

**FINAL COURSE**  
(Revised Scheme of Education and Training)

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**ELECTIVE PAPER : 6D**  
**Economic Laws**

**CASE STUDY DIGEST**



**BOARD OF STUDIES**  
**THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA**

This Case Study Digest has been prepared by the faculty of the Board of Studies. The objective of this digest is to provide good number of case studies for practice to the students to enable them to strengthen their preparation in the subject. In case students need any clarifications or have any suggestions to make for further improvement of the material contained herein, they may write to the Director of Studies.

All care has been taken to provide interpretations and analysis in a manner useful for the students. However, the digest has not been specifically discussed by the Council of the Institute or any of its Committees and the views expressed herein may not be taken to necessarily represent the views of the Council or any of its Committees.

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# Preface

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The Board of Studies, through this release of digest on Case studies at the Final Level for the New Course, wishes to develop the ability to apply the knowledge to address issues in practical situations to enhance the analytical approach of the students on the various subjects.

This Digest on paper 6D: Economic Laws contains case studies with the integration of more than one Acts on the selected laws covered under the Economic Laws. Being an open book examination, this initiative will lead to understanding of the subject with better interpretational, application and analysis of the Laws covered therein.

This Digest of Case studies contains facts, with multiple choice questions and descriptive questions. These questions will be based on the information and facts given in the case studies. In order to read and understand the case studies in a proper manner, read the study material of Paper 6D of the Economic Laws thoroughly, in addition to the booklet on the significant case laws. This comprehensive study will give proper linkage and understanding of the subject.

Students, are, therefore, advised to keep themselves conversant with applicable Laws and case laws in order to interpret and apply them in various circumstances represented through case studies.

With respect to elective papers, the question paper will be comprising of 5 case studies out of which 4 to be attempted. Each case study will be of 25 Marks comprising of objective type questions of 10 Marks, and descriptive types questions of 15 Marks. All the questions in a case study would be compulsory.

The Board of Studies, in its endeavour to assist students in their learning process with broader analytical and interpretational development, has come out with a case study digest for elective papers.

Case-study based MCQs and descriptive questions are of application-oriented and arise from the facts of the case. You need to apply, analyse or interpret the relevant provisions of laws in the light of the given facts of the case to choose the correct answer for the MCQs and give descriptive answers in line with the requirement of the questions.

The case study have been framed in line with amended laws notified vide the significant notifications and circulars issued upto 31.10.2021.

This digest relating to Final (New) Paper 6D: Economic Laws is relevant for May 2022 and November 2022 examinations. Students appearing in November 2022 examinations need to

consider the relevant amendments (containing significant notifications, circulars and other legislative amendments between 01.11.2021 and 30.04.2022), which would be web-hosted at the BoS Knowledge Portal.

Please note that before working on the case studies in this digest, one have to be thorough with the concepts and provisions of Economic Laws discussed in the October, 2021 edition of the Study Material and significant case laws of January 2022 edition.

After attaining conceptual clarity by reading the Study Material, you are expected to apply, analyse and interpret the concepts and provisions learnt in answering the case studies based MCQs and descriptive questions given in this digest. You have to read the case studies and then the questions, identify the related provisions of Economic Laws involved, apply the provisions correctly in addressing the issue raised/ in making the computation required questions. This process of learning and applying the laws and solving case study based questions thereon will help you attain conceptual clarity and hone your application and analytical skills so that you are able to write the examination with confidence and a positive attitude.

The solutions have been worked out on the basis of certain assumptions /views derived from the facts given in the question or language used in the question. It may be possible to work out the solution to the case studies in a different manner based on the assumption made or view taken.

While due care is taken in preparation of this Digest error free, however if any errors or omissions are noticed, the same may be brought to the attention of the Director of Studies.

***Wishing you happy reading!***

## CASE STUDY 1

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

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

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

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

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

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

AFFL recently packed a deal of acquisition with a high growth domestic company 'Style Fabrics Limited' (SFL), which is, in its initial year of operations but has gained reasonable market share in the Indian fabric market. SFL has a turnover (Net of taxes) of ₹ 950 crores and a book value of its assets stood at ₹ 340 crores (against the fair market value of ₹ 650 crores) as on the reporting date as per the last audited financial statements. The deal is expected to be executed in the upcoming quarter. As per the deal, AFFL will acquire control over SFL, by acquiring its shares through the stock exchange in the ratio of the prevailing market price of a share weighted by its price earning multiple.

Further, AFFL is considering the purchase of used plant and machinery but of the latest technology from Tri-Spun Ltd. which is undergoing the Corporate Insolvency Resolution Process (CIRP) in accordance to provisions of the Insolvency and Bankruptcy Code, 2016 (IBC). AFFL is waiting for the resolution plan to be unveiled, through which they can understand which plant and machinery they can buy. But in the mean-time Deputy Director as authorized from the office of Enforcement Directorate (ED) conducted a 'Search and Seizure'

proceedings at the premises of the promoters of Tri-Spun Ltd. and issued a provisional attachment order of 180 days under the relevant provisions of the Prevention of Money Laundering Act, 2002, attaching properties of Tri-Spun Ltd., on the basis of findings during the search and seizure proceedings. In this order, immovable as well as movable properties including plant and machinery were provisionally attached. The Insolvency Professional, CA. Anup Mittal, who is appointed as a Resolution Professional for CIRP, of Tri-Spun limited, opposed the order of provisional attachment of assets by ED on the grounds of declaration of moratorium by the Adjudicating Authority on the assets of Tri-Spun Ltd. as per the provisions of the IBC, 2016, and made an appeal seeking the release of assets.

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

#### **I. Multiple Choice Questions**

1. What shall be the legal validity of the order of attachment of private properties of promoters of Tri-Spun Ltd. involved in money laundering by the adjudicating authority?
  - (a) Valid, because Adjudicating Authority by an order in writing can confirm the attachment of the property, which shall continue till the investigation completes.
  - (b) Valid, because Adjudicating Authority by an order in writing can confirm the attachment of the property, which shall continue during the investigation for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under this Act before the court.
  - (c) Valid, because Adjudicating Authority by an order in writing can confirm the attachment of the property, which shall continue during the investigation for a period not exceeding one hundred and eighty days or the pendency of the proceedings relating to any offence under this Act before the court.
  - (d) Invalid, because Adjudicating Authority by an order in writing, can confirm the attachment of the property, which shall continue during the investigation for a period not exceeding ninety days.
2. With respect to remittance by AIFEL to meet recurring expenses of the branch office in Toronto (Canada) identify the correct statement:-
  - (a) Remittance is not allowed for meeting recurring expenses of a foreign branch
  - (b) AIFEL can remit an amount equal to 10% of the average profits of the previous two financial years

- (c) AIFEL can remit 15% of the average annual sales/ income or turnover of the Indian entity during the last two financial years or up to 25% of the net worth, whichever is higher
  - (d) AIFEL can remit any amount out of the funds maintained in Exchange Earners' Foreign Currency Account.
3. What type of anti-competitive agreement has been entered into by AFFL with the network of distributors and retailers?
- (a) Tie-in agreement
  - (b) Exclusive supply agreement
  - (c) Resale price maintenance
  - (d) Exclusive distribution agreement
4. Whether the acquisition of control in SFL by AFFL can be termed as a "combination" as per the provisions of the Competition Act, 2002 assuming the acquisition took place on 10.01.2021?
- (a) No, as the gross turnover of the company being acquired was below the threshold.
  - (b) Yes, because the gross turnover was ₹ 6590 crores
  - (c) No, because the book value of gross assets was ₹ 1980 crores as on the reporting date
  - (d) Yes, because the fair market value of gross assets was ₹ 3070 crores
5. What shall be the legal validity of the provisional attachment of the movable assets of Tri-spun Ltd. assuming Tri-spun Ltd. is not going under any insolvency process?
- (a) Provisional attachment is legally valid
  - (b) Invalid, because only enforcement director himself can pass the order of attachment of the property
  - (c) Invalid, because only immovable property can be attached
  - (d) Invalid, because provisional attachment of a property can only be for a maximum period of 90 days

## **II. Descriptive Questions**

6. Whether the appeal moved by CA. Anup Mittal, the appointed Resolution Professional of Tri-Spun Limited is tenable? Whether the assets so provisionally attached shall be released or not and provisions of which Act/ Code will prevail? Provide your answer on the basis of the relevant case law as applicable to the facts of the case.



7. Whether the charter (in memorandum form) of Kapas Kisan Union which is signed by all the members thereof can be considered as an anti-competitive agreement?
8. Can AIFEL operate Exchange Earners' Foreign Currency Account? What facility does Exchange Earners' Foreign Currency Account provide primarily and with whom the same can be opened and maintained?
9. Whether AFFL holds a dominant position in the hijab segment of the garment market? Whether the act of changing the price can be considered an abuse of the dominant position? Whether the price charged by AFFL falls within the scope of "predatory price"?

## ANSWERS TO CASE STUDY 1

### I. Answers to Multiple Choice Questions

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

#### Reason:

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

Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under subsection (1) of section 5 or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect, whereupon such attachment or retention or freezing of the seized or frozen property or record shall—

- (a) continue during investigation for a **period not exceeding three hundred and sixty-five days** or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and
- (b) become final after an order of confiscation is passed under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60 by the Special Court;

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

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

**Reason:**

**Permissible debits in the EEFC A/c:**

- (i) Payment outside India towards a permissible current account transaction [in accordance with the provisions of the Foreign Exchange Management (Current Account Transactions) Rules, 2000] and permissible capital account transaction [in accordance with the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000].
- (ii) Payment in foreign exchange towards cost of goods purchased from a 100 percent Export Oriented Unit or a Unit in (a) Export Processing Zone or (b) Software Technology Park or (c) Electronic Hardware Technology Park
- (iii) Payment of customs duty in accordance with the provisions of the Foreign Trade Policy of the Central Government for the time being in force.
- (iv) Trade related loans/advances, extended by an exporter holding such account to his importer customer outside India, subject to compliance with the Foreign Exchange Management (Borrowing and Lending in Foreign Exchange) Regulations, 2000.
- (v) Payment in foreign exchange to a person resident in India for supply of goods/services including payments for airfare and hotel expenditure

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

3. (c) Resale price maintenance

**Reason:**

As per explanation (e) to sub-section 4 to section 3 of the Competition Act 2002, resale price maintenance includes any agreement to sell goods on condition that

the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. In the given case the list is maintained stating the price to be charged (wherein retailers are not specifically allowed to sell at the price lower than list prices) by retailers to ensure uniform price throughout the particular nation hence resale price maintenance is practiced.

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

**Reason:**

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

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

5. (a) Provisional attachment is legally valid.

**Reason:**

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

## II. Answers to Descriptive Questions

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

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

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

Section 5 of PMLA demonstrates that the objective of the attachment is to prevent the likelihood of concealment, transfer or dealing with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime.

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

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

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

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

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

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

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

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

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

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

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

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

### 9. Dominant position or not

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

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

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

#### **Abuse of dominant position or not**

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

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

#### **“Predatory price”**

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

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

## CASE STUDY 2

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

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

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

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

In March 2020, a complaint was filed with the respective State's RERA Authority by the Association invoking the rights given under section 18 read with section 19 (4) of the Real Estate (Regulation and Development) Act, 2016 (RERA), seeking a refund of the amount paid, along with simple interest at the rate of 18% p.a. till the date of refund and compensation for

mental agony because of failure of Imperial Residency Ltd. to give possession of the apartments and flats, in accordance with the terms of agreement for sale. The Authority as per section 37 of the aforementioned Act, directed the Imperial Residency Ltd. to execute the registered agreement for sale in favour of the members of such Association. After such direction (decision) was given by the Authority, APS, being interested in getting the refund of money along with the interest and compensation filed a complaint in an individual capacity to the respective State RERA Authority.

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

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

But due to stiff competition from international manufacturers and lack of infrastructure to sports goods manufacturers in the state, ASL became unprofitable and faced a cash crunch. ASL was unable to serve its debt due to which one of its financial creditor moved to NCLT with an application for initiation of Corporate Insolvency Resolution Process (CIRP) and suggested the name of CA G. S. Sikka (A qualified insolvency professional), to be appointed as an interim resolution professional on the first day of March 2020. On 12<sup>th</sup> March 2020, the Adjudicating Authority after ascertaining the existence of default accepted the application as well as appointed CA G. S. Sikka as the Interim Resolution Professional on the same day. The first meeting of the Committee of Creditors (CoC) was held on 28<sup>th</sup> March 2020 where a simple majority of financial creditors (with infraction margins), approved the appointment of CA Naveen Sood as Resolution Professional, who is also a qualified insolvency professional.

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

On 4<sup>th</sup> September 2020, the Deputy Director along with the team from the office of Enforcement Directorate with an authority letter in this regard, reached the present resident of APS to arrest Mr. Satinder Pal (Landlord of APS). APS informed the Officials of ED that Mr. Satinder Pal had shifted to Australia and the house is given to them on rent. Office of Enforcement Directorate passed the order of attachment of said residential house, despite the fact that Enforcement Directorate was not having any sound evidence indicating the direct



application of proceeds of crime involved in the procurement of said house. But they were under the belief that such a house has been acquired (by Mr. Satinder Pal) as a result of criminal activity relating to the scheduled offence under the Prevention of Money-Laundering Act, 2002 in which Mr. Satinder Pal was involved. They formed this belief based upon the information available to them, from one of the reporting entities under section 12 of the Prevention of Money-Laundering Act, 2002. The house was acquired 12 years ago by Mr. Satinder Pal.

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

### **I. Multiple Choice Questions**

1. What shall be the legal validity of the appointment of CA Naveen Sood as the resolution professional of ASL at the first meeting of the committee of creditors?
  - (a) Valid, because resolution confirming such appointment requires a simple majority
  - (b) Invalid, because resolution confirming such appointment requires a special majority; of not less than 66% of voting share of financial creditors
  - (c) Invalid, because resolution confirming such appointment requires a special majority; of not less than 75% of voting share of financial creditors
  - (d) Invalid, because resolution confirming such appointment requires a special majority; of not less than 75% of total number of financial creditors
2. Do you agree with the views of the management of ISL with regards to the requirement of giving notice to the commission, disclosing the details of the proposed combination?
  - (a) Yes, because giving notice is optional at the will of concerned persons and the enterprises involved therein
  - (b) Partially Yes, because giving notice is mandatory, but in the case of ISL it is exempted; because both the enterprise are Indian companies
  - (c) No, because giving notice is mandatory within a reasonable time

- (d) No, because giving notice is mandatory within 30 days of the date of execution of agreement for acquisition
- 3. Whether the appointment of CA. G S Sikka as the interim resolution professional of ASL is valid & if so, then what shall be the maximum possible date till which he can assume the office as an interim resolution professional?
  - (a) Invalid, because no action under IBC can be initiated against ASL
  - (b) Valid, till the date of appointment of resolution professional
  - (c) Valid, till 30th March 2020
  - (d) Valid, till 10<sup>th</sup> April 2020
- 4. What shall be the legal validity of surrendering the foreign currency by APS on 3<sup>rd</sup> September 2019?
  - (a) Legally valid as he has surrendered the unused/unspent foreign exchange within a period of 180 days from the date of his return to India
  - (b) Legally valid, as he has surrendered the unused/unspent foreign exchange within a period of 120 days from the date of his return to India
  - (c) Legally invalid, as he has to surrender the unused/unspent foreign exchange within a period of 90 days from the date of his return to India
  - (d) Legally invalid, as he has to surrender the unused/unspent foreign exchange within a period of 60 days from the date of his return to India
- 5. Whether the receipt of application cum advance money by Imperial Residency Ltd. is valid in reference to the relevant provisions of RERA?
  - (a) Legally valid, because a written agreement to sell is entered and duly registered.
  - (b) Legally invalid, because the written agreement to sell is entered and registered after the date of receipt of advance money.
  - (c) Legally invalid, because the money so received is more than ten percent of the cost of the apartment
  - (d) Legally invalid, because the written agreement to sell is entered and registered after the date of receipt of advance money and also such amount is more than ten percent of the cost of the apartment

## **II. Descriptive Questions**

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

- (b) Whether the complaint filed by APS with the relevant state RERA authority in individual capacity as well is tenable? Synthesis with the relevant case law as applicable.
- 7. (i) Whether the present residential house (owned by Mr. Satinder Pal) will be considered as proceeds of crime?
  - (ii) Whether the present use of the house in form of letting out to APS or keeping its possession by Mr. Satinder Pal acquired 12 years back, amounts to money laundering?
- 8. Whether the notice containing details of the combination can be given to the commission under the green channel by ISL?

## ANSWERS TO CASE STUDY 2

### I. Answers to Multiple Choice Questions

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

#### Reason

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

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

#### Reason

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

- (a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

- (b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

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

**Reason**

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

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

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

**Reason**

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

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

**Reason**

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

register the said agreement for sale, under any law for the time being in force.

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

## II. Answers to Descriptive Questions

6. (a) The answer to this part of the question lies in the explanation to section 31(1) of the Real Estate (Regulation and Development) Act, 2016.

It is better to refer to the relevant portion of sections 18(1) and 19(4) first.

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

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

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

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

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

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

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

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

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

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

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

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

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

The MahaRERA has examined the arguments advanced by both the parties as well as the record. In this regard, the MahaRERA has perused the order dated 10th July 2018 passed by the Chairman, MahaRERA in Complaint No.

CC00600000023888 filed by one Rising City Ghatkopar Association. The record shows that the complainant was also one of the members of the said Association. The said fact has not been denied by the complainant.

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

**Conclusion on the basis of the above case:**

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

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

**Explanation to Section 2(1)(u)**

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

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

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

- (ii) Explanation added to section 3 is in two parts.
- (i) First part says, a person shall be guilty of offence of money-laundering, if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:-
- (a) Concealment; or
  - (b) Possession; or
  - (c) Acquisition; or
  - (d) Use; or
  - (e) Projecting as untainted property; or
  - (f) Claiming as the untainted property,
- in any manner whatsoever;
- (ii) The second part says that, the process or activity connected with proceeds of crime is **a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime** by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.
- Hence, the fact becomes irrelevant that the house been purchased 12 years back, the offence of money laundering is of continuing nature till the time benefit is enjoyed out of proceeds of crime in any manner.

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

- (1) For the category of combination mentioned in **Schedule III**, the parties to such combination may, **at their option**, give notice in Form I pursuant to regulation 5 along **with the declaration specified in Schedule IV**.
- (2) Upon filing of a notice under sub-regulation (1) and acknowledgement thereof, the proposed combination shall be deemed to have been approved by the Commission under sub-section (1) of section 31 of the Act:



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

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

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

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

**Schedule III is as follows:**

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

- (a) Do not produce/provide similar or identical or substitutable product(s) or service(s);
- (b) Are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade-in the product(s) or provision of service(s) which are at different stage or level of the production chain; and
- (c) Are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade-in the product(s) or provision of service(s) which are complementary to each other.

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

**The contents of Schedule IV is as under:**

**Declaration**

1. The notifying party confirms that it has furnished all the information and

documents as required in Form I, as specified in Schedule II.

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

### CASE STUDY 3

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

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

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

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

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

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

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

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

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

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

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

**I. Multiple Choice Questions**

1. Whether PPL can withdraw the application earlier filed by it under section 9 of the IBC, 2016 before the adjudicating authority?
  - (a) Yes, at the sole discretion of Adjudicating Authority, either on application by the applicant (PPL in this case) or suo-moto
  - (b) Yes, at the sole discretion of Adjudicating Authority, but only at the application from the applicant (PPL in this case)
  - (c) Yes, by adjudicating authority, but only at the application from the applicant (PPL in this case) with the approval of 66% of the voting share of the committee of creditors.
  - (d) Yes, by adjudicating authority, but only at the application from the applicant (PPL in this case) with the approval of 90% of the voting share of the committee of creditors.
2. What shall be the maximum penalty with which Ms. Ankita can be punished for being a 'Benamidar'?
  - (a) Rigorous imprisonment of seven years or a fine of ₹35 lakhs
  - (b) Rigorous imprisonment of seven years or a fine of ₹30 lakhs
  - (c) Rigorous imprisonment of seven years and a fine of ₹35 lakhs
  - (d) Rigorous imprisonment of seven years and a fine of ₹30 lakhs
3. Whether DDRL is required to register the real estate project 'LIGHT' under RERA?
  - (a) Yes, every real estate project needs to be registered
  - (b) No, because each phase is considered a stand-alone real estate project and phase-wise registration is required and here in each phase only one wing will be constructed (6 apartments to be constructed in a wing in an area of 100 square meters only).
  - (c) Yes, because in aggregate 48 units to be constructed considering all phases
  - (d) No, registration under RERA is exempt in the case of the housing project for the low-income group
4. Whether there is any violation of law by Mr. Joshi in respect of remittance of an amount equivalent to USD 275,000 in foreign currency to his daughter Ms. Ankita during the financial year and if yes, then what shall be the penalty that may be levied?
  - (a) Mr. Joshi doesn't violate the law, because he remitted the amount through authorised dealer

- (b) Mr. Joshi violates the law, the penalty levied may be up to USD 25,000
  - (c) Mr. Joshi violates the law, the penalty levied may be up to USD 75,000
  - (d) Mr. Joshi violates the law, the penalty levied may be up to USD 200,000
5. How many registrations DDRL needs to take under RERA for its projects as aforementioned if any of them are required to be registered?
- (a) One
  - (b) Two
  - (c) Nine
  - (d) Need not to register at all.

## II. Descriptive Questions

6. Whether the credence of the director of Gelix Pharma Limited that 'section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) would apply to the personal guarantor as well' is valid? Support your answer with the relevant case law as applicable.
7. Whether Mr. Suri is required to take the prior approval of the apex bank in India, for remitting money to Houston for treatment of his father and stay of Mr. Kunal as an attendant?
8. What are the consequences of failure to respond to the notice from the relevant authority under the Prohibition of Benami Property Transactions Act, 1988, by Mr. Suri? Does it make any difference that Mr. Suri was engaged in making necessary arrangements to send his father to Houston who was diagnosed with cancer?

## ANSWERS TO CASE STUDY 3

### I. Answers to Multiple Choice Questions

1. (d) Yes, by Adjudicating Authority, but only at the application from the applicant (PPL in this case) with the approval of 90% of the voting share of the committee of creditors.

#### Reason

Section 12A of the Insolvency and Bankruptcy Code 2016, provides that Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with

the approval of 90% voting share of the committee of creditors, in such manner as may be specified.

2. (d) Rigorous imprisonment of seven years and a fine of ₹30 lakhs

**Reason**

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

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

3. (c) Yes, because in aggregate 48 units to be constructed considering all phases

**Reason**

Section 3(2)(a) of Real Estate (Regulation and Development) Act 2016, exempts the registration of those real estate projects where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight **inclusive of all phases.**

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

4. (c) Mr. Joshi violates the law, the penalty levied may be up to USD 75,000

**Reason**

As per item number viii in part 1 to schedule III of Foreign Exchange Management (Current Account Transactions) Rules 2000 individuals can avail of foreign exchange facility within a limit of USD 250000 without prior approval of RBI for the purpose of studies abroad.

