of corporate citizenship are:

(i) Minimise harm,
(ii) Maximise benefit,
(iii) Be accountable and responsive to key stakeholders and
(iv) Support strong financial results.

Corporate citizenship, sometimes called corporate responsibility, can be defined as the ways in which a company's strategies and operating practices affect its stakeholders, the natural environment, and the societies where the business operates. In this definition, corporate citizenship encompasses the concept of corporate social responsibility (CSR), which involves companies" explicit and mainly discretionary efforts to improve society in some way, but is also directly linked to the company's business model in that it requires companies to pay attention to all their impacts on stakeholders, nature, and society. Corporate citizenship is, in this definition, integrally linked to the social, ecological, political, and economic impacts that derive from the company's business model; how the company actually does business in the societies where it operates; and how it handles its responsibilities to stakeholders and the natural environment.

Thus, corporate citizenship, similar to its CSR concept, is focusing on the membership of the corporation in the political, social and cultural community, with a focus on enhancing social capital. Notwithstanding the different terminologies and nomenclature used, the focus for companies today should be to focus on delivering to the basic essence and promise of the message that embodies these key concepts –CSR and Corporate Citizenship.

Corporate Social Responsibility is not a fad or a passing trend, it is a business imperative that many Indian companies are either beginning to think about or are engaging with in one way or another.

While some of these initiatives may be labeled as corporate citizenship by some organisations, there basic message and purpose is the same.

(f) Within the broader concept of corporate social responsibility, the concept of Triple Bottom Line (TBL) is gaining significance and becoming popular amongst corporate. Coined in 1997 by John Ellington, noted management consultant, the concept of TBL is based on the premise that business entities have more to do than make just profits for the owners of the capital, only bottom line people understand. "People, Planet and Profit" is used to succinctly describe the TBL. "People" (Human Capital) pertains to fair and beneficial business practices toward labour and the community and region in which a corporations conducts its business. "Planet" (Natural Capital) refers to sustainable environmental practices. It is the lasting economic impact the organization has on its economic environment A TBL company endeavors to benefits the natural order as much as possible or at the least does no harm and curtails environmental impact. "Profit" is the bottom line shared by all commerce. The people issues faced by the organization includes -

i) Health
ii) Safety
iii) Diversity
iv) Ethnicity
v) Education and literacy
vi) Prevention of child labour
vii) Differently – abled

The planet concerns include
i) Climate change
ii) Energy
iii) Water
iv) Air pollution
v) Waste management
vi) Ozone layer depletion, etc.

The need to apply the concept of TBL is caused due to –
i) Increased consumer sensitivity to corporate social behavior
ii) Growing demands for transparency from shareholders/stakeholders
iii) Increase environmental regulation
iv) Legal costs of compliances and defaults
v) Concerns over global warming
vi) Increased social awareness
vii) Awareness about and willingness for respecting human rights
viii) Media's attention to social issues
ix) Growing corporate participation in social upliftment

While profitability is a pure economic bottom line, social and environmental bottom lines are semi or non - economic in nature so far as revenue generation is concerned but it has certainly a positive impact on long term value that an enterprise commands.
But discharge of social responsibilities by corporate is a subjected matter as it cannot be measured with reasonable accuracy.