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

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

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

5. (c) Nine

#### Reason

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

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

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

## II. Answers to Descriptive Questions

6. Issue under consideration

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

#### Relevant case law

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

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



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

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

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

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

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

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

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

#### 7. The amount credited (remitted) to hospital in Houston:

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

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

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

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

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

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

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

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

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

- (i) comply with summons issued under sub-section (1) of section 19; or
- (ii) furnish information as required under section 21, shall be liable to pay a penalty of **twenty-five thousand rupees for each such failure.**

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

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

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

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

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

## CASE STUDY 4

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

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

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

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

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

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

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

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

After a few weeks, he told his desire to his mother about purchasing the property in the town. His mother out of her savings gave him the shortfall money and thereafter, Mr. Mohanty entered into an 'Agreement to sell' with the present owner and the property was registered in the name of Mr. Mohanty and his wife as joint owners with equal share. Mr. Mohanty and his family shifted to the new home. Mr. Mohanty wishes that his Mother shall also stay with them, but his mother decided to stay back in the same village house where she came in as bride after the marriage and spent her entire life afterward that. She occasionally visits the new house of Mr. Mohanty, either during festivals or whenever she came to town for a health checkup or any other reason.

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

Around three years back, VCPL developed a housing project 'NIWAS' near the coast-line area, the possession of which was delivered in-between the months of August'18 to October'18. An association of allottees was formed to manage the daily affairs and security

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

#### **I. Multiple Choice Questions**

1. Within how many months KE shall realise and repatriate the full export value pertaining to its first shipment (of herbs)?
  - (a) Six Months
  - (b) Nine Months
  - (c) Twelve Months
  - (d) Fifteen Months
2. Till which date the meeting of the committee of creditors of KOCL shall be conducted?
  - (a) 13th March 2020
  - (b) 17th March 2020
  - (c) 25th March 2020
  - (d) 8th April 2020

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

## **II. Descriptive Questions**

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

- (b) If KE is Export Oriented Unit under Foreign Trade Policy

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

7. (a) Whether Aramax Limited despite being a single entity/person, can be claimant as both financial as well as operational creditor simultaneously; if no then on what basis it shall be classified in either one (i.e. either financial creditor or operation creditor)?
- (b) In continuation to (a) above, whether Aramax Limited can be included in the committee of creditors or will it be excluded? In case, if it is included then what will be the quantum of its voting rights as against its outstanding debt?
- (c) Whether Mr. Mukand has correctly executed all the procedural aspects of the IBC laws in relation to the committee of creditors, to the extent of information as aforementioned in the given case law?
8. Whether the transaction of purchasing the property by Mr. Mohanty in the joint name of himself and his wife with the partial consideration provided by his mother can be considered as a 'Benami transaction'. Support your opinion with the relevant case law as applicable.

## ANSWERS TO CASE STUDY 4

### I. Answers to Multiple Choice Questions

1. (d) Fifteen Months

#### Reason

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

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

2. (b) 17th March 2020

**Reason**

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

3. (c) 1<sup>st</sup> May 2020

**Reason**

**Regulation 10 of the FEM (Export of Goods & Services) Regulations, 2015** provides that the documents pertaining to export shall be submitted to the authorised dealer mentioned in the relevant export declaration form, **within 21 days from the date of export**, or from the date of certification of the SOFTEX form.

In the given case, the date of export is 10.04.2020, so the last date comes as 01.05.2020.

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

**Reason**

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

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

5. (c) 5 years and 30 days

**Reason**

**Section 14(3) of RERA** provides that in case any **structural defect or any other defect** in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter **within a period of five years by the allottee from the date of handing over possession**, it shall be the duty of the promoter to rectify such defects without further charge, **within**



**thirty days**, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

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

## II. Answers to Descriptive Questions

### 6. If a shipment is exported to a warehouse abroad:

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

- (1) The amount representing the full export value of goods/ software/ services exported shall be realized and repatriated to India within 9 months from the date of export, provided-
  - (a) that where the goods are **exported to a warehouse established outside India** with the permission of the RBI, the amount representing the full export value of the goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within **fifteen months** from the date of shipment of goods;
  - (b) further that the RBI, or subject to the directions issued by that Bank in this behalf, the authorized dealer may for a sufficient and reasonable cause shown, extend the period of 9 months or 15 months, as the case may be.

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

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

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

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

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

**Extension of the time period:**

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

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

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

- (1) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor.
- (2) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.
- (a) Yes, Aramax Limited despite being a single entity/person can be both a financial creditor as well as an operational creditor.

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

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

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

- (c) Mr. Mukand has correctly executed the procedural aspects of the law with respect to the inclusion of the claimant, Aramax Limited in the committee of

creditors. However, Mr. Mukand has failed to conduct the first meeting of the committee of creditors within seven days of its constitution as per provisions contained in section 22(1) of the IBC, 2016 i.e. on or before 17<sup>th</sup> March 2020 and whereas the first meeting was conducted on 20<sup>th</sup> March 2020.

8. As per clause (A) to section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, Benami transaction means a transaction or an arrangement –
- (a) where a property is transferred to or is held by, a person and the consideration for such property has been provided, or paid by, another person; and
  - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

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

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

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

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

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

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

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

- (a) The cost of the house is Rs. 80 lakh, out of which Rs.20 lakh has been contributed by his mother. If the mother is having independent source of earning and have accumulated savings to her credit, she may give the amount to his child Mr. Mohanti for purchase of property. This is covered by Section 9(A)(b)(iii) of the PBT Act.
- (b) Mr. Mohanti has contributed Rs. 60 lakh, which he can show his accumulated earnings from the income of known sources. He may produce the ITRs of the previous years and bank entries to satisfy the authority. This is also covered by Section 9(A)(b)(iii) of the PBT Act.
- (c) The registry of the house can be got in the joint name of husband and wife. Here if wife is having income from the known sources, then to that extent her contribution is considered and for rest amount Mohanti has to show. Else the entire amount may be the savings of Mohanti alone, even though the registry can be made jointly in the name of husband and wife as per Section 9(A)(b)(iii) of the PBT Act.

## CASE STUDY 5

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

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

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

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

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

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

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

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

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

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

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

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

#### **I. Multiple Choice Questions**

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

2. Whether the transaction of acquiring the property in form of a farmhouse by Mr. Rajesh Kachroo in his own name out of the fund utilised from the impartial estate of the undivided family amounts to a 'benami transaction'?
  - (a) No, because the Prohibition of Benami Property Transactions Act, 1988 doesn't apply to Jammu and Kashmir. Hence, as the property lies in the valley of Kashmir is out its preview.
  - (b) No, because the purchase of property by a member of HUF from the known sources of the HUF for his own benefit does not amount to a benami transaction.
  - (c) Yes, because if the property is purchased out of the funds of the undivided family, it shall be registered in the name of Karta.
  - (d) Yes, because if the property is purchased out of the funds of the undivided family, it shall be for the benefit of all the members of the undivided family.
3. Whether Sujata Builders and Developers (P) Ltd. has validly handed over the relevant documents and the possession of the common area to the resident society of Silver Oak Residency within the required time frame?
  - (a) No, because in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees within six months from the date of occupancy certificate i.e. 30<sup>th</sup> December 2020.
  - (b) No, because in the absence of any local law, the promoter shall hand over the necessary documents and plans, including common areas, to the association of the allottees at any time after the completion of the project.
  - (c) Yes, because in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees within 30 days from the date of occupancy certificate i.e. 30<sup>th</sup> September 2020
  - (d) No, because in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees within 30 days from the date of completion certificate i.e. 15<sup>th</sup> December 2020, while the builder handed over on 28.12.2020.
4. Whether the decision was taken by the committee of creditors of liquidation of SR Auto Part Limited is legally valid?
  - (a) Legally invalid, because the decision of liquidation of SR Auto Part Limited can only be taken by NCLT



- (b) Legally invalid, because the decision of liquidation of SR Auto Part Limited can be taken by a committee of creditors only after the resolution plan presented by the resolution professional is rejected.
  - (c) Legally invalid, because the decision of liquidation of SR Auto Part Limited is taken by the committee of creditors with a voting share of less than 75%
  - (d) Legally valid.
5. Whether the act of leasing out the resort for a period of 4 years without permission from RBI to the Hong-Kong based travel and tourism company is valid?
- (a) Legally valid
  - (b) Illegal, because no person resident outside India is allowed to acquire an interest in immovable property in India whether in form of lease otherwise.
  - (c) Illegal, because no person of Hong-Kong is allowed to acquire an interest in immovable property in India whether in form of lease or otherwise.
  - (d) Illegal, because no person resident outside India is allowed to acquire an interest in immovable property in India in any form in any manner without prior permission of RBI whether in form of lease or otherwise.

## **II. Descriptive Questions**

6. Whether Mr. Raju Ganesh Balakrishnan is allowed to transfer his interest in the ancestral house of his family in Kerala? If so, can he repatriate the sale proceeds of such property outside India?
7. As per section 5 of the Competition Act 2002, if any enterprise or group merge or acquire an interest in another enterprise, which create a resulting entity with assets or turnover over the threshold limit is considered as a formation combination, which may adversely affect the competition in the relevant market sphere. Whether Marcus Port & Shipping Limited and Anandy Holding Limited is a 'group' as per the Competition Act, 2002 for purpose of an application under section 5?
8. Whether the property acquired in own name by Mr. Rajesh Kachroo utilized funds realised from the undivided estate of the undivided family and then transferring it to pool of the impartial estate of the undivided family can be considered as a benami transaction as suspicion arises with respect to the purpose and nature of the transaction. How do you see the present transaction? Highlight the commonly applicable circumstances which guide, whether a transaction is benami or not? Is there any litmus test to determine whether the transaction is benami or not?

**ANSWERS TO CASE STUDY 5****I. Answers to Multiple Choice Questions**

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

**Reason**

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

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

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

**Reason**

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

“**Benami transaction**” means, a transaction or an arrangement where the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by a Karta, or member of HUF, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the HUF.

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

**Reason**

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

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

4. (d) Legally valid

**Reason**

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

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

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

5. (a) Legally valid

**Reason**

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

**II. Answers to Descriptive Questions**

6. As per sub-section 5 to section 6 of the Foreign Exchange Management Act 1999, a person resident outside India may hold, own, transfer, or invest in Indian currency,

security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India. Hence, Mr. Raju is allowed to transfer his interest in the ancestral house.

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

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

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

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

7. As per explanation (b) to section 5 of the Competition Act, 2002, “group” means two or more enterprises which, directly or indirectly, are in a position to:
- (i) exercise twenty-six percent or more of the voting rights in the other enterprise;
  - or

- (ii) appoint more than fifty percent of the members of the board of directors in the other enterprise; or
- (iii) control the management or affairs of the other enterprise—;

**Condition (i) - Fulfilled**

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

**Condition (ii) – Not fulfilled**

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

**Condition (iii) – Not fulfilled**

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

Condition (ii) and (iii) are not satisfied but as condition (i) is getting satisfied, hence, Marcus Port & Shipping Limited and Anandy Holding Limited is a 'group' as per the Competition Act, 2002 for the purpose of application of section 51.

**Students are advised to note**

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

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

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

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

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

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

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

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

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

## CASE STUDY 6

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

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

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

3 BHK apartment is comprising with a gross area of 1200 square feet, including external walls and internal partition walls equal to 3% and 4% of the gross area of the apartment, respectively; and also including a balcony of 24 square feet and an open terrace area of 40 square feet for the exclusive use of allottee of the apartment independently. Allotments of all 140 apartments were done in the month of February 2020 to the respective allottees which included Mr. Nayak who had applied for two apartments and got the same in his own name;

and Mr. Gautam who had applied for three apartments, got one in his name, another in the name of his elder son, who is minor and another one in the name of his business firm; which will be used as a guest house for guests related to his business. Rest all had applied for a single apartment or villa. Due to nationwide lockdown, the majority of labour working at 'Nirmal Awas' being casual workers moved back to their villages. CDIL realised that it would be difficult to complete the project by December 2020 (due-date committed for possession) and after some efforts and waiting for a couple of months, the company decided to transfer the project to Jignesh Shah Estate Developers (JSED), a renowned name for developing residential projects. The allottees of 93 apartments, including Mr. Nayak and Mr. Gautam, agreed for such transfer of the project because they already had put a huge sum for the apartments promised to them and hence the allottees of 93 apartments gave their consent by raise of hands to CDIL to transfer its rights and liabilities in Nirmal Awas to JSED. CDIL notified the said transfer to the relevant State Authority under RERA within 30 days of transferring the project. JSED is willing to re-allot the apartments after taking charge from CDIL and it also filed an application to the relevant State Authority under RERA for an extension of 3 months quoting such transfer of project as a major reason.

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

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

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



Banks' Guidelines.

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

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

### **I. Multiple Choice Questions**

1. Since the price of the apartment is based upon the carpet area, it becomes important to correctly measure the same. What shall be the carpet area of the 3 BHK apartment in Nirmal Awas?
  - (a) 1164 Square feet
  - (b) 1136 Square feet
  - (c) 1100 Square feet
  - (d) 1052 Square feet
2. With reference to the explanation given by the banker to TIL with respect to seeking more information, which of the following is not a specified transaction?
  - (a) Any transaction in foreign exchange
  - (b) Any transaction in any high-value imports or remittances
  - (c) Any transaction in any high-value exports or remittances

- (d) Any transaction where there is a high risk or money-laundering or terrorist financing
- 3. What shall be the legal validity of the notice issued to Mr. Mishra by the Initiating Officer?
  - (a) Valid, because Mr. Mishra is a member of the association, and notice can be served through the post
  - (b) Valid, because Mr. Mishra is part of an executive committee and notice can be served through the post
  - (c) Invalid, because Mr. Mishra is not a principal officer of the association
  - (d) Invalid, because notice is served through the post to Mr. Mishra
- 4. Which amongst the following is not a valid alternative available with TIL to park the funds abroad?
  - (a) Deposit the funds with a foreign bank rated not less than AA by S&P
  - (b) Deposit the funds with a foreign bank rated not less than Aa3 by Moody
  - (c) Deposit the funds with a foreign branch of an Indian bank abroad
  - (d) Treasury bills of one-year maturity rated not less than A by Fitch
- 5. What shall be the validity of the decision taken by the committee of creditors to replace the resolution professional?
  - (a) Valid
  - (b) Invalid, because resolution professional once appointed under section 22 can't be replaced
  - (c) Invalid, because resolution professional once appointed under section 22 can be replaced by the committee of creditors with 75% of the voting share.
  - (d) Invalid, because resolution professional once appointed under section 22 can only be replaced by NCLT.

<b>II. Descriptive Questions</b>
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- 6.
  - (a) Whether the transfer of rights and liabilities in the project 'Nirmal Awas' by CDIL to JSED is legally valid?
  - (b) Whether JSED is allowed to re-allocate the allotments already done in the project 'Nirmal Awas' by CDIL?

- (c) Whether the application moved by JSED to seek an extension of time on the grounds of delay on account of transfer of project is maintainable?
7. (a) With reference to admissibility of application for ongoing CIRP in case of one of the subsidiaries of TIL, state your opinion on whether the credence of NCLAT is correct?
- (b) Will it make any difference if the application is moved by an Operational creditor?

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

## ANSWERS TO CASE STUDY 6

### I. Answers to Multiple Choice Questions

1. (c) 1100 Square feet

#### Reason

Section 2(k) of RERA provides the definition of **Carpet Area**. It means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment.

Calculation: 1200 Sq Ft – [3% of 1200 = 36 External wall + 24 Sq Ft of Balcony + 40 Sq Ft of open terrace]

= 1200 – [36 + 24 + 40]

= 1200 – [100]

= 1100 Sq Ft.

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

#### Reason

The explanation attached to Section 12AA(4) of the PML Act provides the meaning of 'Specified transaction'. It states that 'Specified transaction' means-

- (a) any withdrawal or deposit in cash, exceeding such amount;
- (b) any transaction in foreign exchange, exceeding such amount;
- (c) any transaction in any high value **imports** or remittances;

- (d) such other transaction or class of transactions, in the interest of revenue or where there is a high risk of money-laundering or terrorist financing, as may be prescribed.

Thus, as per the definition of 'specified transaction', among the four options given in the above MCQ, the options (c) which states that 'Any transaction in any high-value **exports** or remittances' do not come, since in the explanation the words used are 'any transaction in any high value **imports** or remittances'

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

**Reason**

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

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

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

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

**Reason**

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

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

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

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

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

5. (a) Valid

**Reason**

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

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

## II. Answers to Descriptive Questions

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

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

As per section 15(1) of Real Estate (Regulation and Development) Act 2016, the promoter shall not transfer or assign his majority rights and liabilities in respect

of a real estate project to a third party **without obtaining prior written consent from two-third allottees**, except the promoter, and without the prior written approval of the Authority.

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

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

**Note** – here reasonable interpretation (of law) shall be constructed,  $\frac{2}{3}$  allottees shall be read as at least  $\frac{2}{3}$  allottees and shall be round-up.

Further consent by allottees of 93 apartments, including Mr. Nayak and Mr. Gautam, becomes the consent from only 90 allottees by the virtue of the explanation to section 15(1) as quoted above, and 90 is less than the required number i.e. 92. Moreover, in the case study, nowhere it is mentioned that prior written approval of the State RERA Authority has been taken. Hence for these 3 reasons (as mentioned above) the transfer is not valid.

- (b) JSED is not allowed to re-allocate the allotments for the project 'Nirmal Awas' because as per proviso to sub-section 1 to section 15 of the Real Estate (Regulation and Development) Act 2016. It provides that any such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.
- (c) The application moved by JSED to seek an extension of time on the grounds of delay on account of transfer of project is not maintainable as per the provisions of section 15(2) of the Real Estate (Regulation and Development) Act 2016. It provides that on the transfer or assignment being permitted by the allottees and the Authority under section 15(1), the intending promoter shall be required to comply with all the pending obligations under the provisions of this Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.

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

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

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

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

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

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

In the case of **Dena Bank (Now Bank of Baroda) Vs. S.Shivakumar Reddy and Anr.** [Civil Appeal No. 1650 of 2020 dated 4<sup>th</sup> August, 2021], the **Supreme**

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

**Court of India** stated that the **right to initiate CIRP and a petition under section 7 or 9 (Section 9 deals with the CIRP by Operational Creditor) of the IBC** is required to be filed within the period of limitation prescribed by law, which would be 3 years from the date of default by virtue of **Section 238A of the IBC read with Article 137 to the Schedule to the Limitation Act, 1963**, unlike delay in filing a suit. [Para 140]

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



## CASE STUDY 7

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

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

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

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

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

Due to delay in realisation of revenue, RNPLL was in financial distress, further lock-down due to COVID-19 hit the liquidity. Outstanding dues in respect of imports are nearly USD 2.4 million. RNPLL is seeking an extension for the period of import settlement from the authorised dealer with respect to one of its major import transactions (PO G-212) where the date of the

invoice was 7<sup>th</sup> April 2020, the date of shipment was 10<sup>th</sup> April 2020, date of IGM and arrival at the port was 14<sup>th</sup> April 2020 and Bill of Entry was furnished on 15<sup>th</sup> April 2020. RNPLL is hopeful for immediate recovery as well as improvement in both top and bottom lines apart from its financial liquidity because the pharmacy business has a great opportunity to revive by developing a vaccine for COVID-19.

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

FDDR is developing its second housing project. Based upon its experience out of the first project, it decided to make certain changes in the building layout and specification, which were not originally in the sanctioned plan. Hence, permission from 78 out of 150 total allottees was taken in advance in writing approving the changes. One amongst the 78 allottees, had got allotment of two apartments. A letter from the authorised architect with the recommendation of the changes has been obtained in advance. FDDR comes under the scanner of Initiating Authority in respect of one of its property which is alleged to be 'benami'. The Initiating Officer after recording the reasons in writing served a show-cause notice that 'why the property should not be treated as benami property', on the principal officer of FDDR. The initiating officer believes that he must conduct an investigation in order to fetch some conclusive pieces of evidence against FDDR regarding the benami nature of the property.

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

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

### **I. Multiple Choice Questions**

1. Whether FDDR is legally authorised to make changes in building layout and specification?
  - (a) Yes, FDDR is legally authorised to make any sort of changes, because it has obtained a letter from authorised architect with the recommendation of changes in advance.
  - (b) Yes, FDDR is legally authorised to make any sort of changes, because it has obtained written consent from the majority of allottees in advance.
  - (c) No, FDDR is not legally authorised to make any sort of changes, because once the plan is sanctioned, no changes in building layout and specification are allowed, unless the authority under RERA approves so.
  - (d) No, FDDR is not legally authorised to make any sort of changes, because it has obtained written consent from less than 2/3<sup>rd</sup> of the allottees in advance.
2. On which date, the combination of SHL and VPL, shall be deemed to have been approved by the commission?
  - (a) 6th October
  - (b) 18th October
  - (c) 20th October
  - (d) 5th November
3. Whether the extension of the period of the resolution process can be granted again by the adjudicating authority on the subsequent application by the resolution professional?
  - (a) Yes, for the entire 80 days.
  - (b) Yes, but only for 75 days, because CIRP shall mandatorily be completed within a period of 330 days
  - (c) Yes, but only for 15 days, because the aggregate of all extension periods granted can't be more than 90 days
  - (d) No
4. Which of the following scope of actions can be undertaken by the initiating officer

against FDDR under the Prohibition of Benami Property Transactions Act 1988?

I Impound, II Investigation, III Provisional attachment, IV Attachment, V Confiscation

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

## **II. Descriptive Questions**

6. With respect to imports made by RNPLL, please answer the following questions:-
- (a) What is the time limit for settlement of import payments on account of normal imports from China?
  - (b) Can authorised dealer grant extension of the time period in case of settlement of import payment for PO G-212?
  - (c) If yes, specify the date till what extension can be granted by the authorised dealer; if no, who can grant so?
7. Whether the initiating officer is authorised to conduct an investigation on his own against FDDR? Does he require any approval for the same?
8. It is really appreciable that the banker showed sympathy with Mr. Nishankh but whether

the banker is legally correct for denying to provide any service to Mr. Nishankh in absence of furnishing an Aadhaar Card as proof of identity?

## ANSWERS TO CASE STUDY 7

### I. Answers to Multiple Choice Questions

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

#### Reason

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

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

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

2. (b) 18th October

#### Reason

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

3. (d) No

**Reason**

The proviso to section 12(3) of the IBC provides that any extension of the period of CIRP under this section **shall not be granted more than once.**

In the given case, the extension has already been granted, so no extension for the second time shall be given.

4. (a) I, II, and III

**Reason**

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

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

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

5. (a) I and III

## II. Answers to Descriptive Questions

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

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

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

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

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

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

- a. The import transactions covered by the invoices are not under investigation by Directorate of Enforcement / Central Bureau of Investigation or other investigating agencies;
- b. While considering extension beyond one year from the date of remittance, the total outstanding of the **importer does not exceed USD one million or 10 per cent of the average import remittances during the preceding two financial years, whichever is lower;** and
- c. Where extension of time has been granted by the AD Category – I banks, the date up to which extension has been granted may be indicated in the 'Remarks' column.

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

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

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

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

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

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

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

8. Section 11A(1) of the PML provides that every Reporting Entity shall verify the identity of its clients and the beneficial owner, by—
- (a) authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016) if the reporting entity is a banking company; or
  - (b) offline verification under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (18 of 2016); or
  - (c) use of passport issued under section 4 of the Passports Act, 1967 (15 of 1967); or
  - (d) use of any other officially valid document or modes of identification as may be notified by the Central Government in this behalf:

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

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



## CASE STUDY 8

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

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

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

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

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

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

Pushpa Builders and Infra Limited (PBIL) is a company promoted by Mr. Kataria in the early 2000s. Since then PBIL delivers many world-class residential housing projects. Currently, 3 projects are ongoing. One of these is 'Green Valley Apartments' which was started around 10 years ago. 'Green Valley Apartments' are located in foothills and facing towards the lake, these features made it a big hit. The applications received for the apartments were three times more than its allotment capacity. The allottees of Green Valley Apartments were given apartments not under a transaction of 'sale', but under an 'agreement of lease' wherein the

apartments were leased out to the allottees for a period of 499 years. Mr. Meena, also being one of the allottees paid consideration equal to 99.99% of the sale price of the apartment to get the lease, like the other allottees. It was also agreed that as per the terms of agreement of the lease, each year ₹ 12 will be paid to PBIL as a lease rental, which is obviously, a negligible amount.

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

#### **I. Multiple Choice Questions**

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

2. Can the adjudicating authority grant extension to the resolution professional in the present case for the purpose of completion of fast track CIRP?
  - (a) Yes, adjudicating authority is bound to grant an extension, if seek by resolution professional at his own
  - (b) Yes, because the resolution professional is instructed to do so by the committee of creditors, with resolution supported by a majority number of creditors
  - (c) Yes, because the resolution professional is instructed to do so by the committee of creditors, with resolution supported by creditors holding a voting share of more than sixty-six percent.
  - (d) No, the extension cannot be granted.
3. Who can be considered as the beneficial owner with respect to the deposit made of ₹ 2 lakhs in the bank account of the driver directly as an advance salary for 10 months as per the provisions of the Prevention of Money Laundering Act, 2002?
  - (a) KAL
  - (b) Mr. Kataria
  - (c) Mrs. Kataria
  - (d) Driver
4. Who can be considered as the benamidar with respect to purchasing a piece of land for ₹ 4.12 crores from Mr. Noor Mohamad Khan, out of the funds diverted from KAL?
  - (a) Mr. Kataria
  - (b) Mrs. Kataria
  - (c) Mr. Noor Mohamad Khan
  - (d) KAL
5. With respect to the enactment of the legislation, based upon the promulgated ordinances by the government, what shall be the relevance of commissions' opinion on the same for the government?
  - (a) It's the discretion of the government to make reference to the commission prior to making any law or policy on competition or any other matter
  - (b) The commission in the present case fails to furnish its opinion in response to a reference made to it within the prescribed period and hence its opinion becomes time-barred and irrelevant

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

## II. Descriptive Questions

6. Mr. Kataria is having suspicions regarding the powers of the Assistant Commissioner of Income Tax (ACIT). Please elaborate the powers of ACIT to him and also determine whether the ACIT is authorised under the Prohibition of Benami Property Transactions Act, 1988, to:
  - (a) Summon Mr. and Mrs. Kataria to appear in front of his office,
  - (b) Compel to produce books of accounts, and
  - (c) Receive and record evidence on affidavits.
7. Provide your opinion (must be supported by legal provision and precedence) on the following;
  - (a) Determine the nature of the transaction with respect to the remittance to Mr. Prince Kataria in foreign currency that resulted in contravention under the provisions of the Foreign Exchange Management Act, 1999 and the regulations issued thereunder and also determine the amount involved in the contravention.
  - (b) What will be the amount of maximum penalty that can be levied for contravention identified in part (a) above? Whether there is any minimum limit prescribed?
  - (c) Whether the offence committed in part (a) above is compoundable in nature? If yes, please state the relevant authority, who is authorised to do so.
8. With respect to the argument advanced by PBIL to defend itself against the claim made by the allottees, answer the following questions (opinion must be supported by legal provision and precedence);
  - (a) Whether an 'Agreement to Lease' with a structure in which a huge amount is charged upfront followed by negligible lease rentals for an exceptionally long lease period tantamount to 'sale'?
  - (b) Whether the allottees in the present case can claim a remedy under section 18 of the RERA through the adjudicating authority?

**ANSWERS TO CASE STUDY 8****I. Answers to Multiple Choice Questions**

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

**Reason**

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

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

**Reason**

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

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

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

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

3. (d) Driver

**Reason**

Section 2(1)(fa) of the PML Act defines the meaning of 'Beneficial Owner' as under:

"beneficial owner" means an individual who ultimately owns or controls a client of a reporting entity or the person on whose behalf a transaction is being conducted and includes a person who exercises ultimate effective control over a juridical person.

In the given the driver's account was credited, so he shall be treated as beneficial owner.

4. (b) Mrs. Kataria

**Reason**

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

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

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

**Reason**

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

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

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

## **II. Answers to the Descriptive Questions**

6. Section 19(1) of the Prohibition of Benami Property Transactions Act 1988 (PBPT Act), deals with the powers of authorities. It provides that the authorities shall, for the purposes of this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely;
- (a) discovery and inspection;
  - (b) enforcing the attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining him on oath;
  - (c) compelling the production of books of account and other documents;
  - (d) issuing commissions;
  - (e) receiving evidence on affidavits; and
  - (f) Any other matter which may be prescribed.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

Merely because the Legislature has excluded the allotment, when it is given on rent, it does not exclude the long term lease like the present one. That will be defeating and frustrating the object of the Act and hence, it has to be held that the Appellate Tribunal has rightly held that, so far as the present case is concerned, considering the long term lease of '999 years', it would definitely amount to sale.

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

- (b) Section 18(1) of the RERA provides that If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—
- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
  - (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

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

rentals, signed between PBIL and allottees **tantamount to sale** as the facts of the present case are similar to the case law as discussed above.

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

## CASE STUDY 9

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

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

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

TCL entered a 'usage-based fee agreement' with the leading colleges in different cities to use their respective computer lab facilities. In this manner, TCL also got equipped with testing centres in different cities. Against the competitors, they had the leverage of AI-equipped

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

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

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

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

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

The MD at DREIL is very enthusiastic about branding and digital marketing. He is of the opinion that DREIL is eligible to advertise and accept the applications for allotment of flats and apartments at Deccan Residency Towers - II either themselves or through real estate agents,

without fresh registration, hence started marketing in full swing. Mr. Liaquat booked an apartment through Mr. Miraj who is a registered real estate agent under RERA and he charged a lump-sum amount as the commission which is equal to 1.25% of the cost of the apartment.

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

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

### **I. Multiple Choice Questions**

1. With respect to the payments received from allottees against flats and apartments at Deccan Residency Towers - I, DREIL is –
  - (a) Guilty, because the separate account shall be maintained with a commercial bank
  - (b) Guilty, because less than 90% amount is deposited to such separate account
  - (c) Guilty, because the amount so deposited in a separate account is also used to cover land cost
  - (d) Not guilty
2. The real estate agent, Mr. Miraj, is -
  - (a) Guilty, because he facilitated the sale of an apartment in a non-registered project

- (b) Guilty, because the commission charged by him is more than 1% of the cost of the apartment.
  - (c) Not Guilty, because he is registered under RERA
  - (d) Not Guilty, because he facilitated the sale of an apartment in a registered project
3. Whether the price of ₹ 500/- and ₹ 250/- respectively charged by TCL can be considered as a predatory price?
- (a) Yes, because these are lower than the prevailing market price
  - (b) Yes, because these are lower in comparison to prices it started charging two years later
  - (c) Yes, because these contribute tiny profits which are lesser than the average rate of return of TCL
  - (d) No, because these are more than the costs
4. Whether the immovable property acquired by Mr. Liaquat Ali, in the joint name of himself and his wife is valid?
- (a) The acquisition is valid because payment is made through a debit entry to a non-resident account maintained by Mr. Liaquat.
  - (b) The acquisition is valid because the property is acquired jointly
  - (c) The acquisition is valid because it's the single immovable property they own
  - (d) The acquisition is invalid
5. By which date TCL must realise the full export value of software and repatriate same to India with respect to the export of software that was transmitted over the electronic media?
- (a) 25<sup>th</sup> March 2021
  - (b) 30<sup>th</sup> March 2021
  - (c) 25<sup>th</sup> September 2021
  - (d) 30<sup>th</sup> September 2021



**II. Descriptive Questions**

6. (a) Which amongst the following persons, is a benamidar:-
- (i) Ms. Saba
  - (ii) Mr. Amanat Ali
  - (iii) Mother of Mr. Amanat Ali
- (b) If anyone amongst the aforementioned persons is a benamidar, then what shall be the quantum of penalty leviable and upon whom it shall be levied?
7. (a) Whether TCL holds a dominant position in the relevant market of online testing?
- (b) If yes, does it amount to abuse of dominant position?

**ANSWERS TO CASE STUDY 9****I. Answers to Multiple Choice Questions**

1. (d) Not guilty

**Reason**

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

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

**Reason**

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

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

**Reason**

Explanation (b) to section 4(2) defines the meaning of '**predatory price**' which means the sale of goods or provision of services, **at a price which is below the cost**, as may be determined by regulations, of production of the goods or

provision of services, with a view to reduce competition or eliminate the competitors.

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

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

**Reason**

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

5. (c) 25<sup>th</sup> September 2021

**Reason**

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

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

## II. Answers to Descriptive Questions

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

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

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

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

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

Hence, in the present case;

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

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

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

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

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

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

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

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

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

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

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

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

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

## CASE STUDY 10

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

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

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

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

Whereas BCL was sold under MBO (management buy-out). A few years later BCL, diversified its operation and entered in manufacturing of assembly lines for companies engaged in the

manufacturing of a variety of gym equipment. But the consortium of business managers, who acquired BCL failed to manage its operations and finally, BCL went into the corporate insolvency resolution process (CIRP). The business was restructured as per the resolution plan and the process was completed during the recent quarter of the current fiscal year. One of the gym equipment manufacturers owed ₹32 lakhs of operational debts to BCL. Such debt was overdue for quite a long period. BCL sent a demand notice to such an equipment manufacturer, which was not responded to at all.

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

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

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

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

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

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

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

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

**I. Multiple Choice Questions**

1. With respect to the purchase and sale of the plot which was meant for a farmhouse by Mr. Darshan, who would be considered as a 'benamidar'?
  - (a) No one is benamidar
  - (b) Daughter-in-law of Mr. Darshan
  - (c) Wife of Mr. Darshan
  - (d) Both Daughter-in-law and Wife of Mr. Darshan
2. Whether BCL can apply for initiation of corporate insolvency resolution plan against the specified gym equipment manufacturer?
  - (a) No, the corporate debtor who underwent CIRP itself, can't apply for initiation of CIRP against other corporate debtors.
  - (b) No, because the requisite years have not been elapsed yet, from the conclusion of its own CIRP
  - (c) No, because the claim is not yet denied by the specified gym equipment manufacturer
  - (d) Yes, BCL can apply for initiation of CIRP against the specified gym equipment manufacturer
3. Under FEMA, 1999, Ms. Vanya for the financial year 2020-21 will be considered as a:
  - (a) Person Resident in India
  - (b) Person Resident outside India
  - (c) Non-Resident in India
  - (d) Person of Indian origin
4. With respect to the project GVR, GKPL is considered to be –
  - (a) Guilty, liable for a penalty equal to ₹1,30,000
  - (b) Guilty, liable for a penalty equal to ₹1,60,000
  - (c) Guilty, liable for a penalty equal to ₹3,25,000
  - (d) Not Guilty, not liable for any penalty
5. Identify which of the following reasons make the acquisition of the flat in India by Ms. Natasha in her and Jai's joint name, invalid:-
  - i. Invalid because neither of the owners of the property is resident in India



- ii. Invalid because two years have not been elapsed since the marriage of her and Jai
- iii. Invalid because part of the consideration was paid by Jai in Indian currency
- (a) Only i and ii
- (b) Only ii and iii
- (c) Only i and iii
- (d) All i, ii, and iii

## II. Descriptive Questions

6. In the lights of the applicable provisions of relevant law and precedence (if any) decide the validity of the credence held by Ms. Mridula and scope/powers of CCI;
  - (a). CCI in its order imposed a penalty of 3% of the average turnover of the last three preceding financial years to BML. Whether the quantum of penalty levied is within the preview of CCI?
  - (b). Whether CCI is authorised to play the role of administrator and judicial tribunal simultaneously or is it a full-time Adjudicating Authority?
  - (c). CCI conducted an inquiry against 7 other auto-mobile companies apart from the company against whom the complaint was made. Whether CCI is authorized to expand the scope of its inquiry?
  - (d). If BML denies/doesn't obey the order of CCI, which imposes a monetary penalty, then what action CCI can take to ensure proper execution of the order passed and recovery of the penalty?
7. Considering the validity of both the application moved by the association of allottees of GVR, in light of applicable provisions of relevant law and precedence (if any), you are required to decide;
  - (a). Whether the advance payment made against the allotment to be made to the allottees can be regarded as 'financial lending'? How advance given by homebuyers against the allotment is distinct from the debt of the operation creditor? State the points of differences on the basis of decided case law.
  - (b). Whether the making of the application for claiming relief under section 18 of RERA, 2016, is allowed to the association of allottees as an additional remedy, especially after action under IBC?
8. Mr. Manohar wishes to sell his share of agricultural land situated in India, to repatriate the sale proceeds, outside India, so that he can buy a separate house for Jai and Natasha in a suburb of LA. Advice, whether Mr. Manohar can do?

**ANSWERS TO CASE STUDY 10****I. Answers to Multiple Choice Questions**

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

**Reason**

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

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

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

**Reason**

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

3. (b) Person Resident outside India

**Reason**

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

Section 2(v) provides that “person resident in India” means—

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

(B) a person who has come to or stays in India, in either case, otherwise than—

- (a) for or on taking up employment in India, or
- (b) for carrying on in India a business or vocation in India, or
- (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

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

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

**Reason**

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

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

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

5. (b) Only ii and iii

**Reason**

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

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

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

## II. Answers to Descriptive Questions

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

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

- (b) In the Civil Writ Petition Number 11467/2018 by Mahindra Electric Mobility Limited & Ors. against CCI & Another, the Delhi High Court on 10.04.2019 at para 85 of its order, held that CCI does not perform only or purely Adjudicatory functions so as to be characterized as a Tribunal solely discharging judicial powers of the state; it is rather, a body that is in parts administrative, expert (having regard to its advisory and advocacy roles) and quasi-judicial - when it proceeds to issue final orders, directions and (or) penalties.
- (c) Section 19 of the Competition Act, 2002, gives the power to the commission that it may make inquiry into certain agreement and dominant position of enterprise. Its sub-section (1) provides that the CCI may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on –

- (a) on receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
- (b) a reference made to it by the Central Government or a State Government or statutory authority.

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

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

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

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

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

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

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

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

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

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

Point of difference	Operational Creditor	Advance by the allottee
Role of supplier	In operational debts, a person who supplies the goods and services becomes a creditor.	In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor.
Time value of money	Payments made in advance for goods and services are not made to fund the manufacturer of such goods or provision of such services.	Advance by allottees against allotment is to fund the developer to construct the apartment and flats.
The stake of interest of fund provider in the business of the other party	The operational creditor has no interest in or stake in the corporate debtor's business	Allottee of a real estate project is vitally concerned with the financial health of the corporate debtor
Stake in the corporate debtor	Operational creditor has no interest in or stake in the corporate debtor.	The allottees of a real estate project, who is vitally concerned with the financial health of the corporate debtor.
Advance payment	Payments made in advance for goods and	In real estate projects, money is raised from the

	services are not made to fund manufacture of such goods or provision of such services.	allottee, being raised against consideration for the time value of money.
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- (b) Hon'ble Supreme Court, while disposing of civil writ petition no. 43 of 2019, in the matter of Pioneer Urban Land and Infrastructure Ltd and Anr vs. Union of India, held that on reading to section 88, it was identified that remedies under RERA are additional remedies, which will not bar other remedies available to a homebuyer.

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

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

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

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

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

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

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

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

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



## CASE STUDY 11

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

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

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

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

After keeping the buyers in dark for more than 13 months, BLF Ltd. intimated to the buyers on 22.10.2008 that there would be a delay in approvals from the Government authorities and that

even the construction would not take off in time. By that time, BLF Ltd. had enriched itself by crores of rupees by collecting its timely installments from the buyers. Before a single brick was laid, the buyers had already paid installments as stipulated in the agreement, for the months of November 2007, January 2008, March 2008, June 2008, and September 2008, up to almost 33% of the total consideration.

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

#### **Allegation Arising out of the above facts**

1. In place of 19 floors with 368 apartments, which was the basis of the apartment booking by the allottees for their respective apartments, now 29 floors have been constructed. Consequently, not only the areas and facilities originally earmarked for the allottees got substantially compressed, but the project also got abnormally delayed. The fall-out of the delay is that nearly a hundred apartment allottees have to bear huge financial losses as, while on one hand, their hard-earned money got blocked, and on the other hand, they have to wait indefinitely longer than the agreed period for the occupation of their respective apartments.
2. The apartment buyer's agreements containing the terms and conditions of booking were signed after months of booking of the apartments, (booking made in November 2006 and agreements got signed in September 2007 i.e. after 11 months) and by that time the allottees had already paid a substantial amount and they hardly had any option but to adhere to the dictates of BLF Ltd. In this case, BLF Ltd. had devised a standard form of printed "Apartment Buyer's Agreement" for booking the apartments in its project and a person desirous of booking an apartment was required to accept it in 'toto' and give his or her assent to the agreement by signing on the dotted lines, even when clauses of the agreement were onerous and one-sided.
3. BLF Ltd. had the absolute right to reject and refuse to execute any apartment buyer's agreement without assigning any reason, cause, or explanation to the intending allottee. Thus, there was neither any scope of discussion nor any variation in the terms of the agreement.
4. "The Jannat", nor while executing the apartment buyer's agreements also, had got the layout plan of Phase-V approved by the authority. The decision of BLF Ltd. to announce the scheme, execute the agreements and carry out the construction without any approved layout plan had serious irreparable fallouts for which the entire liability in a normal course should have been by it, but the consequences have been shifted to the

allottees. Further, the agreement stifles the voice of the buyers due to the insertion of the waiver clause in the agreement that no consent of the apartment allottee is at all required, if any change or condition is imposed by the authority while approving the layout plan.

5. BLF Ltd. had reserved to itself the exclusive rights and sole discretion, not only to change the number of zones but also their earmarked use from residential to commercial purpose, etc.
6. The land of 6.67 acres earmarked for the multi-storied apartments could even be reduced unilaterally by BLF Ltd. pursuant to the approval/sanction of the layout plan by the authority. The carpet area for the apartments was lesser than the size stipulated in the sale agreement, and therefore, the allottees wanted to get compensated for the same.
7. In each apartment, the allottee had to pay the sale price for the super area of the apartment and for the undivided proportionate share in the land underneath the building on which the apartment was located. Out of the total payments made by the apartment allottees, BLF Ltd. had authorized itself vide clauses 3 and 4 respectively that it would retain 10% of the sale price as earnest money for the entire duration of the apartment on the pretext that the apartment allottee complies with the terms of the agreement.
8. Since the apartments were sold without the approval of the layout/building plan, clause 1.5 stipulated that if due to the change in the layout/building plan, if any amount was to be returned to any of the apartment allottees, BLF Ltd. would not refund the said amount, but would retain and adjust this amount in the last installment payable by the respective apartment allottee. Further, the apartment allottee would also not be entitled to any interest on the said amount.
9. Although the apartment allottees had paid for the proportionate share in the ownership of the said land for common area facilities within 'The Jannat', BLF Ltd. had reserved with itself the right to modify the ratio with the purpose of complying with the Haryana Apartment Ownership Act, 1983.
10. In case, if any of the apartment allottees refused to give consent to alter/delete/modify the building plan, floor plan, but even to the extent of increasing the number of floors and /or the number of apartments, BLF Ltd. had the discretion to cancel his agreement and to refund the payment made by the apartment allottee that too with the interest @ 9% per annum, which is wholly arbitrary as in case of default by the apartment allottees, the rate of interest/penal interest is as high as 18% per annum.
11. Preferential location charges were paid up-front, but when the allottee does not get the desired location, he only gets the refund/adjustment of the said amount at the time of the last installment, that too without any interest.

12. In case of delay in delivering possession in the stipulated time and any of the allottees wants to terminate the agreement, BLF Ltd. thereafter had no obligation to refund the amount to the apartment allottee but would have the right to sell the apartment and only thereafter repay the amount. In the process, BLF Ltd. was neither required to account for the sale proceeds nor even has any obligation to pay interest to the apartment allottee and the apartment allottee had to depend solely on the mercy of BLF Ltd. The quantum of compensation had been unilaterally fixed by BLF Ltd. at the rate of Rs. 5/- per sq. ft. (or even Rs. 10/- per sq. ft.) of the super area which is a mere pittance.
13. BLF Ltd. unilaterally had reserved to itself the right to mortgage/create a lien and thereby raise finance/loan the land, the payment of which has been made by the allottees. In case of an event where BLF Ltd. is not able to repay or liquidate the finance/ loan, the apartment allottees might be the direct sufferers.
14. The apartment allottees had been foisted with the liability to pay an exorbitant rate of interest, in case the allottee fails to pay the installment in due time i.e. 15% for the first 90 days and 18% after 90 days and no consequential interest clause for failure on the part of the builder to adhere to its obligations and time schedule.
15. The discount is given to the prospective buyers after the revised plan was as high as Rs. 500 per sq. ft., BLF Ltd. had offered only Rs 250 per sq. ft to the older buyers. The buyers of the apartments who had invested a huge amount of money starting from October 2006 in 'The Jannat' had been put to a disadvantageous position vis-à-vis prospective buyers in November 2009 i.e., after a period of 3 years.
16. The maximum FAR allowed is 175% of the site area and population density is 100 to 300 persons per acre @ 5 persons per dwelling unit. So far as the maximum height of the building is concerned, the relevant regulations prescribe that the buildings of 'The Jannat' have not been constructed in adherence to the said regulations and there has been violation on account of both FAR and density per acre.
17. BLF Ltd., however, had increased the height up to 29 floors while the foundation laid out underneath the building is suited only to sustain the load of 19 floors (which is not safe).

**The defense raised by BLF Ltd in response:**

BLF Ltd. argued that the association of allottees cannot file a case before the CCI because it is not in a dominant position as per the provisions of the Competition law. According to BLF Ltd., there are many large real estate companies and builders in India, particularly in Northern India as well as in NCR and Gurgaon who offer stiff competition and give competitive offers in the relevant market of residential apartments to give a wider choice to the consumers. Even though BLF Ltd. is a large builder, there are hundreds of other builders, all over India as well as in Northern India, including NCR, who offer residential apartments to prospective investors. The project was finally completed and possession was given in May 2010 after a little delay

which was due to environmental constraints. Infact, their rival HTL Limited has a market share of 35% in the relevant market. BLF Ltd. further argued that CCI has no jurisdiction over the case as 'sale of an apartment' can neither be termed as the sale of goods nor sale of service. Moreover, the terms and conditions of the agreement are mentioned in the information related to agreements executed in December 2006/2007. None of the impugned conditions can be said to have been imposed after 20.05.2009, when Section 4 of the Competition Act, 2002, came into force. BLF Ltd. also argued that the reduction in the carpet area was on account of the exterior walls appurtenant to their apartments and this is the case with all the apartments and not specific to the homes of the allottees alone who have filed the complaint.

### I. Multiple Choice Questions

1. The relevant geographic market in this case is\_\_\_\_\_.
  - (a) Gurgaon for sale of services of high rated residential property
  - (b) Delhi for sale of goods of high rated residential property
  - (c) Northern India for sale of goods of high rated residential property
  - (d) Whole India for sale of services of high rated residential property
2. The remedy available to the allottees by filing a complaint before:-
  - i. Insolvency and Bankruptcy Code
  - ii. Consumer Forum
  - iii. RERA

(Assume that the scheme of BLF Ltd., 'The Jannat' got commenced after the enactment of relevant provisions of the IBC, 2016 and RERA, 2016 for this particular question.)

  - (a) Only i
  - (b) Only ii
  - (c) i, ii, and iii
  - (d) None of the above
3. The chairperson and other members of the CCI office shall be appointed by:-
  - (a) Central Government and shall hold the office for a term of five years or till he has attained the age of sixty-five years.
  - (b) Selection committee and shall hold the office for a term of five years or till he has attained the age of sixty-five years.
  - (c) Central Government and shall hold the office for a term of five years or till he has attained the age of sixty-seven years in case of chairperson and sixty-fives

years in case of other members.

- (d) Selection committee and shall hold the office for a term of five years or till he has attained the age of sixty-seven years in case of chairperson and sixty-fives years in case of other members.
4. Whether the collection of 95% of consideration by BLF Ltd. without regards to the stage of construction is appropriate as per RERA assuming that the scheme of BLF Ltd., 'The Jannat' got commenced after the enactment of relevant provisions of the RERA, 2016 for this particular question and 'The Jannat' is registered as per the relevant provisions of the said act.
- (a) Appropriate as the terms/ timing of payment is governed by the sale agreement between the promoter and the allottee.
  - (b) Not appropriate as the timing of payment should be in line with the stage-wise completion/construction schedule.
  - (c) Appropriate, since the necessary discount has already been factored into the consideration by BLF Ltd.
  - (d) Not appropriate, because at least 10% of consideration to be reserved to pay on the receipt of the occupation certificate
5. The application of compensation under section 19 of the Real Estate (Regulation and Development) Act 2016 is
- (a) Adjudged by the adjudicating officer appointed by Real Estate Regulatory Authority at the advice of appropriate government in 30 days from receipt of application
  - (b) Adjudged by the adjudicating officer appointed by appropriate government at the advice of Real Estate Regulatory Authority in 30 days from receipt of application
  - (c) Adjudged by the adjudicating officer appointed by Real Estate Regulatory Authority at the advice of appropriate government in 60 days from receipt of application
  - (d) Adjudged by the adjudicating officer appointed by appropriate government at the advice of Real Estate Regulatory Authority in 60 days from receipt of application

## **II. Descriptive Questions**

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

7. Whether the contentions of BLF Ltd. that CCI has no jurisdiction over the case by providing the reasons for the same in its defense statement are valid?
8. Analyze whether the provisions of RERA are applicable to BLF Ltd. If yes, state the penalties that would be levied on the promoters of BLF Ltd. for non-registration under RERA.
9. What would be your advice for the allottees with regard to the validity of the reduction of carpet area as per the provisions of the RERA, 2016 assuming the project got commenced after the enactment of the RERA, 2016?

### ANSWERS TO CASE STUDY 11

#### I. Answers to Multiple Choice Questions

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

**Reason:**

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

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

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

2. (c) i, ii, and iii

**Reason:**

In the matter of **M/s M3M India Private Limited Vs. Dr. Dinesh Sharma & Anr**,

the High Court of Delhi, dated 4<sup>th</sup> September, 2019, [CM(M) 1244/2019 & CM APPL. 38052-38053/2019], the issue raised was whether proceedings under the Consumer Protection act, 1986 can be commenced by home buyers against developers after the commencement of RERA.

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

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

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

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

**Reason:**

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

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

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

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

**Reason:**

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

Sub-section (2) states that the agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments,



along with specifications and internal development works and external development works, the **dates and the manner by which payments towards the cost of the apartment, plot, or building, as the case may be, are to be made by the allottees** and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

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

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

**Reason:**

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

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

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

## II. Answers to Descriptive Questions

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

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

The dominant position has been defined under Explanation(a) to Section 4 as “a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

- (i) Operate independently of competitive forces prevailing in the relevant market; or
- (ii) Affect its competitors or consumers or the relevant market in its favour.

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

- a. **Market Share:** BLF Limited (25%) along with its subsidiaries BLF Home Developers Limited (10%) and BLF New Gurgaon Home Developers Private Limited (16%) holds a total market share of  $(25+10+16) = 51\%$  in the relevant market.
- b. **Size and resources of the enterprise:** Out of 118 companies in the real estate sector in the relevant market, BLF Ltd. has a share of about 69% of gross fixed assets, 45% of the total capital employed, 41% of the total net income, 63% of the total cash profits and 78% of the total PAT, which shows its size and resources are far greater than other real estate concerns.
- c. **Size and importance of the competitors:** BLF Ltd. is having a clear edge over

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

- d. **Economic power of the enterprise including commercial advantages over competitors:** BLF Ltd. has a gigantic asset base as compared to its competitors. Further, it also has enormous cash profits and net profits as compared to its competitors. The position of cash profits and net-worth shows that BLF Ltd. is far ahead on these accounts also as compared to its competitors. Based on a comparison of cash profits and net profits of 118 companies, BLF Ltd. has 63% and 78% share respectively. The huge cash profits and net worth of BLF Ltd. are giving them tremendous economic power over their rivals.
- e. **Vertical integration of the enterprises or sale or service network of such enterprises:** BLF Ltd. has developed 22 urban colonies, and its development projects span over 32 cities. It has about 300 subsidiaries engaged in the real estate business. Thus, it has a vast network through which it can do business effectively. Since BLF Ltd has a large land bank, it is capable of carrying out construction without depending upon the requirement of acquiring land. Moreover, the land was also acquired long back at a very low cost, unlike its competitors. Its wide sales network act as a relevant factor conferring upon commercial advantage over its rivals.

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

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

There shall be abuse of the dominant position, if an enterprise or a group-

- (a) Directly or indirectly, imposed unfair or discriminatory (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale of goods or service.
- (b) Limits or restricts (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods of services to the prejudice of consumers; or

- (c) Indulges in practice or practices resulting in denial of market access in any manner; or
- (d) Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- (e) Uses its dominance position in one relevant market to enter into, or protect, other relevant market.

BLF Ltd. has abused its dominant position which can be ascertained from the following points:

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

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

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

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

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

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

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

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

8. In case if the project got commenced in 2016 and was in progress on the effective date of coming into force of RERA, 2016 on 1<sup>st</sup> May 2017 then the provisions of RERA would

have been applicable to BLF Ltd. because as per section 3(1) of the RERA 2016, the promoter shall make an application to the authority for registration of the project that is the ongoing date of commencement of this act and for which completion certificate has not been issued within a period of 3 months from the date of commencement of the RERA.

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

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

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

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

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

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

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

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

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

## CASE STUDY 12

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

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

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

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

Mrs. Razia is settled with her husband in England. She is an air hostess with British Airways. She flies for 11 days in a month and thereafter is on a layover for 19 days. During the break (lay-over), she stays in Mumbai in the premises of British Airways. Mrs. Sudha transferred the

farmhouse (not entire agriculture land) situated at B91, Ludhiana without any consideration in the name of her daughter Ms. Razia, as Ms. Razia is still a citizen of India.

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

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

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

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

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

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



England for his treatment on 17.08.2013, when Mr. Rehman returned to India, he was prevented from entering in the estate by Mrs. Sudha.

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

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

#### **I. Multiple Choice Questions**

1. Whether the maternal grandfather of Mr. Abhas is liable for punishment under the Prevention of Money Laundering Act, 2002?
  - (a) No, he is not liable for any punishment under any provisions of the Prevention of Money Laundering Act, 2002
  - (b) Yes, he is liable to punishment for the commitment of offence under Part A of the Schedule to the Prevention of Money Laundering Act, 2002
  - (c) Yes, he is liable to punishment for the commitment of offence under Part C of the Schedule to the Prevention of Money Laundering Act, 2002
  - (d) Yes, he is liable for punishment for the commitment of offence under Part A, Paragraph 12 as well as of Part B to Schedule to the Prevention of Money Laundering Act, 2002
2. Whether Mr. Rehman can purchase the agricultural land in Ludhiana in his own name?
  - (a) Yes, as he has paid the amount through his bank account
  - (b) Yes, he can purchase the immovable property in India taking prior permission of RBI
  - (c) Yes, he can purchase the immovable property as he is holding a long term visa in India
  - (d) No, he cannot purchase any immovable property in India.

3. Who can be considered as the benamidar for the property purchased in Maharashtra (presume said transaction taken place after 1<sup>st</sup> November 2016)?
- (a) Mr. Abhas
  - (b) Ms. Shabina
  - (c) Grandfather of Mr. Abhas
  - (d) The transaction is not a benami transaction
4. Whether Mrs. Shabina after her marriage, acquire the immovable property in India, as per the provisions of FEMA, 1999?
- (a) No, she can't acquire, as she is a foreign citizen now
  - (b) Yes, she can acquire the immovable property in India, with permission of RBI
  - (c) Yes, she can acquire the immovable property in India, but only with the prior permission of RBI
  - (d) Yes, she can acquire the immovable property in India, either by obtaining Long term visa from the Central Government of India or with the prior permission of RBI
5. Ms. Sudha being an ostensible owner of the land can be considered as \_ \_ \_ \_ , under the Prohibition of Benami Property Transaction Act 1988, assuming the land was purchased by Mr. Rehman from unknown sources?
- (a) Beneficial Owner
  - (b) Benamidar
  - (c) Real Owner
  - (d) None of the above

## **II. Descriptive Questions**

6. Whether Ms. Razia can acquire the farmhouse (not entire agriculture land) situated at B91, Ludhiana without any consideration from her mother Mrs. Sudha, considering the provisions of FEMA, 1999.
7. Whether the contention of Mr. Rehman that Mrs. Sudha has no right to transfer (sell) the immovable property which was purchased by him in her name, under the Prevention of Benami Property Transactions Act, 1988 is correct?
8. Whether the purchase of property by Mr. Aslam in the name of his mother in a fiduciary capacity i.e. as a trustee is barred by the provisions of Prohibition of Benami

Transactions Act, 1988? Support your opinion with the relevant legal case law.

9. Whether the fees paid by Mr. Abhas exceeded the prescribed threshold of FEMA Rules? State the consequences of the same.

## ANSWERS TO CASE STUDY 12

### I. Answers to Multiple Choice Questions

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

**Reason:**

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

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

**Part A: Paragraph 12** – Offences under the Customs Act, 1962 – Section 135: Evasion of duty of prohibitions

**Part B: Offence under the Customs Act, 1962** – Section 132 – False declaration, false documents, etc.

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

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

**Reason:**

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

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

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

3. (b) Ms. Shabina

**Reason:**

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

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

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

**Reason:**

Regulation 7 of the FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a person being a citizen of Afghanistan, Bangladesh or **Pakistan belonging to minority communities in those countries**, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who is residing in India and has been granted a Long Term Visa (LTV) by the Central Government may purchase only one residential immovable property in India as dwelling unit for self-occupation and only one immovable property for carrying out self-employment.

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

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

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

5. (b) Benamidar

**Reason:**

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

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

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

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

**II. Answers to Descriptive Questions**

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

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

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

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

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

Regulation 3(a) of the aforesaid Regulations provides that an NRI or an OCI may acquire immovable property in India **other than agricultural land/ farmhouse/**

**plantation property** provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

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

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

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

(A) a transaction or an arrangement—

- a. where a property is transferred to or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- b. the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by-**

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

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

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

**Note** – Section 41 of the Transfer of Property Act 1882 deals with transfer by ostensible owner. It says where, with the consent, express or implied, of the

persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be violable on the ground that the transferor was not authorised to make it.

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

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

a transaction or an arrangement—

- (a) Where a property is transferred to or is held by, a person and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by –**

- (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;
- (iii) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual;

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

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

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

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

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

9. Under the Liberalised Remittance Scheme, all resident individuals, including minors, are allowed to freely remit up to USD 2,50,000 per financial year (April – March) for any permissible current or capital account transaction or a combination of both. Further, resident individuals can avail of foreign exchange facility for the purposes mentioned in Para 1 of Schedule III of FEM (CAT) Amendment Rules 2015, dated May 26, 2015, within the limit of USD 2,50,000 only. [The students may refer the FAQs on Liberalised Remittance Scheme (updated as on 21<sup>st</sup> October, 2021, by access the URL <https://m.rbi.org.in/scripts/FAQView.aspx?Id=115>]

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

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

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



## CASE STUDY 13

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

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

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

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

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

tie-up with LPL would be beneficial for both MEL as well as WTL. LPL would be paid for the services provided to both companies independently.

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

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

Meanwhile, Mr. Rajesh Panchal was appointed as the Resolution Professional for the MEL and WTL. Mr. Rajesh Panchal immediately took custody and control, including the business records of the companies. The creditors of the companies included the Bank, LPL as well as Orange Rock Limited (hereinafter referred to as “ORL”) which had given a loan to both the companies for the purpose of its venture and raw materials to the companies on credit, which remained unpaid. Mr. Rajesh Panchal, keeping the facts and circumstances in mind, formed the Committee of Creditors (“COC”). Mr. Panchal also invited prospective lenders, investors and other people to put forward the resolution plan. He received a resolution plan from Athens Global Private Limited (hereinafter referred to as “AGPL”), a global leader in the field of technology solutions which offered to infuse an upfront payment of ₹90 crores and take over

the company. The resolution plan included preference payment to the Bank and other financial institutions. However, LPL was aggrieved for not being given preference in the resolution plan. It submitted the plea to the NCLT to make necessary amendments to the resolution plan. LPL said that on the grounds of equity and fairness it must be paid in the same proportion as the Bank and other financial institutions.”

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

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

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

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

### **I. Multiple Choice Questions**

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

- (c) is partly an operational creditor and partly a financial creditor
  - (d) ORL has the option to classify itself as either a financial creditor or an operational creditor
2. The resolution plan as received from AGPL by the insolvency professional contained a provision for combination, as referred to in section 5 of the Competition Act, 2002. In such a case, who shall take approval and approval of which authority is required if the resolution plan is to be considered for approval by COC?
- (a) AGPL shall take prior approval of Competition Commission of India
  - (b) Mr. Rajesh shall take prior approval of Adjudicating Authority
  - (c) Mr. Rajesh shall take prior approval of Competition Commission of India
  - (d) AGPL shall take prior approval of Adjudicating Authority as well as of Competition Commission of India.
3. Mr. Rajesh Panchal, keeping the facts and circumstances in mind, formed the committee of creditors ("COC"). The COC would consist of:
- (a) Bank and LPL
  - (b) LPL and ORL
  - (c) Bank and ORL
  - (d) Bank, LPL and ORL
4. Manish Mehra purchased a flat in Mumbai in the name of his son Jubin from his savings but Jubin upfront denied the ownership of the flat. This transaction is:
- (a) A Benami transaction
  - (b) A valid transaction
  - (c) A voidable transaction
  - (d) None of the above
5. Mr. Manish Mehra had entered into an MoU for the Malshej Premises with TBPL, but on account of lack of funds and financial difficulties, TBPL could not complete the construction and handover the premises to TBPL within the time limit specified in the MoU and assuming that there was default on part of TBPL to return the funds to Mr. Manish on his application for withdrawal from the project, Mr. Manish has recourse under:
- (a) The Real Estate (Regulation and Development) Act, 2016
  - (b) The Insolvency and Bankruptcy Code, 2016
  - (c) The Consumer Protection Act, 2019
  - (d) All of the above

**II. Descriptive Questions**

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

**ANSWERS TO CASE STUDY 13****I. Answers to Multiple Choice Questions**

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

**Reason:**

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

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

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

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

Further section 21(4) of the IBC provides that **where any person is a financial creditor as well as an operational creditor, -**

- (a) **such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the**

committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

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

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

**Reason:**

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

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

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

3. (c) Bank and ORL

**Reason:**

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

In the given case-

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

Regarding ORL, section 21 (4) (a) of the IBC provides where any person is a

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

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

4. (b) A valid transaction

**Reason**

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

—

“benami transaction” means, —

a transaction or an arrangement—

- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by—**

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

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

5. (d) All of the above

**Reason:**

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

connected therewith or incidental thereto.

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

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

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

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

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

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

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

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

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



**II. Answers to Descriptive Questions**

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

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

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

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

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

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

Further Section 2(zk)(i), (ii), (v) and (vi) defines the term “promoter” means –

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

- (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or
- (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or
- (vi) such other person who constructs any building or apartment for sale to the general public.

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

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

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

Merely because the Legislature has excluded the allotment, when it is given on rent, it does not exclude the long term lease like the present one. That will be defeating and frustrating the object of the Act and hence, it has to be held that the Appellate Tribunal has rightly held that, so far as the present case is concerned, considering the long term lease of '999 years', it would definitely amount to sale.

The Court opined that having regard to the totality of the facts and circumstances and the terms and conditions of the 'Agreements', having regard to the entire purport and object of the Act, it has to be held that, the dispute in the present case definitely falls within the jurisdiction of RERA. The interplay of all the provisions contained in the Act, coupled with the real purport of the 'Agreement of Lease', leads to no other inference, but to Lavasa.doc hold that, the complaints filed by the Respondents before the 'Adjudicating Officer', under **Section 18 of the Act, are definitely maintainable** and

the 'Adjudicating Officer' is having the jurisdiction to entertain and decide those complaints.

In the given case, the Memorandum of Understanding ("MoU") was executed for a period of 99 years effective from the date of signing and TBPL received a consideration of ₹50 lakhs for the purpose of the arrangement, and the occupancy fee was set as low as ₹500 per month. The MoU was also duly stamped with the applicable stamp duty and was duly registered. The fact that Manish paid a consideration for the arrangement, the document was stamped and registered and the term of the MoU was for a long period of 99 years reflects that the nature of the transaction was that of a sale. Also, the fact that Manish had the right to alter the premises and make changes therein and was also liable to pay the water, electricity, and other charges, shows that his rights and obligations were equivalent to that of a purchaser. In drafting a document, the intent captured therein is more material than the nomenclature used. When the document captures the intent of a sale between both parties, the title given to the document is immaterial. Hence the MoU is nothing but an agreement for sale and Manish has the right of recourse to under section 18 of RERA.

7. Given the facts of the case, the Bank has classified the accounts of MEL and WTL as Non-Performing Assets (NPAs) and issued a demand notice to Mr. Arjun Malhotra for payment of the dues standing in the books of the Bank on account of the default of MEL and WTL. Arjun's response mentioned that since the efforts were underway to cure the defaults in terms of monetization, the Bank was requested to withdraw the demand notice.

Section 60(2) of the Insolvency and Bankruptcy Code, 2016 ("Code") provides that, "where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal".

Hence, the provisions of the Code provide for recourse to the personal guarantee even if the Corporate Insolvency Resolution Process has been initiated against the corporate debtor, being MEL and WTL in the given case. Had the intention of the legislature been to let the aggrieved creditor, Bank in a given case, kept waiting for subsequent events to happen under the Insolvency Process, the provisions for the initiation of proceedings wouldn't have been made in the first place. Therefore, it would not be right for Mr. Malhotra to assume that the proceedings of insolvency have been filed with the NCLT so no action can be taken until the resolution plan has been accepted/materialized. Also, it is to be noted that the liability of a guarantor, Arjun in the given case, does not extinguish/reduce merely by virtue of the proceedings. The law does not envisage that the insolvency resolution of the personal guarantor should follow only when the process of the corporate insolvency of the corporate debtor has come to an end.

The Supreme Court, in the matter of State Bank of India vs. V. Ramakrishnan (Civil Appeal No. 3595 of 2018, dated 14<sup>th</sup> August, 2018) quoted the following key recommendations of the Insolvency Law Committee Report dated 26.03.2018:

The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of Section 14.

Since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under Section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision.

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

After the decision of the Apex Court, Section 14(3) of the IBC was substituted by the Insolvency and Bankruptcy Code (Second (Amendment) Act, 2018. w.e.f. 6-6-2018. It now provides as under:

Section 14(3)(b) the provisions of sub-section (1) **shall not apply to a surety in a contract of guarantee to a corporate debtor.**

In view of the above, the bank shall proceed against Mr. Arjun by filing an application for insolvency resolution of Mr. Arjun before the NCLT

8. In terms of section 5(20) of the IBC, "operational creditor" means a person to whom an operational debt is owed. Operational debt includes any person to whom such debt has been legally assigned or transferred. In the given case LPL has made a claim against the services it rendered to MEL and WTL ("corporate debtor"), hence LPL can be classified as an operational creditor.

The LPL initiated CIRP against the corporate debtors, which was accepted by the NCLT and Resolution Professional was appointed, CoC was constituted and invited the resolution plan from the prospective buyers. CoC comprises on financial creditors only and the operational creditors although entitled to attend the CoC meeting but could not vote in the meeting.

While considering of the resolution plan, section 30 of the IBC is attracted. **Section 30(2) provides that –**

The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

- (a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
- (b) **provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-**
  - (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
  - (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

**whichever is higher**, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

**Section 30(4)** states that the committee of creditors may approve a resolution plan by a vote of not less than 66% per cent. of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board.

In the case of **India Resurgence ARC Private Limited Vs.M/s. Amit Metaliks Limited & Anr., the Supreme Court of India**, dated 13<sup>th</sup> May, 2021 [Civil Appeal No. 1700 of 2021], the Apex Court observed as under:

As regards the process of consideration and approval of resolution plan, it is now beyond a shadow of doubt that the matter is essentially that of the commercial wisdom of Committee of Creditors and the scope of judicial review remains limited within the

four-corners of Section 30(2) of the Code for the Adjudicating Authority; and Section 30(2) read with Section 61(3) for the Appellate Authority.

The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for: (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.

In regard to the question of fair and equitable treatment, though the Adjudicating Authority as also the Appellate Authority have returned concurrent findings in favour of the resolution plan yet, to satisfy ourselves, we have gone through the financial proposal in the resolution plan. What we find is that the proposal for payment to all the secured financial creditors (all of them ought to be carrying security interest with them) is equitable and the proposal for payment to the appellant is at par with the percentage of payment proposed for other secured financial creditors. No case of denial of fair and equitable treatment or disregard of priority is made out.

Thus, what amount is to be paid to different classes or subclasses of creditors in accordance with provisions of the Code and the related Regulations, is essentially the commercial wisdom of the Committee of Creditors; and a dissenting secured creditor like the appellant cannot suggest a higher amount to be paid to it with reference to the value of the security interest.

Accordingly, myself assuming as the judge of the NCLT, will see that the resolution plan submitted by the resolution applicant is in consonance with the provisions of section 30(2)(b). If it is so, the commercial wisdom of the CoC in approving the resolution plan should not be interfered.

## CASE STUDY 14

Vikas Kapoor is an aspiring Bollywood actor. With all his dreams and aspirations, he came to Mumbai in the year 2010 to try his luck. Blessed with a charming personality and being hardworking as well, he was offered his 1st break by a small-time producer in Bollywood. He was offered to play the role of best friend in the main lead. The opportunity is not to die for Vikas, but there will definitely be an option to take a chance. After all, he had nothing to lose. The movie was released on 29<sup>th</sup> October 2011, and was a hit. Vikas received recognition for his work and was soon signed up for some other movie projects. Vikas thought it would be a good time to take it to the next level and to start his own production house. He met his friend Ms. Shaira and told her about his business plan. She liked the idea and encouraged him to pursue it, offering him her full support. On 16<sup>th</sup> February 2013, he incorporated his company known as Vikas Films Private Limited (VFPL). The company was incorporated with a share capital of ₹10 lakhs. The vision of the company was to be a premier production house, and the mission of the company was to provide quality entertainment. VFPL started working on its first-ever film, '*Dil Se Dil Tak*', in which Vikas and Shaira were in the lead role.

Vikas was in New York, shooting an item number of his upcoming film when he remembered that Shaira's birthday was coming. Vikas was in love with her and wanted to propose to her on her birthday. He thought what could be a better way to do that than to gift her some jewellery. He took the opportunity to stop by Gazelle, a famous jewellery store in New York. The price of gold on that day was USD 50 per gram, which was higher than the prevailing rates in India. But he did not want to compromise and settle for less and he bought a necklace made with 80 grams of gold. While standing in the payment queue, his eyes struck a rose made up of silver weighing 30 grams. The price of silver was USD 19 per gram. He wanted to buy something for himself too; after all, he has never been overseas before. He had always dreamed of buying a branded watch with a platinum finish, and so he bought one, worth USD 550, along with the silver rose. He thought of wearing it, but he was already wearing a watch. He thought that he should not wear it as there is a risk of damage while in transit. Vikas arrived in India and walked through the Green Channel though he was required to walk through the Red Channel since he was carrying more than the limits of bona fide baggage (allowed for duty-free clearance) under the Baggage Rules, 2016.

Meanwhile in India, Dreamland Reels Pvt. Ltd (DRPL), one of the oldest companies in the Bollywood Industry, which is engaged in the production, and distribution of films all over India. The filmmaking process involves production, distribution and exhibition. An exhibition is when people see a movie in the theatre. For the exhibition, DRPL would tie-up with various Multiplexes and Single Screen Theatres, collectively referred to as the 'Exhibitors'. With the

rise of Multiplexes, the market share of Single Screen Theaters', has come down to 35% (means if 100 exhibitions took place then 65 are in multiplexes and the remaining 35 in Single Screen Theaters). So, the importance of Single Screen Theaters is relatively less. DRPL is all set to release its mega starrer film 'Hero No. 1' on 25<sup>th</sup> December 2015. While 'Hero No. 1' is going to release soon, DRPL has another project which is nearing completion, and they wished to release the same on 14<sup>th</sup> February 2016, with the title 'Love Tales'. What could be a better occasion than Valentine's Day to release a film with a plot on modern romance. DRPL called for a meeting with all the Exhibitors to discuss the release of 'Hero No.1'. DRPL put forth a condition before the Single Screen Theatres that if they wanted to purchase the rights of the film 'Hero No. 1' they also have to purchase the rights of the film 'Love Tales' to be released and exhibited on Valentine's Day which DRPL kept as a non-negotiable condition. The majority of the Single Screen Theatres agreed to the condition because DRPL is the largest (number of films per year) producer as well apart from being one of the oldest, but some did not find it lucrative and hence declined. Unfortunately, the ones who declined did not get the rights to exhibit both, 'Hero no 1' and 'Love Tales'.

Vikas had just returned to India. The time had come, VFPL was ready with its film 'Dil Se Dil Tak' and wanted to release the same on February 14, 2016. VFPL invited Exhibitors and observed that various Single Screen theatres had declined their invitation. Vikas then came to know that the same was due to the fact that the Single Screen theatres have already purchased the rights of the film 'Love Tales', under a condition put forth by DRPL, which was also to be released on February 14, 2016. Vikas was taken aback and he thought that though DRPL was a well-known banner, but how could they do that. He thought of this as an extremely unfair move on DRPL's part. He decided that he had to do something about this. He appointed a lawyer, Rohan Kumar. Rohan heard the case and advised Vikas to report the same as DRPL had contravened the provisions of the Competition Act, 2002.

Legal experts based upon the precedence established by Commission (Competition Commission of India) and other judicial bodies believe Multiplexes and Single Screen Theatres shall be considered as different segments ("Relevant Product Market") because the features and commercial conventions are distinct despite the core element (film) of their sale is same.

It was December 2016, Vikas' movie 'Dil Se Dil Tak' got released and managed to do reasonably well. Not a big hit, and not a flop either. VFPL made a profit of ₹80 lakhs from the movie and Vikas earned ₹40 lakhs as his remuneration in the capacity of the actor. Vikas decided to purchase a house, now that he had the funds, it would be a good move, he thought. He contacted Mr. Kataria, a broker who showed Vikas some options in South Mumbai, but they seemed beyond his budget. Mr. Kataria then showed him a beautiful farmhouse in Panvel for ₹30 lakhs which was so beautiful that Vikas thought it would be a



good place for throwing some parties and immediately agreed to seal the deal. The farmhouse was purchased in the name of his mother, Mrs. Shanti Kapoor. Vikas paid the money from the remuneration he earned and also paid Mr. Kataria his brokerage fees of ₹5 lakhs. Mrs. Shanti Kapoor thereafter retransferred the said property in the name of Vikas.

Mr. Kataria was glad that he could earn ₹5 lakhs from Vikas, and he felt it like an achievement. His nephew Ranjan pleaded with him to lend him some money. Mr. Kataria gave him ₹5 lakhs as a loan, and Ranjan signed a document to return it to Mr. Kataria. Ranjan used that money, which his uncle had given him and with an additional sum of ₹3 lakhs which he had from unaccounted money, purchased a garage in Nagpur in his own name. Ranjan was happy, as finally, he could start his two, three, and four-wheelers service centre.

Ms. Shaira was thrilled to see the gifts Vikas brought for her. He proposed to her, and she accepted. Both got engaged. Vikas was so happy that everything in his life was finally headed in the right direction. He visited his rapper friend who goes by the name, "KingStar" who told Vikas of his upcoming rap song, 'Dance Trance' and made Vikas listen to it. Vikas was so impressed that he was willing to purchase the copyrights of the song for using the same in his next film. He offered KingStar a sum of ₹5 lakhs to be paid from the remuneration, which Vikas had earned from his first movie. KingStar was ready to sign the papers, and Vikas made him sign the copyrights in favour of Ms. Shaira.

### **I. Multiple Choice Questions**

1. DRPL had kept a condition in front of the Exhibitors who were Single Screen Theatres to purchase rights of exhibiting both the movies 'Hero no 1' to be released on 25<sup>th</sup> December 2015, and 'Love Tales' to be released on 14<sup>th</sup> February 2016. Though there was no written document in that regard, some Single Screen Theatres accepted the condition and purchased rights of both the movies. Therefore, the understanding is:
  - (a) Not an agreement
  - (b) Is an Anti-competitive agreement
  - (c) Is a Void Agreement to the extent Single Screen Theatres were made to accept the condition of purchasing rights of both the movies
  - (d) Is a Valid Agreement
2. Regarding DRPL it can be said that:
  - (a) DRPL enjoys a dominant position in the market, as it is for quite a long time in the Industry
  - (b) DRPL enjoys a dominant position in the market, as its film is a mega starrer one

- (c) DRPL enjoys a dominant position in the market, as it is the largest producer in the Industry.
  - (d) It is not certain if DRPL has a dominant position
3. In the context of the purchase of a garage in Nagpur in name of Mr. Ranjan, Mr. Kataria is
- (a) Liable for committing a Benami transaction, because he paid part of the consideration
  - (b) Liable for committing a Benami transaction, because he paid the majority of the consideration
  - (c) Liable for committing a Benami transaction, because his money has been channelized although he himself not paid the same
  - (d) Not liable for committing a Benami transaction
4. In the transaction regarding rap song, 'Dance Trance', which is the following statement is correct?
- (a) Transaction is benami and Mr. Vikas is benamidar.
  - (b) Transaction is benami and Ms. Shaira is benamidar.
  - (c) Transaction is benami and KingStar is benamidar.
  - (d) Transaction is not benami.
5. Under which of the section of the Competition Act, 2002 Mr. Vikas can approach to Competition Commission of India against the DRPL?
- (a) Under-section 3(4)
  - (b) Under-section 4
  - (c) Under-section 19
  - (d) Under all of the above sections

## **II. Descriptive Questions**

6. Evaluate the legal validity of both the transactions regarding the Panvel farmhouse. If the transactions are valid, justify with reasons. If not, then suggest what could be the proper course of action.
7. Is Vikas Kapoor guilty of an offence under the Prevention of Money Laundering Act, 2002? Explain.

8. VFPL has reported DRPL for contravention of the provisions of the Competition Act, 2002. Please examine the case and elaborate your findings in terms of the said Act.

## ANSWERS TO CASE STUDY 14

### I. Answers to Multiple Choice Questions

1. (b) Is an Anti-competitive Agreement

**Reason:**

It may be termed as “tie-in arrangement”, which includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

In terms of Section 3(4)(a) of the Competition Act, 2002, the tie-in arrangement shall be an agreement in contravention of section 3(1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

2. (c) DRPL enjoys a dominant position in the market, as it is the largest producer in the Industry.

**Reason:**

Section 4 of the Competition Act, 2002 deals with the abuse of dominant position.

Section 4(2) provides that there shall be an abuse of dominant position under section 4(1), if an enterprise or a group,—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service

3. (d) Not liable for committing a Benami transaction

**Reason:**

Here Kataria was involved in purchasing a garage in Nagpur. He simply gave ₹ 5 lakh to his nephew Ranjan on his demand. Ranjan purchased the garage with the money lent by Kataria. Hence Kataria is not liable for indulge in benami transaction.

4. (b) Transaction is benami and Ms. Shaira is benamidar.

**Reason:**

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

In the given case, the song’s copy right was purchased by Vikas in the name of her wife Shaira. The money was paid out of genuine source by Vikas. Although it is a benami transaction, however it is exempted in terms of section 2(9)(A)(b)(iii).

The benamidar is Shaira.

5. (d) Under all of the above sections

**Reason:**

Analysing each of the sections/ sub-section given in the option:

**Section 3(4):** Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including— (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

In the given situation, the DRPL was found to have engaged in tie-in arrangement.

**Section 4** deals with abuse of dominant position. Yes, DRPL was in dominant position and have abused its dominant position.

**Section 19** deals with the Inquiry into certain agreements and dominant position of enterprise. In this the CCI may make an inquiry in to section 3 and 4 either on its motion or on receipt of any information.

<b>II. Answers to Descriptive Questions</b>
---------------------------------------------

6. Firstly, the purchase of the Panvel farmhouse has been done in the name of Mrs. Shanti Kapoor, mother of Vikas Kapoor. This is a Benami Transaction.

Section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, lays down the definition of a Benami Transaction, which reads as under:

***“benami transaction” means,—***

- (A) a transaction or an arrangement—
  - (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
  - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by—**

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

It says it is a transaction where a property is transferred to a person and consideration paid by another person and the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration. Further, one of the exceptions to a Benami transaction provides that when the property is held in the name of any person who is individual's lineal ascendant or descendant and such a lineal ascendant or descendant appear as a joint owner in the property and the consideration has been paid from known sources of the individual. Mother is a lineal ascendant.

Hence, in the given case though the consideration has been paid from a known source, i.e. remunerations earned by Vikas Kapoor, the farmhouse is not held jointly by the mother and the son for the exception to apply.

**Secondly,** Mrs. Shanti Kapoor re-transfers the Panvel farmhouse to Vikas. Here, Mrs. Shanti Kapoor is treated as benamidar. Section 6 of the Prohibition of Benami Property Transactions Act, 1988 deals with the matter relating to prohibition on re-transfer of property by benamidar, which reads as under:

- (1) No person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.

- (2) Where any property is re-transferred in contravention of the provisions of sub-section (1), the transaction of such property shall be deemed to be null and void.

Thus, as per the above provisions the aforesaid transaction of transfer of property from the mother to his son shall be null and void.

The ideal course of action in the given case should have been the execution of a sale deed in the favour of Vikas Kapoor capturing the consideration paid by him, duly stamped with the applicable stamp duty, and registered. If Vikas was desirous of later transferring the same in favour of his mother, then he could have executed a Gift Deed as per the Transfer of Property Act. Alternatively, Vikas and his mother could have been joint owners of the farmhouse.

7. It is mentioned in the case itself that Vikas required to walk through the red channel because he carries more than the limits of bona fide baggage (allowed for duty-free clearance) under the Baggage Rules, 2016; but he walked through the green channel to avoid customs duty. Hence, Vikas has committed an offence under section 135 of the Customs Act, 1962.

As per Section 3 of the Prevention of Money Laundering Act, 2002, whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property, shall be guilty of offence of money-laundering.

Further as per Section 2(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

Further as per paragraph 12 of part A of Schedule to the Prevention of Money Laundering Act 2002, offences under the Section 135 of Customs Act, 1962 regarding evasion of customs duty; are considered as a scheduled offence under the Prevention of Money Laundering Act, 2002.

Therefore, Vikas is guilty of an offence under the Prevention of Money Laundering Act, 2002.

**Students are advised to note**

Mr. Vikas also committed an offence under Section 132 of Customs Act, 1962 regarding false declaration which is mentioned under part B of the schedule to the Prevention of Money Laundering Act, 2002. But same is not a scheduled offence under the Prevention of Money Laundering Act, 2002. Because offences specified under Part B of the Schedule considered as the scheduled offence only if the total value involved in such offences is one crore rupees or more. This is not the case here considering the prevailing exchange rate between USD and INR.

8. The facts of the case are that DRPL wanted to release its film 'Hero no 1' on 25<sup>th</sup> December 2015, being Christmas and its film 'Love Tales' on 14<sup>th</sup> February, 2016 being Valentine day. VFPL also wanted to release its film 'Dil Se Dil Tak' on the same day as 'Love Tales'.

DRPL put forth a condition before the Single Screen Theatres that if they want to purchase the rights of the film 'Hero no 1', they have to also purchase the rights of the film 'Love Tales' to be released and exhibited on valentine's day. DRPL kept that as a non-negotiable condition.

With the rise of Multiplexes, the market share of Single Screen Theaters', has come down to 35% (means if 100 exhibitions took place then 65 are in multiplexes and the remaining 35 in Single Screen Theaters).

Since the legal experts based upon the precedence established by Commission (competition commission) and other judicial bodies believe Multiplexes and Single Screen Theatres shall be considered as different segments ("relevant product market") because the features and commercial conventions are distinct despite the core element (film) of their sale is same, hence the importance of 35% market share held by Single Screen Theaters' for exhibition shall not be considered in relative context to 100; instead it shall be considered as separate relevant product market. Means appreciable adverse effects shall be measured and considered in an independent context.

The majority of the Single Screen Theatres agreed to the condition because DRPL is the largest (number of films per year) producer as well apart from being one of the oldest, but some did not find it lucrative and hence declined. Unfortunately, the ones who declined did not get the rights to exhibit both, 'Hero no 1' and 'Love Tales'.

Since DPRL put forward tie-in agreement (prohibited under section 3(4) the Competition Act, 2002 and explained through explanation to said sub-section) as a

non-negotiable condition in front of Single Screen Theatres, hence guilty under section 3(1) the Competition Act, 2002 of entering an anti-competitive agreement.

DRPL being the largest (number of films per year) producer, hold the dominance over the exhibitors (as well as on other producer and distributors) but that neither prohibited and nor considered as offence. This feature of being the largest producer empowers the DPRL to put forward the non-negotiable condition and also influences/forces the majority of the Single Screen Theatres to agree on the condition (tie-in i.e. to purchase the rights of the film 'Hero no 1', Single Screen Theatres have to also purchase the rights of the film 'Love Tales') hence DRPL also guilty under section 4(1) of the Competition Act, 2002 of abusing the dominance.



## CASE STUDY 15

Bindal Steel and Power Ltd. (BSPL) was incorporated in 2002. It is engaged in the exploration of iron ore and produces economical and efficient steel and power through backward and forward integration. BSPL's business operations span across the states of Chhattisgarh, Odisha, and Jharkhand in India, where it operates some of India's most advanced steel manufacturing and power generation capacities on a global scale. BSPL has created cutting-edge capacities to produce up to 9.95 Million Tonne Per Annum (MTPA) of Iron through a judicious mix of Direct Reduced Iron (DRI), Blast Furnace and Hot Briquetted Iron (HBI) Routes catering to its 11.6 MTPA of Liquid Steelmaking capacities across three locations in India and abroad as well. The company has an installed finished steel capacity of 6.55 MTPA which is prudently spread over Bar Mills, Plate Mills, Rail and Universal Beam Mill (RUBM), Medium & Light Structural Mill (MLSM), and Wire Rod Mill.

Bindal Steel & Power (Mauritius) Ltd. (BSPML) subscribed 7 lakh shares of BSPL at USD 9 each (USD 6.3 million) in 2002. The parent company BSPML holds 56% shares in BSPL. BSPL is also an associate of Bindal Steel & Power (USA) Ltd. (BSPUL) which holds 27% shares of BSPL. In 2009, the BSPL is planning for vertical expansion by diversifying from the steel and power industry to the automobile sector. BSPL in order to meet expenses for working capital in relation to setting up of factories in different locations of India issued 6% debentures worth \$ 80 million which were listed on the New York Stock exchange. BSPL had already applied for the loan registration number for the purpose of a loan through an automatic route of RBI. BSPL submitted the duly certified Form ECB, which also contains the terms and the conditions of loan, in duplicate to the local branch of SBI Bank for obtaining valid LRN. The debentures were raised in foreign currency and also are repayable in foreign currency. The parent company BSML subscribed to 60% of debentures issued by BSPL. The foreign branch of SBI Bank in the U.S.A also subscribed 10% of debentures issued by BSPL. The 6 months NIBOR prevailing in the New York Stock exchange at the time of providing the loan was 3%. BSPL is required to deposit tax which is deducted at source on interest income at a rate of 5% on behalf of the subscribers of the debentures.

BSPL is required to repay the loan in the time span of 5 years. The repayment schedule is 25% payment in 1<sup>st</sup> year, 20% payment between 2<sup>nd</sup> to 4<sup>th</sup> year, and balance 15% payment in 5<sup>th</sup> year. Taking 360 days in calculation the average period of loan comes out to be 3.2 years. After 1 month from the date of the issue of debentures, the Board meeting was held to formulate the risk management policy of the loan. The Board is of the opinion that the

company BSPL is at a high risk of fluctuation in foreign exchange and hence the board needs to hedge the principal portion of the debt by entering into a forward contract.

As per the latest audited balance sheet of BSPL, its paid-up share capital was USD 7.5 million (face value equivalent to USD 6 per share), reserves and surplus of USD 8 million out of which USD 5 million were free reserves. One of the outstanding loans was equivalent to USD 5 million in form of rupee-denominated bonds provided by BSPML in 2006 bearing a coupon rate of 4% p.a.

In 2016, Bindal Steel and Power Ltd. (BSPL) decided to expand its presence to several other states. The board of directors thought it would be a good move to set up few more factories, particularly in the states in which BSPL wants to create its presence. To undertake this, venture finance was a pre-requisite for this purpose. BSPL was not desirous of increasing its equity component and decided to raise its debt component instead. Accordingly, the management of BSPL decided to apply for a loan. BSPL approached Uniform Finance Limited (UFL) for this purpose. It submitted an application to UFL requesting for ₹100 crores as a loan. UFL agreed to facilitate the lending as secured lending to be repaid in 40 EMIs. BSPL accepted the conditions and entered into a Loan Agreement with UFL. BSPL handed over 40 postdated cheques to UFL towards the payment to UFL. The dates of the cheques were in correspondence with the EMI dates.

UFL was part of the Uniform Industries Group. The Group had another entity known as Uniform Capital Limited (UCL). UCL was also involved in commercial finance and had a larger client base as compared with UFL. The Group was desirous of merging UFL in UCL to further expand its client base under one umbrella in the name of UCL. The petition for the merger was under consideration in the High Court (HC) and HC approved the same.

BSPL wanted to procure some infrastructure-related material for setting up the factories. It entered into an agreement with Infra Providers Pvt. Ltd. (IPPL) for the purpose. IPPL was renowned in the industry for providing good quality infrastructure-related material for building and construction purposes. BSPL and IPPL executed a Procurement Agreement which fleshed out the quality and quantity of material to be delivered, the logistics of the delivery, the schedule of delivery, the tranches in which payment would be made by BSPL, etc.

BSPL commenced the activities towards the new venture. IPPL started delivering the requisite materials to BSPL for settling up the factories. However, BSPL was not convinced with the quality of the material and withheld the payment of money to IPPL. IPPL contested the same and sued BSPL in the court of law for non-payment of money. BSPL's contention was that since the material supplied did not meet the specified quality it was not liable to pay IPPL for the same.

BSPL had also taken a loan in form of rupee-denominated bonds from Bindal Steel & Power (USA) Ltd. (BSPUL). Though BSPUL was a group entity the loan was taken at an arm's length interest rate. The repayment was to be done by BSPL at a later date.

Unfortunately, the market hit with depression, and the economic conditions in the industry were impacted. BSPL suffered some losses which impacted its bank balance. As a result of the same, the postdated cheques submitted to UFL were dishonored. UCL (as UFL got merged with UCL) was aggrieved and called for the arbitration proceeding for the matter which was a medium of settlement recorded between the parties in terms of the Loan Agreement signed between BSPL and UFL.

IPPL came to know of the situation of BSPL and filed an application to the NCLT for initiation of corporate insolvency resolution process against BSPL and then after UCL also decided to file an application to the NCLT for the same.

### **I. Multiple Choice Questions**

1. For initiation of the corporate insolvency resolution process against BSPL, IPPL can file an application to NCLT jointly with:
  - (a) Uniform Capital Limited
  - (b) Uniform Capital Limited and Bindal Steel & Power (USA) Ltd.
  - (c) Bindal Steel & Power (USA) Ltd.
  - (d) IPPL can file application solely only and not jointly
2. The Committee of Creditors (CoC) of BSPL would comprise of:
  - (a) IPPL and BSPUL
  - (b) UCL and BSPUL
  - (c) UCL, BSPUL and BSPML
  - (d) UCL
3. Assume that there are no legal proceedings going on between IPPL and BSPL and NCLT admitted the application filed by IPPL for initiation of the corporate insolvency resolution process against BSPL but immediately thereafter IPPL and BSPL came to a satisfactory settlement. In such a case, the application for CIRP:
  - (a) May be allowed to withdraw by NCLT on an application by IPPL

- (b) May be allowed to withdraw by NCLT on an application by IPPL subject to the approval of the Committee of Creditors with a 90% voting share
  - (c) May be allowed to withdraw by NCLT on an application by IPPL or Resolution professional
  - (d) Cannot be withdrawn
4. Whether the all-in-cost of the debentures is within the prescribed threshold under FEMA, 1999?
- (a) Yes, because the all-in-cost is 6% whereas the prescribed limit is 7.5%.
  - (b) No, because the all-in-cost is 11% whereas the prescribed limit is 7.5%.
  - (c) Yes, because the all-in-cost is 6.03% whereas the prescribed limit is 7%.
  - (d) Yes, because the all-in-cost is 6% whereas the prescribed limit is 10.5%.
5. Which of the following statement is correct?
- I. Raising of ECB through a foreign branch of SBI Bank is not valid because the foreign branch of an Indian bank cannot subscribe to the foreign currency-denominated bonds
  - II. Raising of ECB through a foreign branch of SBI Bank is not valid because the foreign branch of an Indian bank cannot subscribe to debentures, funds of which are to be used for working capital purposes
  - III. BSPL has appropriately hedged the foreign exchange exposure as per the provisions of FEMA, 1999
  - IV. The parent company of BSPL cannot subscribe to the debentures because it is holding more than 51% equity in BSPL.
- (a) I and III
  - (b) II, III, and IV
  - (c) Only II
  - (d) II and III

## II. Descriptive Questions

6. Whether the application to NCLT for CIRP against BPSL filed by UCL is valid considering the fact that arbitration proceedings are pending as well as the loan was

taken from the former company, UFL, and not UCL? Assume no application to NCLT by IPPL has been filed.

7. Whether the application filed by IPPL to NCLT for initiation of corporate insolvency resolution process against BSPL is eligible to be admitted or liable to rejection?
8. Whether the BSPL allowed raising the external commercial borrowing through an automatic route?

### ANSWERS TO CASE STUDY 15

#### I. Answers to Multiple Choice Questions

1. (d) IPPL can file application solely only and not jointly

**Reason:**

The IPPL here is an Operational Creditor. Since the BSPL has made default in paying the dues of the IPPL, so IPPL can initiate CIRP against BSPL.

2. (d) UCL

**Reason:**

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

Since IPPL is an operational creditor, so it can not be a part of the CoC. UCL being the financial creditor, so it can become member of CoC.

3. (b) May be allowed to withdraw by NCLT on an application by IPPL subject to the approval of the Committee of Creditors with a 90% voting share

**Reason:**

Section 12A of the IBC states that the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on **an application made by the applicant with the approval of 90% voting share of the committee of creditors**, in such manner as may be specified.

4. (a) Yes, because the all-in-cost is 6% whereas the prescribed limit is 7.5%.
5. (c) Only II

**II. Answers to Descriptive Questions**

6. Uniform Finance Limited (UFL) is part of the Uniform Industries Group. BSPL vide a Loan Agreement taken a loan from of ₹100 crores from UFL to be repaid in 40 EMIs. Here, EMIs would mean every month installment. For the same BSPL had submitted 40 postdated cheques, which were dishonored owing to the financial crunch faced by BSPL.

The Loan Agreement mentioned arbitration as a mode of dispute settlement between the parties, hence, UCL called for arbitration proceedings for solving the dispute pertaining to non-payment of the balance amount by BSPL.

We can say that considering the nature of the transaction, the debt owed by BSPL is a financial debt and hence, UFL is a financial creditor of BSPL and BSPL is a corporate debtor.

A financial creditor can apply to the NCLT under Section 7 of the Insolvency and Bankruptcy Code, 2016 (Code) for initiation of corporate insolvency resolution process against the corporate debtor.

A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money.

It is to be noted that an application filed under the said Section 7 of the Code is NOT BARRED by the ongoing arbitration proceedings. However, once an application under Section 7 of the Code is admitted by the NCLT, the other proceedings pending before any Courts or Tribunals including the Arbitral Tribunals are stayed after the commencement of the moratorium period. The moratorium period shall commence from the date of admission of the application by the NCLT.

Section 14(1)(a) provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely, the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, **arbitration panel** or other authority.

Section 238 of the IBC provides that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law

Further, in the interim, UFL got merged into Uniform Capital Limited (UCL) which is another group entity of Uniform Industries Group. Hence, though the debt was originally due by BSPL to UFL, but by virtue of the High Court approving the scheme of merger, the loan amount receivable by UFL stands transferred and vested in UCL. Accordingly, UCL has acquired the status of the financial creditor in terms of section 5(7) of the Code.

Hence, it can be concluded that in spite of the fact that arbitration proceedings are ongoing, UCL being the financial creditor of BSPL can apply to the NCLT for initiation of the corporate insolvency resolution process.

7. BSPL had entered into a Procurement Agreement with Infra Providers Pvt. Ltd. (IPPL). The motive of entering into this agreement was for BSPL to procure materials for setting up its factories. BSPL did not make payment to IPPL on the grounds that the quality of the material was not in consonance with the Procurement Agreement. The said agreement did specify the specifications of the materials. IPPL contested the same and sued BSPL for the payment.

Here, it is worthwhile to take reference of the definition of **Operational Creditor** and **Operational Debt** as defined under the IBC.

Section 5(20) “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Section 5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

In the given case, the transaction, that BSPL entered into with IPPL was in the ordinary course of its business, hence the debt can be categorized as an operational debt under section 5(21) of the Insolvency and Bankruptcy Code, 2016 (Code) and IPPL can be categorized as an operational creditor under Section 5(20) of the Code.

An operational creditor can make an application to the NCLT under Section 9 of the Code for the initiation of the corporate insolvency resolution process. One of the pre-requisite for an Operational Creditor to file an application under Section 9 is that the operational creditor does neither receive payment from the Corporate Debtor (BSPL in our case) nor receives any notice of the existence of a dispute.

Section 5(6) of the IBC states that “dispute” includes a suit or arbitration proceedings relating to— (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty.

BSPL and IPPL regarding the quality of the materials, and hence, due to which the question of making payment by BSPL is pending. This qualifies as a ‘dispute’ in terms of section 5(6) of the Code.

Hence, IPPL’s application for initiation of corporate insolvency resolution process against BSPL is liable to be rejected in the presence of a ‘pre-existing dispute’ as to the debt. IPPL should rather wait for an order of the competent court in whose jurisdiction the dispute has been filed.

8. The RBI vide its Circular No. RBI/FED/2018-19/67FED Master Direction No.5/2018-19 dated 26.03.2019 (updated as on 10.12.2021) at Para 2.2. has prescribed the Limit and leverage for ECB Framework.

All eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route. Further, in the case of FCY denominated ECB raised from direct foreign equity holder, **ECB liability-equity ratio for ECB raised under the automatic route cannot exceed 7:1**. However, this ratio will not be applicable if the outstanding amount of all ECB, including the proposed one, is up to USD 5 million or its equivalent. Further, the borrowing entities will also be governed by the guidelines on debt-equity ratio, issued, if any, by the sectoral or prudential regulator concerned.

Equity includes paid-up share capital and free reserves (including the share premium received in foreign currency) as per the latest audited balance sheet. ECB Liability includes all outstanding amounts of all ECB (other than rupee-denominated) and proposed ones (only outstanding ECB amounts in case of refinancing). Both ECB and equity amounts will be calculated with respect to the foreign equity holder.

In the given case, Bindal Steel & Power (Mauritius) Ltd. (BSPML) subscribed 7 lakh shares of BSPL at USD 9 each in 2002 but the face value of share needs to be considered that is USD 6 per share, hence paid-up capital amounts to USD 4.2 million. The parent company BSPML holds 56% shares in BSPL. The share of BSPML in Free Reserves is \$ 2.8 million (56% of USD 5 million). Thus, equity is USD 7 million (USD 4.2 million + USD 2.8 million).

The company issued 6% debentures of USD 80 million which was listed on the New York Stock exchange. The parent company, BSML subscribed to 60% of debentures issued by BSPL. Thus, ECB liability is USD 48 million. The outstanding amount of the old loan is not included because it is denominated in rupees.

The ECB liability-equity ratio is 6.86:1 (USD 48/ USD 7). Since the ratio is less than 7:1, hence the BSPL allowed raising the external commercial borrowing through an automatic route.



## CASE STUDY 16

Mr. Prem Mehra is an Indian businessman. He became the Chairman of the Premium Company Ltd. in 2004 after his father's death. Premium company was established in July 1984 by Mr. D.D. Mehra, the father of Mr. Prem Mehra. The company is running multiple businesses such as Financing, Infrastructure, Telecommunications, etc.

Mrs. Ashima Mehra, the wife of Mr. Prem Mehra is a philanthropist and also a Director in Premium Company. Mr. and Mrs. Mehra have three children - Mr. Aditya Mehra, Mr. Akhil Mehra and Ms. Kaira Mehra. Amongst the three, Mr. Aditya is the eldest son and Ms. Kaira is the youngest amongst the three siblings. Mrs. Anuradha Mehra the mother of Mr. Prem Mehra also holds a 10% equity stake in the Premium Company.

The Premium Company started the telecommunications business in India on 3<sup>rd</sup> June 2004, with nationwide CDMA 2000 service. The company introduced its GSM service in 2009. The company with the corporation of a Japanese company introduced its co-branded Android smartphones in India in 2014.

On 11<sup>th</sup> March 2016, Premium Company announced that it had acquired Z-Fone Tele-Services Limited (ZTSL) and it agreed to pay ₹292 crores within the next 5 years. As a result of the deal, Premium Company acquired ZTSL India's subscribers and its spectrum.

Premium Company in 2007 acquired a controlling stake in Ganesham Films and after some time bought all the stakes in Ganesham Films and subsequently, changed the name of the company to Premium Mediatek Networks.

To pay the existing debts and to make the company work efficiently, Premium Company took bank loans from a consortium of Indian banks. The company wanted to expand its telecom business and DTH services in India. So, this time the company approached foreign banks for the loan. Being one of the pioneer companies of India and on its credibility, all the three foreign banks - Global Bank of America, Exim Bank of Scotland, and Chartered Bank of London, sanctioned the required loan amounts.

The Indian lenders of Premium Company included ABD State Bank with an exposure of over ₹1,245 crore followed by Bank of Baroda (₹1,090 crore), P&G National Bank (₹810 crore), and JV National Bank (₹792 crore). Among overseas lenders, Global Bank of America had an exposure of over ₹700 crore (converted into Rupees ) followed by Exim Bank of Scotland (over ₹430 crore, converted into Rupees), and Chartered Bank of London (₹350 crore, converted into rupees). All the four Indian banks as aforesaid sanctioned the loans in the year 2012 in a consortium agreement. Premium Company assured the bank to pay all the installments on time. The company as per their commitment paid installments on time.

Everything went well but from August 2017, due to heavy losses, the company defaulted in paying installments to all the nationalised as well as the foreign banks. Due to tough competition in the telecommunications market and the entry of new giants in the market, the rates of voice calls and data plans reduced considerably. The Banks started sending reminders to the Premium Company to clear all of their respective dues.

The JV National Bank seized and then attached a warehouse of PQR to recover the unpaid loan as per court decree, but even after many attempts, not able to recover its loan by selling the property at the expected market price. So, the bank had decided to lease the premises. Premium Company had come to know about it and had approached the bank in May 2016 to take the premises on lease. The annual rent of the premises had been fixed at ₹1.5 crores. As the company went in losses from the year 2017, it defaulted in paying lease rentals for the last two years, which amounted to ₹3 Crores. Due to non-payment of dues by some other companies as well along with Premium Company to JV National Bank, the NPA of JV National Bank rose to sixty-five percent. JV National Bank has been grappling with mounting bad loans for the last two years.

Mr. Prem Mehra in a press conference announced four real estate projects in Mumbai, Nagpur, Pune, and Nashik on 21<sup>st</sup> November 2019 that Premium Company will undertake. The details of the project were as follows:

- ◆ Premium Serene in Vashi Mumbai, where the proposed project consists of an area of five hundred square meters and the number of proposed apartments will be eight .
- ◆ Premium Codename in Nagpur, where the proposed project consists of an area of fifty thousand square meters and the number of proposed apartments will be eighty.
- ◆ Premium lifestyle in Pune, where the proposed project area consists of five thousand square meters and the number of the proposed apartments will be eighty.
- ◆ Premium Royal serenity in Nasik, where the proposed project area consists of five thousand square meters and the proposed apartment will be one hundred.

The company decided that the booking of the apartments in all the projects will start after 24<sup>th</sup> December 2019, after obtaining all the legal permissions from the prescribed authority. A board meeting was held on 5<sup>th</sup> December 2019. The board of directors was of a view that there is the shortage of funds with the company. Ultimately with a unanimous decision, the budget for two projects was reduced. The company decided to reduce the number of apartments in two projects. Now the company will build only eight apartments in Premium Serene in Vashi Mumbai and in the case of Premium Codename in Nagpur, the construction will take place in two phases. In the first phase, a twenty-five square meters area will be developed with the construction of forty flats and in the second phase, another twenty-five square meters area will be developed for constructing the remaining forty flats. As per the Act, all the required documents were then submitted by the company for RERA registration.

From 25th December 2019, the company started the bookings of flats in all four projects. As a Christmas day offer, the company gave an extra two lakh rupees discount on each project on the booking of the flat within 6 months of starting of construction work. People started booking flats in all four projects. The cost of the flats in all four projects started from rupees three crores to seven crores. The company started the work in all the projects in full swing after getting the commencement of work certificate for each of the projects from the authority.

Mr. Harshit Khanna, a registered real estate agent, is the owner of a firm called Harshit Homes. He wanted to get associated with Premium Company for selling the flats of Mumbai as well as Nagpur projects respectively. Mr. Harshit gave an advertisement without the company's knowledge, in the newspaper for the sale of flats along with an offer that whosoever books any flats via his firm will get extra one percent discount on booking amount.

The company overall got a good response for the three projects except for the Nasik project. It got only seventy percent of the total booking slots till mid of February. A board meeting was held on 26<sup>th</sup> February 2020 in which it was decided that due to losses in other businesses of the company and being heavily in debt to the creditors, the company will sell its Nasik project to a third party, XYZ Infrastructure Company. After overtaking the project, XYZ Infrastructure Company made certain changes in the layouts of the project.

Premium Company tried to sell its assets to various companies, including its rival Tele Tones Company, to clear the debts but the deals did not crystallize as expected. Later, the insolvency proceedings against Premium Company started on a plea filed by Japanese Telecom Company after the company failed to clear its dues.

The CoC final meeting was to be held on 25<sup>th</sup> March 2020, but amidst the nationwide lockdown, it got cancelled. According to the order of the National Company Law Tribunal, CoC needs to complete the entire process by 30<sup>th</sup> March 2020, and the resolution professional, Legal Hawk needs to file the resolution plan with the NCLT, Mumbai by 2<sup>nd</sup> April 2020.

### **I. Multiple Choice Questions**

1. In which of the four real estate projects started by Premium Company, registration of the project is not mandatory?
  - (a) Premium Serene
  - (b) Premium Codename
  - (c) Premium lifestyle
  - (d) Premium Royal Serenity
2. Mr. Harshit has himself announced that any person making bookings via their agency will be given an extra discount. In regards to the provisions of RERA, this announcement can be deemed as:-

- (a) Voidable at the option of the Premium Company.
  - (b) Misleading the buyers for services that are not intended to be offered.
  - (c) Correct and to be intended to be offered by the Company.
  - (d) To be reliable as made by the registered agent of the company.
3. The company decided to construct the Nagpur project in two different phases due to a shortage of funds. What shall be the impact of the decision on the project?
- (a) Both the phases are part of one project and so no separate registration is required for each phase.
  - (b) Separate registration of the project is required only in cases where it is developed by two different promoters.
  - (c) Each phase will be considered as a stand-alone project and separate registration is required for both phases.
  - (d) If the second phase is immediately started after completion of the first phase then no separate registration of the phases is required.
4. XYZ Infrastructure Company after the takeover of the project, did changes in the layouts of the project. Is it authorised to do the changes to the layouts of the ongoing project?
- (a) Before doing any changes in the project, it has to take prior approval of the RERA Authority
  - (b) As a new promoter of the project, it is authorised to make necessary changes.
  - (c) With the permission of the two-third of allottees of the flats, they can make necessary changes.
  - (d) The new promoter is required to carry forward the project by complying with all the pending obligations of the erstwhile promoter.
5. The final meeting of the committee of creditors was to be held on 25th March 2020. Is it necessary to hold the meeting in person or can it be arranged otherwise?
- (a) Since it is a final meeting, everyone needs to be present in person.
  - (b) Meeting in person is not necessary and it can be held via video conferencing.
  - (c) Only resolution plans can be discussed via video conferencing and voting needs to be done in person.
  - (d) With prior permission of the Tribunal (NCLT), resolution professionals can hold meetings via video conferencing.

**II. Descriptive Questions**

6. Answer the following questions with respect to the constitution of the committee of creditors.
  - a. All the four Indian banks, as a consortium gave loans to Premium Company. How will they form part of the committee of creditors and how their voting shares would be determined?
  - b. JV National bank is a financial as well as an operational creditor of the Premium Company. Can JV National Bank club both the debts and claim it as a financial debt?
7. In context with the Competition Act, 2002, answer the following:
  - a. What is the obligation on part of Premium Company and Z-Fone Tele-Services Limited under the Competition Act 2002, assuming that acquisition of ZTSL by the company will result in the formation of a 'combination'?
  - b. In case, the Commission is suspicious about the adverse effects of the merger of both the companies on the competition, then what measures will the Commission take to investigate before issuing the approval order?

**ANSWERS TO CASE STUDY 16****I. Answers to Multiple Choice Questions**

1. (a) Premium Serene

**Reason:**

Section 3(2)(a) of the RERA provides the exemption from registration. It reads as under:

Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required where the area of land proposed to be developed **does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:**

In the given case, the Premium Serene of Vashi Mumbai, the proposed project consists of an area of five hundred square meters only and the number of proposed apartments will be eight only. Since it is neither exceeding from 500 sq meter in area nor in number of apartments from five, hence no registration is required.

2. (b) Misleading the buyers for services that are not intended to be offered

**Reason:**

Section 10(c) of the RERA states that every real estate agent registered under section 9 shall not involve himself in any unfair trade practices, namely:—

- (i) the practice of making any statement, whether orally or in writing or by visible representation which— (A) falsely represents that the services are of a particular standard or grade; (B) represents that the promoter or himself has approval or affiliation which such promoter or himself does not have; **(C) makes a false or misleading representation concerning the services;**
- (ii) permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.

Thus, the announcement of Harshit shall be treated as unfair trade practice under section 10(c)(i)(C) of RERA.

3. (c) Each phase will be considered as a stand-alone project and separate registration is required for both phases.

**Reason:**

The Explanation attached to section 3(2) reads as under:

For the purpose of this section, **where the real estate project is to be developed in phases, every such phase shall be considered a stand-alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.**

4. (d) The new promoter is required to carry forward the project by complying with all the pending obligations of the erstwhile promoter.

**Reason:**

Section 15(2) of the RERA reads as under:

On the transfer or assignment being permitted by the allottees and the Authority under sub-section (1), the **intending promoter shall be required to independently comply with all the pending obligations** under the provisions of this Act or the rules and regulations made thereunder, **and the pending obligations as per the agreement for sale** entered into by the erstwhile promoter with the allottees.

Provided that any transfer or assignment permitted under provisions of this section shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending

obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder.

5. (b) Meeting in person is not necessary and it can be held via video conferencing.

**Reason:**

Section 24(1) of the IBC provides that the **members of the committee of creditors may meet in person or by such other electronic means as may be specified.**

## II. Answers to Descriptive Questions

6. a. According to Section 21(3) of the IBC, 2016, subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to **two or more financial creditors** as part of a consortium or agreement, **each such financial creditor shall be part of the committee of creditors** and their **voting share shall be determined on the basis of the financial debts owed to them.**

Hence, each of the Indian banks will form part of the committee of creditors and their voting shares would be determined on the basis of financial debts (loan) owed to them by the Premium Company.

Here, it is to mention that foreign bank cannot be part of the CoC, since IBC is not an extra-territorial law. The courts situated outside India will not recognize the insolvency or liquidation proceedings of a company in India for its obligations abroad. This comes under the chapter of Cross Border Insolvency for which section 234 and 235 of the IBC deals with. Section 234 deals with the agreements with foreign countries and section 235 deals with the letter of request to a country outside India in certain cases.

- b. According to Section 21(4) of the IBC, 2016, where any person is a financial creditor as well as an operational creditor,—
- (a) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;
  - (b) such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

So, in the above-mentioned scenario, JV National Bank has no right to club both the debts and claim it as financial debt, as the **bank would be considered as a financial creditor only to the extent of financial debts owed by it.**

7. a. Under Section 6(2) of the said Act, it is stated that subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of—

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

Section 6(2A) of the said Act, states that no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.

- b. In case, the Commission is suspected of the merger of the company then it will investigate it under section 29 of the Competition Act 2002, in the following manner;

- (1) Where the commission is of the prima-facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a show-cause notice to the parties to combination to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.
- (1A) After receipt of the response of the parties to the combination, the Commission may call (Regulation 20 of the regulations) for a report from the Director-General and such report shall be submitted by the Director-General within such time as the Commission may direct.
- (2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have an appreciable adverse effect on competition, then it shall direct the parties to the said combination to publish details of the combination or the receipt of the report from Director general Called under sub-section (1A), whichever is later direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.



## CASE STUDY 17

Mr. Brijesh Lal is a leading real estate developer based in Jaipur. In the last two decades, his company, Satya Sai Developers Pvt. Ltd. has successfully developed many housing projects, which includes three in Jaipur and one each in Delhi, Bhopal, and Mumbai. The apartments which were built in Mumbai and Delhi included all the modern amenities and luxuries. The company is an ISO-certified company having a good reputation for delivering the projects well within the stipulated time and date.

In March 2014, Mr. Lal launched two projects in Jaipur, by the name 'Sun Residency' and 'Lotus Square'. In Sun Residency, 500 residential units consisting of 3BHK apartments were to be developed. This project was to be completed in all respects by November 2019. Lotus square was a small project with only 12 residential units of 4 BHK each to be completed by July 2016.

In January 2016, Mr. Lal transferred his rights in the project, Lotus square, to a third party, BN Housing Developers, as he wanted to concentrate on some other big projects, which he planned to launch by June 2016. But in between, the Real Estate (Regulation and Development) Act, 2016, came into force from 1<sup>st</sup> May 2016. So, Mr. Lal registered Sun Residency and submitted all the requisite documents with the concerned authorities. As the application for registration was found to be complete in all respects, the project was granted registration by RERA.

BN Housing Developers thought that it is a small project and they didn't find any need to register the project and they were also confident to successfully complete the project on time. As per their commitment, they successfully completed the project on time and all the allottees of apartments got their possessions by the end of July 2016.

According to the specified date for completion, Sun Residency was also completed and all the allottees got their possession by December 2019. But in February, some cracks developed in the walls of the building, and allottees found some quality issues in the construction. The association of allottees tried to bring it to the notice of Mr. Lal who was shocked to hear such complaints as he never compromised on construction quality for any of his projects. He called an urgent meeting of his team to discuss the issue.

Meanwhile, Mr. Lal finalised the land in one of the posh areas of Gurugram, National Capital Territory (NCT). He purchased 1000 square meters of land in that area for twenty crore rupees. He decided to build a project in two phases and so he thought to purchase 600 square meters of the adjoining plot too. The plot belonged to an NRI, Mr. Ranveer, cousin brother of Mr. Lal from whom Mr. Lal wanted to buy that plot for seven crore rupees. But Mr. Ranveer

demanded eight crore rupees. Mr. Lal was so desperate and excited to start the project that he accepted his offer and purchased the land. Mr. Lal paid seven crore rupees from his RFC account and the remaining amount he paid as a gift through crossed cheque to Mr. Ranveer which Mr. Ranveer deposited to his NRO account. Mr. Ranveer gave his approval and finalised the deal.

Finally, in September 2016, Mr. Lal was able to launch the project by the name 'Imperial Residency' in which 200 residential units consisting of 3BHK apartments were to be developed. In the first phase, 100 units will be constructed and in the second phase, the next hundred units will be constructed. The date of completion of the project was December 2020.

Mr. Raj Maheswari, manager in KDM Bank wanted to purchase a luxurious flat of his own. As he was in direct contact with Mr. Lal, he called him and asked him about the availability of flats in Imperial Residency. Mr. Lal told him that only two flats were left, as the rest all were booked. Mr. Lal's manager briefed Mr. Raj about the project. Mr. Raj got interested in the information and went to see, Imperial Residency, along with his wife. He liked its strategic location and all the other amenities offered in the project. He gathered all the information regarding the sanctioned plan, layout plan, and mode of payments from the sales office representative. On the same day, Mr. Raj along with his wife Mrs. Ashima, jointly entered into an agreement for sale with the promoters of the project and made a payment of 10% of the booking amount for the flat. In installments, Mr. Raj paid 70% of the total amount to the builder as the slab got completed and the remaining 30% was to be paid at the time of possession of the flat. Mr. Raj paid 80% of the total amount from his own disclosed sources of income and for the rest 20%, he took a loan.

A company called X-One Company Ltd. bought twenty flats in phase one of Imperial Residency. As of now, all the flats got booked due to the affordability and provision of all the modern amenities in the flats. The project was in its full swing. In January 2020, there was an earthquake in the Delhi NCR area. But there was no damage caused to the existing structure of the building. Although the architect of the project suggested some structural changes in the layout plan of the building, to make the building more resistant to earthquakes, so, in the future, it can withstand the earthquake of a larger frequency that is likely to occur in that location. But X-One Company Limited didn't voted for the need for such changes as it felt there is no such need.

Mr. Lal acquired an old building near Shantivan, Ashram road, Jaipur. It was situated in a good location. Mr. Lal thought of acquiring the building from the existing flat owners. He contacted the secretary of the society. It was a building with 2bhk apartments and had six floors. On each floor, there were 4 flats and on the ground also, the building had four flats. So, in total, the building had 24 flats. The society people agreed to sell their flats if they were paid thirty lakh rupees per flat.

Mr. Lal had a meeting with his architect wherein the architect suggested him to do some structural changes in the existing building layouts and to build car parking by demolishing the flats on the ground floor, as it will increase the flat value and he will be able to earn more profit by selling the flats. As per the architect's advice, Mr. Lal purchased all the flats from existing flats owners. After a year of making all the structural changes and renovation as suggested by his architect, Mr. Lal sold each flat at forty lakh rupees. He renamed the building as 'Premium Heights' and advertise for selling the flats. The building and flats after renovation looked so good, that one third of the previous residents of the building again re-purchased the flats from Mr. Lal. Rest other flats were sold to the new allottees.

Mr. Lal's friend, Mr. Navneet Singh, started a housing project in 2016. The date of completion of the project was November 2019 and the allottees were to get an allotment of flats by December 2019. Mr. Singh wanted Mr. Lal to get associated with the project as a financier. Mr. Lal agreed to finance, one-fourth of the project cost, in return that he will get five percent profits on the sale of each flat. But the project got delayed and by November 2019 only eight percent of work could have been completed. A meeting was held by Mr. Singh on 5<sup>th</sup> December 2019 wherein he tried to convince all the allottees that the work will be completed by May 2020 and will start getting possession from June month. But some of the allottees refused to wait for the next six months and demanded a refund, to which Mr. Lal objected. The aggrieved allottees decided to file a complaint against the promoters if their amounts were not refunded.

### **I. Multiple Choice Questions**

1. The allottees wanted a refund of their entire amount from Mr. Singh. Do you think Mr. Lal has a right to raise objections against the refund?
  - (a) As being one of the financiers of the project, Mr. Lal has a right to raise the objection.
  - (b) Mr. Lal can raise objections, only when he is one of the promoters of the project.
  - (c) Mr. Lal can raise an objection, only if it is mentioned in the sale deed.
  - (d) The allottees have the right to claim a refund whereas Mr. Lal has no right to raise any objection against the same.
2. Mr. Lal did renovation and changes in the existing building and re-sold one-third of the flats in Premium Heights to some of the previous owners. With respect to the scope of RERA, which of the following is the correct option?
  - (a) RERA is not applicable as the building is not demolished and the only renovation is done with required structural changes.

- (b) RERA is not applicable as the flats are re-allotted to the existing 1/3rd of the flat owners.
  - (c) RERA is applicable as Mr. Lal purchased more than fifty percent of the flats before their renovation.
  - (d) RERA is applicable as Mr. Lal advertises for selling and flats are resold with new allotments.
3. The association of allottees of Sun Residency brought the construction defects to the notice of Mr. Lal. After allotting the possession to the allottees and formation of society, is Mr. Lal still liable to the allottees? Identify the correct statement, regarding the liability of Mr. Lal.
- (a) Once the society of allottees is formed, Mr. Lal is not at all liable for any repairs or defects in the buildings.
  - (b) Mr. Lal is liable only towards the structural defects in the buildings if such defects bring to his notice within five years from the date of handing over the possession.
  - (c) Mr. Lal is liable towards the structural defects or any other defect in workmanship, quality, or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development in the buildings if such defects occurred within five years from the date of handing over the possession.
  - (d) Mr. Lal is liable for the structural defects in the buildings if such defects bring to his notice within five years from the date of handing over the possession.
4. Regarding the flat purchased by Mr. Raj jointly along with Mr. Ashima, which of the following is the correct statement?
- (a) Advance in form of deposit shall not be a sum of more than 5% of the cost of the property.
  - (b) Any amount of deposit can be collected by the promoter if a written agreement for sale is entered.
  - (c) Said transaction is a Benami transaction.
  - (d) None of these is a correct statement.

5. The promoters of Lotus Square didn't register the project with RERA authority as required under RERA, 2016. What will be the consequences they have to bear for it?
- (a) Penalty up to ten percent of the estimated cost of the project.
  - (b) Penalty up to ten lakh rupees or ten percent of the estimated cost of the project, whichever is higher.
  - (c) Penalty of five lakh rupees, which may cumulatively be extended up to ten percent of the estimated cost of the project.
  - (d) Penalty up to ten percent of the estimated cost of the project and imprisonment up to five years.

## II. Descriptive Questions

6. Mr. Ranveer sold his plot to Mr. Lal and out of eight crore rupees receivable, for one crore rupees, he wanted Mr. Lal to transfer him in form of a gift. Examine and analyse the situation.
7. Due to the earthquake in that area, the architect of the building proposed some alternations in the structure of the layout of the building. As an owner of the maximum apartments in the building do you think, X-One Company Ltd. is in a position to influence the opinion of promoters and the other flat holders?

## ANSWERS TO CASE STUDY 17

### I. Answers to Multiple Choice Questions

1. (d) The allottees have the right to claim a refund whereas Mr. Lal has no right to raise any objection against the same.

**Reason:**

The allottees can demand refund from the promoter in terms of section 19(4) of RERA. Here Mr. Lal is the financier only and do not come within the definition of promoter as prescribed under section 2(zk) of RERA.

2. (d) RERA is applicable as Mr. Lal advertises for selling and flats are resold with new allotments.

**Reason:**

Section 3(2)(c) of RERA provides that notwithstanding anything contained in

sub-section (1), no registration of the real estate project shall be required for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Thus, as per the provision the registration was not required for renovation or repair or re-development provided the promoter has not done the advertisement. Here the promoter has done advertisement, therefore he is liable for registration under RERA.

3. (d) Mr. Lal is liable for the structural defects in the buildings if such defects bring to his notice within five years from the date of handing over the possession.

**Reason:**

The proviso attached to section 11(4)(a) of the RERA provides that the responsibility of the promoter, with respect to the **structural defect** or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

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

4. (d) None of these is a correct statement.

**Reason:**

We have to examine each of the option given below:

**Option (a):** As per section 13(1) of RERA the advance payment is restricted up to 10% of the cost of apartment. In the given case, Mr. Ashima paid only 10%, so option (a) is correct.

**Option (b):** Section 13(1) provides that a promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, **as an advance payment or an application fee, from a person without**

**first entering into a written agreement for sale** with such person and register the said agreement for sale, under any law for the time being in force. In the given case, the agreement for sale was entered into before giving 10% as an advance. Hence option (b) is correct.

**Option (c):** This is not the benami transaction, since the purchase has paid the amount from his known sources of income (on which the Income tax has been paid) and for the remaining amount he has taken loan from bank. Hence option (c) is correct.

**Option (d):** Now option (d) remains which is the last correct option which says "None of these is a correct statement."

5. (a) Penalty up to ten percent of the estimated cost of the project.

**Reason:**

Section 59(1) of the RERA provides that if any promoter contravenes the provisions of section 3, he shall be liable to a penalty **which may extend up to 10% of the estimated cost** of the real estate project as determined by the Authority.

## II. Answers to Descriptive Questions

6. Under the Liberalised Remittance Scheme ("LRS"), all resident individuals, including minors, are allowed to freely remit up to USD 250,000 per financial year for any permissible current or capital account transaction or a combination of both. Such remittances are permitted to be used for conducting permissible current or capital account transactions and subsumes gifts in foreign currency made to any NRI or Persons of Indian Origin ("PIO").

However, as per answer to FAQ no. 26 on the LRS, a resident individual can make a rupee gift to an NRI/PIO, who is a close relative of the resident individual [relative' as defined in Section 2(77) of the Companies Act, 2013] by way of crossed cheque /electronic transfer. The amount should be credited to the Non-Resident (Ordinary) Rupee Account (NRO) of the NRI / PIO and credit of such gift amount may be treated as an eligible credit to NRO Account. The gift amount would be within the overall limit of USD 250,000 per financial year as permitted under the LRS for a resident individual. It would be the responsibility of the resident donor to ensure that the gift amount being remitted is under the LRS and all the remittances made by the donor during the financial year including the gift amount have not exceeded the limit prescribed under the LRS.

Here, the term “relative” is to derive its meaning from the definition provided in section 2(77) of the Companies Act, 2013, which state that ‘relative’ with reference to any person, means anyone who is related to another, if –

- (i) They are member so a HUF;
- (ii) They are husband and wife; or
- (iii) One person is related to the other in such manner as prescribed in Rule 4 of the Companies (Specification of definitions details) Rules, 2014. i.e. spouse, father, mother, son, son’s wife, daughter, daughter’s husband, brother, and sister of the individual.

Accordingly, FEMA brings in, a restrictive meaning to gifting transactions by covering gifts of the sum of money within the LRS domain and the scope of relative is narrower.

So, according to the definition of ‘relative’ under the Company Act 2013, it does not include cousin brother. Therefore, gift of a sum of Indian Rupees by Mr. Lal by way of a crossed cheque to his cousin brother would require prior approval of RBI.

Hence, in the above case, rupees one crore can only be transferred to Mr. Ranveer, if in case, he comes within the ambit of the definition of "close relatives" otherwise the money can be transferred through crossed cheque to a cousin brother, only with the prior permission of RBI and no benefit of the limit under LRS would be available in such case.

7. Section 14(2)(ii) of the RERA, 2016, states that the promoter shall not make any other alterations or additions in the sanctioned plans, layout plans, and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation to section 14(2)(ii) also states that, for the purpose of this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

Hence, from the provisions of the above section and its explanation, it is clear that despite the company holding twenty flats in the project, it will be counted as a single allottee. The builder needs the consent of two-thirds of allottees prior to making changes in the existing plan or building layout. So, it can be said that X-One Company Ltd. is not in a position to manipulate neither builder nor any other allottees. If two-third of the allottees give their written consent, then the required changes will be made in the building structure.



## CASE STUDY 18

Mr. Sanjeev Kumar is an entrepreneur running his company engaged in manufacturing designer shirts, office wear, and T-shirts, under the brand titled “S. Kumar's Designer Wears” since 1999. It is a famous Indian brand, sold at many dealership outlets across the whole of India. The brand is famous among both middle class as well as elite class people.

After many years of struggle, finally, Mr. Kumar owned a bungalow in Saket Vihar, New Delhi where he has just started residing along with his family. Mr. Kumar's wife, Mrs. Reena, is a doctor by profession and works in a private hospital in Gurugram. Their son, Rehan has completed his graduation from NIFT, Delhi in the year 2015. After that, he joined his father's business. Mr. Kumar's daughter, Anjali, is pursuing graduation in fine arts from the University of East London which is a three years' degree course.

Mr. Kumar on 3<sup>rd</sup> July 2019, remitted USD 100,000, for his daughter's education abroad. It includes her college fees, hostel accommodation, and food expenses. On his daughter's birthday, after two months, Mr. Kumar remitted USD 3,500 as a gift to his daughter on her birthday from his RFC Account.

Mr. Kumar had high aspirations and wanted to expand his business internationally. Hence, in the year 2015, after his son joined his business, Mr. Kumar thought of exporting his designed garments to other Western and Asian countries. After discussing with his wife and son, Mr. Kumar included his son as a director in his company. Thereafter, as required, Mr. Kumar completed various formalities required for exporting his product. After submission of all the documents, Mr. Kumar was finally issued a ten-digit unique importer-exporter code (IEC) from the office of the Directorate General of Foreign Trade (DGFT) under Section 7 of the Foreign Trade (Development & Regulation) Act, 1992.

In the month of July 2015, Mr. Kumar sent his first export consignment of designer clothes to a foreign buyer in Malaysia. The order amounted to USD 15,000. As per the conversation and agreement, the importer was required to make payment in three months after shipment. As per the terms and conditions, a letter of credit was opened by the Malaysian International Bank on behalf of the importer.

Mr. Kumar grabs another good deal of USD 25,000, from a USA-based client, Mr. James Samuel who wanted to import designer clothes from India as they were economical as well as of good quality. In the U.S.A there was a good demand for designer men's wear.

Mr. Kumar was able to get 20% of the total export value in advance. Mr. Kumar and his son, both made some exclusive designs especially for Mr. James, as per his requirements. Mr. Kumar was well aware that completing orders within a given time frame, plays a key role in receiving more orders in the future. Mr. Kumar shipped the goods within five months and the remaining export value was repatriated in India within six months from the export date through the authorized dealer.

Every time, Mr. Kumar before shipping goods used to file the requisite export declaration form as per the rules and procedure. Mr. Kumar submitted the requisite form in duplicate to the Commissioner of Customs for verification and authenticity check.

Mr. Kumar in January 2018, got an export order from UAE based client, Mr. Mohammed Khalid. Mr. Khalid owes Al-Hend Retail which is one of the largest retail chains of UAE, both in terms of revenue and in terms of the total number of stores. It sells a range of goods including groceries, electronics, and apparel under various retail brands. Mr. Khalid wanted to tie up with Mr. Kumar for men's official and fashion wear. Mr. Khalid asked Mr. Kumar to send some of the sample, so that he can finalise the patterns and designs. Mr. Kumar's son, Mr. Rehan, personally went to UAE to show the samples to Mr. Khalid and finalised the order. They both had detailed discussions about the fabric, patterns, and designs. Mr. Khalid placed his first order for USD 27,000. Mr. Rehan assured him that the order will be shipped within the next five months. As per the deadline, Mr. Khalid received his order before the expiry of five months. The designs and collection as expected got a good response from the customers.

As per the demand in the UAE market, Mr. Khalid in September 2018, again placed an order for around USD 60,000. Mr. Kumar assured Mr. Khalid that as per his requirements, he will make some new designs and will try to complete and deliver the order within six months' time. This time, Mr. Kumar was paid an advance amount of USD 15,000. But even after seven months, Mr. Kumar was not able to deliver the order to Mr. Khalid as he was under constant pressure to deliver the orders of other clients. In the first week of March 2019, Mr. Kumar's company's labour went on strike as they wanted an increment in their salary. The management tried to resolve the issues with the labourers but all their efforts went in vain. As a result, there was a complete lockdown in the company for the next two months. Due to which export orders of Mr. Kumar got delayed and he started getting reminders from his clients including Mr. Khalid.

After negotiation, the labourers were given 10% increments in their salary as demanded. They all were back to work from 1<sup>st</sup> May 2019. By end of July 2019, Mr. Kumar was not able to complete Mr. Khalid's order. By September 2019, he was only able to partially deliver his consignment. Mr. Kumar called Mr. Khalid and apologized to him for not being able to deliver the order on time. He requested Mr. Khalid to give him one month's time to complete his order, to which Mr. Khalid refused and wanted Mr. Kumar to refund his advance amount. Mr. Kumar then personally went to UAE to convince Mr. Khalid and Mr. Khalid to agree for one month time.

Meanwhile in New York, on 2<sup>nd</sup> November 2019, Mr. James while reading the newspaper, came across an advertisement that an exhibition cum fashion show was to be organised for 7 days, from 12<sup>th</sup> December to 19<sup>th</sup> December 2019. Many designers and big fashion brands from all over the world will showcase their best designs in the exhibition. Mr. James called Mr. Kumar and asked him to participate and also send him some sample designs to be displayed on his behalf at the exhibition.

In India, as per the special provisions for the export of garment samples, only those exporters are allowed to send samples that are registered with the Apparel Export Promotion Council (AEPC). Hence, it was easy for Mr. Kumar to send samples as he was a member of AEPC.

As this sounded to be a good opportunity and in future, he can get more prospective clients from other countries, he asked Mr. James to send him the form as well as all the formalities required to be done for the participation. Mr. Kumar discussed the same with his son, Mr. Rehan and they started making some new designs, keeping in mind the latest trends. The shipment got ready for dispatch. The shipment was dispatched on 1<sup>st</sup> December and it reached New York by 15<sup>th</sup> December to Mr. James.

The consignment consisted of samples that were of value not exceeding the USD 10,000. The samples were displayed at the exhibition and got a very good response. As a result of this exhibition, Mr. Kumar got two more orders worth USD 30,000 each from two different outlets, one situated in Los Angeles, U.S.A and one retail outlet situated in Canada.

Mr. Kumar was very happy as his revenue collection in the U.S and Canadian markets rose to USD 100,000 annually. He was immensely happy with all of his dealers including Mr. James and owner of retail outlets in the U.S.A and Canada. As a token of appreciation, he sent them gifts in form of customized suits and a good mobile phone as a gift to each of them which cost him, a total of three lakh rupees.

In July 2018, Mr. James' wife, Mrs. Anna, called Mr. Kumar. She is working in association with UNO, for an NGO called "Hope", which works for children who suffer from autism (problems with communication and social interaction). Mrs. Anna approached Mr. Kumar, to help her in raising the funds for such children and Mr. Kumar donated USD 3,000 from his account under the liberalised remittance scheme. Mr. Kumar also gave Mrs. Anna some references of his friends who generally used to contribute to such a noble cause. She got a good response from Mr. Kumar's friends too. Mrs. Anna was overwhelmed by the support, she got from Mr. Kumar and his friends. She sent all the receipts of donations to Mr. Kumar's address with a thank you note.

### **I. Multiple Choice Questions**

1. After the declaration form is submitted by Mr. Sanjeev Kumar to the Commissioner of Customs, what will be the course of action after its verification by the Commissioner?
  - (a) The Commissioner will pass an order for the export of the shipment to proceed.
  - (b) The Commissioner shall forward the original copy of the declaration to RBI.
  - (c) The Commissioner shall issue a no-objection certificate (NOC) to Mr. Kumar and send a copy to AD bank.
  - (d) The Commissioner will retain the original copy of the declaration form and return the duplicate copy to Mr. Kumar.
2. The importer-exporter code number is:
  - (a) Only issued to identify exporter and importer and not meant to be used while doing any transactions

- (b) Required to be mentioned on copies of declaration forms submitted to a specified authority.
  - (c) Needed only while the export amount is to be realized.
  - (d) Only used by RBI in order to maintain records of exporter and importer.
3. Do you think the declaration requirement is applicable, in the case where Mr. Kumar exports garment samples to Mr. James in the U.S.A?
- (a) It is applicable if samples are not to be imported back
  - (b) It is not applicable as it is exempted from such requirement
  - (c) It is applicable as the samples are sent outside India.
  - (d) It is not applicable as the export of garments is excluded from such requirements.
4. Mr. Kumar remitted USD 3,000 for donation abroad under LRS. Can such donation be considered under the prescribed limit of LRS?
- (a) The amount so remitted will be reduced from the prescribed limit of LRS in a financial year.
  - (b) The amount so remitted cannot be considered under the prescribed limit of LRS.
  - (c) The amount so remitted can be considered under LRS, only if it is remitted with prior approval of the Central Government.
  - (d) The amount so remitted can be considered under LRS, only if it is remitted with prior approval of RBI.
5. Whether Mr. Kumar had undertaken any obligation while taking advance payment against export order, from Mr. Kahlid?
- (a) Mr. Kumar needs to inform RBI if he fails to deliver the shipment within the stipulated time.
  - (b) Mr. Kumar needs to dispatch the shipment within one year from the date of receipt of advance payment.
  - (c) Mr. Kumar needs to refund the full advance payment if the order is not dispatched within a period of six months with prior approval of RBI.
  - (d) Mr. Kumar needs to refund the full advance payment if the order is not dispatched within a period of 1 year with prior approval of RBI.

**II. Descriptive Questions**

6. Mr. Kumar after remitting USD 100,000 for her daughter's education abroad, again remitted USD 3,500 as a gift to his daughter Anjali. Evaluate that how as an Indian resident, he was eligible to do both these remittances one after another?
7. What are the evidences that Mr. Kumar may need to furnish at the time of filing declaration of exports if required by the Commissioner of Customs and what are the other requirements that Mr. Kumar needs to adhere to relating to such declaration?

**ANSWERS TO CASE STUDY 18****I. Answers to Multiple Choice Questions**

1. (b) The Commissioner shall forward the original copy of the declaration to RBI.

**Reason:**

As per Regulation 6 (A) of Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, the declaration in form EDF shall be submitted in duplicate to the Commissioner of Customs. And after duly verifying and authenticating the Declaration Form, the Commissioner of Customs shall forward the original Declaration Form/Data to the nearest office of the Reserve Bank and hand over the duplicate Form to the exporter for being submitted to the Authorised Dealer.

2. (b) Required to be mentioned on copies of declaration forms submitted to a specified authority.

**Reason:**

As per Regulation 5 of Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, the importer-exporter code number allotted by the Director General of Foreign Trade (DGFT) shall be indicated on all copies of the declaration forms submitted by the exporter to the **specified authority** and in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.

3. (b) It is not applicable as it is exempted from such requirement.

**Reason:**

As per Regulation 4 (a) of Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, export of goods may be made without furnishing the

declaration if it comprises trade samples of goods and publicity material that supplied free of payment,

4. (a) The amount so remitted will be reduced from the prescribed limit of LRS in a financial year.

**Reason:**

In terms of Para 7(b) of the Master Direction – Liberalised Remittance Scheme (LRS) issued by the RBI vide its Circular No. RBI/FED/2017-18/3 FED Master Direction No. 7/ 2015-16 dated 01.01.2016 (Updated as on 20.06.2018), any resident individual may **remit up-to USD 2,50,000** in one FY as gift to a person residing outside India or as donation to an organization outside India. Further as per FAQ No. 3 on LRS (updated as on 21.10.2021) provided by the RBI, which states that individual can avail of foreign exchange **facility for the gift or donation within the LRS limit of USD 2,50,000 on financial year basis.**

5. (b) Mr. Kumar needs to dispatch the shipment within one year from the date of receipt of advance payment.

As per Regulation 15 (1)(i) of Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, where an exporter receives advance payment (with or without interest), from a buyer/ third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that the shipment of goods is made within one year from the date of receipt of advance payment.

## II. Answers to Descriptive Questions

6. Para 1 of Schedule III of the FEM (Current Account Transactions) Rules, 2000 states that individuals can avail of foreign exchange facility for the -

Gift or donation; [Ref. Para 1(ii)]

Studies abroad, [ref. Para (viii)]

within the limit of USD 250000 only.

Any additional remittance in excess of the said limit shall require prior approval of the RBI.

Thus, as per the Liberalised Remittance Scheme, Authorised Dealers may freely allow remittances by resident individuals up to USD 250,000 per F.Y. (April-March) for any permitted current or capital account transaction or a combination of both as mentioned in Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

AD Category I banks and AD Category II may release foreign exchange up to USD 250,000 or its equivalent to resident individuals for purpose of the gift or for studies abroad without insisting on any estimate from the foreign University. However, AD Category I bank and AD Category II may allow remittances (without seeking prior approval of the Reserve Bank of India) exceeding USD 250,000 based on the estimate received from the institution abroad but for remittance of gift amount exceeding prescribed limits, prior approval of the Reserve Bank of India is necessary

However, no approval of RBI shall be required for transactions mentioned in Schedule II and Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, where the payment is made out of funds held in Resident Foreign Currency (RFC) Account of the remitter.

Hence, a remittance made by Mr. Kumar to Ms. Anjali of USD 5,000 from the RFC Account as well as a remittance of USD 100,000 towards her education is within the limits mentioned under Liberalised Remittance Scheme.

Since in this case, the total remittances (i.e. USD 100000 + USD 3000) is much below /within the overall limit of USD 250000, hence, it did not require any prior approval of the Reserve Bank of India and so Mr. Kumar being a resident individual was eligible to do both these remittances one after another, but within a Financial Year.

7. Para 3 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015, deals with the matter relating to the **declaration of exports**. It provides that-
- (1) In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, **a declaration in one of the forms set out in the Schedule and supported by such evidence** as may be specified, containing true and correct material particulars including the amount representing –
    - (i) the full export value of the goods or software; or
    - (ii) if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.
  - (2) Declarations shall be executed in sets of such number as specified.

- (3) For the removal of doubt, it is clarified that, in respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services without furnishing any declaration, **but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India** in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.
- (4) Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

The declaration shall be supported by such evidence as may be needed, containing true and correct amount and material particulars including -

- The exporter is a person resident in India and has a place of business in India;
- The destination stated on the declaration form is the final place of the destination of the goods exported;
- The value stated in the declaration represents the full export value of the goods. If the full value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods in overseas market.

**Other requirements that Mr. Kumar needs to adhere to relating to such declaration**

- Realization of export proceeds in respect of export of goods from the third party should be duly declared;
- The Importer-Exporter code number allotted by the DGFT shall be indicated on all copies of the declaration forms submitted by the exporter to the specified authority and in all correspondence of the exporter with the authorised dealer or the Reserve Bank, as the case may be.



## CASE STUDY 19

Mapple Inc. is an American MNC that designs and markets consumer electronics, computer software and personal computers, etc. Mapple India is the Indian subsidiary of Mapple Inc. through which it markets and sells its products in India. XPhone and Sintel are leading mobile service providers in India, jointly having more than 30 crore Indian subscribers that account for almost 52% market share in the GSM market. In total, there are around 20 service providers in India but none of them individually holds more than 30% of the market share.

Particular models of iPhones – iPhone 3G and iPhone 3GS, were manufactured by Mapple Inc., launched in India during August 2008 and March 2010, respectively. During the fiscal year, 2010, worldwide sales of iPhones were 73.5 million.

Mobile services in India can be offered through two competing technologies i.e. GSM and CDMA and that, SIM cards of each of these cellular services are compatible only with those handsets which deploy their respective technologies and thus not able to substitution. iPhones are based on GSM technology. Handsets can be broadly classified as smartphones and featured phones. While acknowledging that iPhone is a unique product, there are certain smartphones offered by other brands such as Nokia, Blackberry, and Samsung that have advanced features and which could be considered as substitutes for the iPhone.

Mapple Inc. and Mapple India entered into some exclusive contracts/agreements with XPhone and Sintel respectively, for the sale of iPhones in India, even prior to its launch. XPhone and Sintel are both, cellular data and GSM network service providers functioning in India. As a result of the agreements, XPhone and Sintel got exclusive selling rights for an undisclosed number of years. The iPhones sold by XPhone and Sintel came in the compulsorily locked form, thereby meaning, that the handset purchased from either of them shall work only on their respective networks and none other.

Mapple Inc. permitted iPhone users only those applications on their iPhones that have been approved by them and available through their own online application store namely 'App Store'. Further, no other third-party applications can be run on iPhone unless the same has been approved by Mapple Inc. If however, the operating system of jail broken iPhone is upgraded, the iPhone gets re-locked and all the third-party applications are deleted by the servers of Mapple Inc. permanently. XPhone and Sintel refused to accept any iPhone for repairs at their authorized service centers if the same is not purchased from them. However, an unlocked iPhone can be purchased from abroad. Also, a consumer who has purchased a locked iPhone in India and has paid the unlocking fees is free to choose the network operator of his choice after unlocking the iPhone.

Out of the total market share for smartphones in India, Mapple India had a market share of 1.5% in the year 2008; less than 1% in 2009 and 2010 respectively, and 2.4% in 2011. Additionally, at the time of the launch of iPhone in India, there were about 250 million GSM mobile subscribers which subsequently rose to about 600 million in the year 2011.

An allegation by Ms. Rekha:

Ms. Rekha was one of the biggest fans of iPhones. After it was launched in India, she purchased an iPhone but was extremely disappointed when she realized, that, there were so many restrictions for using such iPhone which did not appear, value for money. When she investigated more into this, she found out that Mapple India was taking undue advantage of the dominant position that it enjoyed in the market. She then approached the CCI, to file a complaint against such abuse, in violation of section 4 of the Competition Act, 2002. In her complaint, she made the following allegations -

Mapple India enjoys a dominant position in the relevant market for smartphones, both in India as well as internationally, as iPhone, being the largest selling smartphone in the world. The informant also averred that XPhone and Sintel jointly enjoyed a dominant position in the relevant market for GSM mobile telephony services in India. The informant further submitted that XPhone and Sintel have abused their dominant positions by imposing unfair conditions on the purchasers of Mapple iPhones.

Reply by Sintel to the report of CCI:

It fails to consider that any dispute in relation to a telecommunication service is actionable under the Telecom Regulatory Authority of India Act, 1997, and the Competition Act, 2002 cannot be invoked as the CCI does not have any jurisdiction on the matters of cellular service providers in India when TRAI is the regulatory body. The bundled offer was in compliance with the guidelines of TRAI.

The informant failed to make any averment of having purchased Mapple iPhone 3G/3GS to show that she had any interest in the matter and has the locus standi to file the information.

The informant also failed to state that she had purchased iPhone 3G and 3GS from the grey market in India or abroad and consequently it is inexplicable as to how she has a grievance in this regard.

Mapple iPhone 3GS is being sold since June 2011 without its network being locked. For this reason, the issue raised in the information filed by Ms. Rekha is infructuous. The practice of locking the network onto the Mapple iPhone, even though in accordance with international practice, has long been discontinued in India.

Reply by XPhone to the report of CCI:

The agreement was non-exclusive and iPhones were available in India through a number of other distributors/channels and XPhone, being a telecom service provider provided the best tariff plans to its customers and XPhone never imposed any restrictions on its customers with respect to using unlocked phones and therefore, there it can be said that there is no violation.

The tariff plans, as were provided to iPhone customers were the same and if not, even better than the normal plans offered to other subscribers. Further, the tariff plans, as approved by Mapple Inc. were filed with the TRAI in August 2008 and were in full compliance with the TRAI regulations. Additionally, it is important to note that, even if an iPhone specific plan was published, the customers always had complete freedom to choose from other plans which were not iPhone specific and rather the customer were spoilt for choice, given the range of plans available to them. Therefore, there is no question of XPhone, being discriminating with iPhone customers vis-à-vis its other customers.

The concept of “collective dominance” is not recognized under section 4 of the Competition Act. Both, Sintel and XPhone are separate legal entities, with no structural links and with the completely different boards of directors and management. Therefore, the question of “collective dominance” does not arise.

iPhones are easily available in the open market and without any network locking. More importantly, even the iPhones bought through XPhone distribution channels were unlocked as and when a request was made after following the due process. Further, the TRAI’s MNP (mobile number portability) regulations give a right to the customer to move from one service provider to another freely, and consequently, the same customer can unlock his phone without any hassle. These facts clearly indicate that the allegations in the information are mere speculations and should be dismissed outright.

### **I. Multiple Choice Questions**

1. The relevant market(s) that the Director-General will identify while making the inquiry is/are
  - I. Smart Phones in India
  - II. GSM cellular service in India
  - III. Smart Phones in America and India
  - (a) Only I
  - (b) I and II
  - (c) II and III
  - (d) I, II, and III

2. The iPhones sold by XPhone and Sintel came in the compulsorily locked form, thereby meaning, that the handset purchased from either of them shall work only on their respective networks and none other. This is in the nature of
  - (a) Exclusive supply agreement
  - (b) Horizontal agreement
  - (c) Tie in agreement
  - (d) Refusal to deal
3. Whether the contention of Sintel that CCI does not have jurisdiction on the matters of cellular service providers in India when TRAI is the regulatory body is correct?
  - (a) Yes, TRAI has sole jurisdiction as the industry regulator, CCI does not have jurisdiction
  - (b) No, both have the jurisdiction; but TRAI can supersede and has primacy being industry regulator over CCI.
  - (c) No, both special acts and primacy have to be given to the respective objectives of both the regulators under their respective statutes.
  - (d) Can't say, as information on TRAI regulations is not provided
4. Assuming the iPhone is not purchased by Miss Rekha from the Mapple store. Can she file a case, in the forum under the Competition Act 2002?
  - (a) No, as Ms. Rekha has purchased iPhone from the grey market i.e. through distributors and thus, has no right to file a case
  - (b) No, as Ms. Rekha has not suffered any loss due to tie-up agreement made by Mapple India with XPhone and Sintel respectively
  - (c) Yes, as Ms. Rekha has used the iPhone and availed the cellular services, so she indirectly gets affected
  - (d) Yes, not only Ms. Rekha but any person can file such a case
5. The chairperson and other members of the CCI office shall be appointed by
  - (a) Central Government
  - (b) Relevant State Government
  - (c) High Court
  - (d) Central Government and the selection committee

**II. Descriptive Questions**

6. Whether there can be a case of abuse of dominant position against Mapple India, XPhone, and Sintel respectively?
7. Is there an appreciable adverse effect on competition due to the agreement made by Mapple India with XPhone and Sintel respectively?
8. Briefly states the duties of the CCI and the orders that can be passed by it after the establishment of infringement of section 3 or section 4 respectively?

**ANSWERS TO CASE STUDY 19****I. Answers to Multiple Choice Questions**

1. (b) I and II

**Reason:**

**Relevant Market:** It means the market which may be determined by the Commission with reference to the **relevant product market** or the **relevant geographic market** or with reference to both the markets. [Section 2(r)]

**Relevant geographic market:** It means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. [Section 2(s)]

**Relevant product market:** It means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. [Section 2(t)]

Hence, for this purpose the relevant market for Smart phones and GSM Cellular Services shall be India, the option I and II are correct.

2. (c) Tie in agreement

**Reason:**

The words “**tie-in arrangement**” has been defined in explanation (a) to section 3 which includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

In the given case, the iPhones sold by XPhone and Sintel shall work only on their respective networks and none other, which comes in the definition of “tie-in agreement”.

3. (c) No, both are special Acts and primacy has to be given to the respective objectives of both the regulators under their respective statutes

**Reason:**

In the case of **CCI vs Bharti Airtel Ltd, Supreme Court of India, dated 5<sup>th</sup> December, 2018**, [Civil Appeal no. 11843 of 2017] recognised that the TRAI Act and the Competition Act are both special Acts and primacy has to be given to the respective objectives of both the regulators under their respective statutes. CCI's jurisdiction is not excluded by the presence of sectoral regulators and to that end, the CCI enjoys primacy with respect to issues of competition law.

The Apex Court, opined that the purpose of the Competition Act is to eliminate the practices which are having adverse effect on the competition and to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants in India. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the TRAI Act. [Para 89]

Obviously, all the aforesaid functions not only come within the domain of the CCI, TRAI is not at all equipped to deal with the same. Even if TRAI also returns a finding that a particular activity was anti-competitive, its powers would be limited to the action that can be taken under the TRAI Act alone. It is only the CCI which is empowered to deal with the same anti-competitive act from the lens of the Competition Act. [Para 90]

The conclusion of the aforesaid discussion is to give primacy to the respective objections of the two regulators under the two Acts. At the same time, since the matter pertains to the telecom sector, which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which leads to the prima facie conclusion that the IDOs have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion. This balanced approach in construing the two Acts would take care of Section 60 of the Competition Act as well. [Para 91]

4. (d) Yes, not only Ms. Rekha but any person can file such a case.

**Reason:**

Section 19(1)(a) of the Competition Act, 2002 provides that the Commission may inquire into any alleged contravention of the provisions contained in section 3(1) or section 4(1) either on its own motion or on receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, **from any person, consumer or their association or trade association.**

Thus, as per the provisions of section 19(1) the Commission may inquire into the alleged contravention if it receives information from any person or consumer. **Hence not only the Rekha but any person can make an application to the CCI to inquire.**

5. (a) Central Government

**Reason:**

Section 9(1) of the Competition Act, 2002 provides that the **Chairperson and other Members of the Commission shall be appointed by the Central Government** from a panel of names recommended by a Selection Committee.

## II. Answers to Descriptive Questions

### 6. Legal Position

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

- a. **market share of the enterprise;**
- b. size and resources of the enterprise;
- c. size and importance of the competitors;
- d. economic power of the enterprise including commercial advantages over competitors;
- e. vertical integration of the enterprises or sale or service network of such enterprises;
- f. dependence of consumers on the enterprise;
- g. monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or

otherwise;

- h. entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- i. countervailing buying power;
- j. market structure and size of market;
- k. social obligations and social costs
- l. relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- m. any other factor which the Commission may consider relevant for the inquiry.

The dominant position has been defined under explanation (a) to Sec 4 as a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-

- (i) operate independently of competitive forces prevailing in the relevant market; or
- (ii) affect its competitors or consumers or the relevant market in its favour.

#### **Analysis of the case**

Maple India had a market share of 1.5% in the year 2008; less than 1% in 2009, and 2010 respectively and 2.4% in 2011. Prima facie, these percentages of market share don't suggest anything that tantamount to the existence of dominance.

XPhone and Sintel are leading mobile service providers in India, jointly having more than 30 crore Indian subscribers that account for almost 52% market share in the GSM market. As regards the dominance of XPhone and Sintel in the relevant market, since both are two separate entities without the evidence of having any horizontal agreement or cartelization between them that could be deemed as anti-competitive. Hence, on the basis of section 19(4) conditions that neither Sintel nor XPhone, individually, have any adequate market power so as to be deemed dominant.

Also, the argument that XPhone and Sintel hold nearly 52% of the market share in the GSM services in India cannot be accepted for the fact that they are horizontal competitors who fight for greater market share. Moreover, there is no allegation, qua these OPs that they have indulged in anti-competitive conduct among themselves for a common cause.

#### **Conclusion**



Thus, it can be concluded that since dominance does not get established, there can be no case for abuse of dominance against all the three aforesaid entities under Section 4 of the Act.

7. According to Section 3(1) of the Act, “No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India”.

Section 3(4) of the Act, highlights anti-competitive agreements between vertically related enterprise as “Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including —

- (a) tie-in arrangement;
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement;
- (d) refusal to deal;
- (e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India”.

Further, what constitutes appreciable adverse effect on competition has been provided for in Section 19(3) of the Act.

The words “**tie-in arrangement**” has been defined in explanation (a) to section 3 which includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

In the above case, even though, some kind of ‘the tie-in arrangement’ can be seen which has an adverse implication on the purchaser of iPhones in terms of their ability to choose and switch between various cellular service providers and data plans. But since none of (Mapple India / Sintel / XPhone) have a dominant position in their respective market, and that there has been no intentions and evidence to show that the market has been foreclosed to competitors or that entry-barriers have been erected for new entrants in any of the markets by any of the opposite parties.

Mapple India had a share of less than 3% in the market of smartphones during the

period 2008-11. Furthermore, the share of GSM subscribers using Mapple iPhone to total GSM subscribers in India is minuscule (less than 0.1%). No operator has more than 30% market share, in an otherwise competitive mobile network service market. As none of the impugned operators, (XPhone / Sintel) have market-share exceeding 30%, that smartphone market in India is less than a tenth of the entire handset market, and that Mapple iPhone has less than 3% share in the smartphone market in India, it is highly improbable that there would be an Appreciable Adverse Effect on Competition (AAEC) in the Indian market for mobile phones.

Moreover, the lock-in arrangement of the iPhone to a particular network was only for a specific period and not perpetual, a fact known to prospective customers. It is difficult to construe consumer harm from entering into a 'tie-in' arrangement by the horizontally related enterprises. It is observed that there is no restriction on consumers to use the network services of XPhone and Sintel to the extent that the network services can be availed on any mobile handset, even an unlocked iPhone purchased from abroad. Also, a consumer who has purchased a locked iPhone in India and paid the unlocking fees is free to choose the network operator of his choice.

Also, there is no evidence to show that entry barriers have been created for new entrants in the markets i.e. in the smartphone market and mobile services market by any of the impugned parties. Similarly, existing competitors have not been driven out from the market, or that the market itself has been foreclosed. Hence, the belief that the tie-in arrangement has caused serious harm appears untrue. Hence, there appears no appreciable adverse effect on competition due to agreement by Mapple India with XPhone and Sintel respectively.

8. Section 18 of the Competition Act 2002, provides that, subject to the provisions of this Act, it shall be the duty of the Commission:

- (a) To eliminate practices having adverse effect on competition;
- (b) To promote and sustain competition;
- (c) To protect the interests of consumers; and
- (d) To ensure freedom of trade carried on by other participants

in markets in India.

The proviso attached to this section further states that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of Central Government, with any agency of any foreign country.

Apart from the duties as mentioned in section 18, the other functions of the Commission are:

- **Inquiry into certain agreements and dominant position of enterprise (Section 19):** The Commission may inquire into any alleged contravention of the provisions contained in section 3(1) or 4(1) either on its own motion or on receipt of any information; or a reference made to it by the Central / State Government.
- **Inquiry into combination by Commission (Section 20):** The Commission may, upon its own knowledge or information relating to acquisition or merger or amalgamation, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India.
- **Reference by statutory authority (Section 21):** The Commission shall give its opinion when any reference is made by any statutory authority.
- **Reference by Commission (Section 21A):** When any issue is raised by any party that any decision which the Commission has taken during any proceeding which would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may take a reference in respect of such issue to the statutory authority.
- **Meetings of Commission (Section 22):** The Commission shall meet periodically as prescribed by its Regulations.
- Orders by Commission after inquiry into agreement or abuse of dominant position (Section 27)
- **Division of enterprise enjoying dominant position (Section 28):** The Commission may direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

As per section 27 of the Competition Act 2002, where after an inquiry under section 19 regarding alleged contravention of entering into an anticompetitive agreement or abuse of dominance as per procedure detailed in section 26, if Commission find the allegation true and contravention of section 3(1) or 4(1) respectively; it may pass all or any of the following orders

**Cease and desist order** - direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be.

**Impose penalty** - as it may deem fit which shall be not more than ten percent of the

average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

**Modification of the terms of such agreements** - Agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

**To abide** - Which direct the enterprises concerned to abide by such other orders as the commission may pass and comply with the directions, including payment of costs if any

Such other order or issue such directions as it may deem fit.

In case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader, or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.

## CASE STUDY 20

Ashok and Deepak are the sons of Late Shri Rajesh Mehra. Being the legal heirs of Rajesh Mehra, they both inherited immovable properties in Lucknow from their father. Ashok, an Indian citizen, is living in London for the past 7 years, running his practice as a Civil Engineering consultant. Deepak is a director of BSC Private Limited (BSC) along with his son Jay, which is engaged in the business of manufacturing silk garments.

BSC imported machinery worth ₹ 30,50,00,000/- from Germany, shipped it to India on 10.05.2020. As a result of the installation of which, the company's cost of manufacturing of silk clothes got reduced significantly and therefore the board of the company decided in a meeting to reduce the prices of the silk clothes, thereby, revising its cost structure as follows:

Particulars	Before Change (Competitive Price) (in ₹ )	After Change (in ₹ )
Cost of manufacturing per meter	300	180
Selling price per meter of cloth	500	350

The market share of BSC gradually started to increase due to lower prices offered in the market than the comparative market price of ₹ 440 to ₹ 520, which affected businesses of other silk manufacturers in the market. Accordingly, they arranged for a meeting and in that decided to make a complaint to the CCI stating that BSC is guilty of predatory pricing having the effect of reducing the competition or eliminating the competition.

For the import of machinery from Germany, BSC had sought professional advice from Polylingua Consultants based in Spain for which they raised a bill of 2,05,000 Euros, equivalent to ₹ 2,05,00,000. Polylingua Consultants were not paid 1,02,000 Euros out of their total receivable amount, so the advocate of Polylingua Consultants sent a demand notice for payment under section 8 of the Insolvency and Bankruptcy Code, 2016 against which there was no reply made by BSC within the stipulated time and so the advocate of Polylingua Consultants moved a petition under section 9 of the Insolvency and Bankruptcy Code, 2016 seeking commencement of insolvency process against BSC. They were not having any office or bank account in India, so it could not submit a 'Certificate from a financial institution' as required under the code. On getting aware of the fact that Polylingua Consultants have filed an application for insolvency process, BSC sent an email to Polylingua Consultants stating that there was the existence of dispute for the unpaid amount of 1,02,000 Euros because there was a breach by Polylingua Consultants of a warranty but there was no evidence available with BSC to support its assertion of fact and then after also filed a hard copy of the email with the Adjudicating Authority within 5 days of the filing of application by Polylingua Consultants.

Ashok got a contract as an engineering consultant for a real estate project in Varanasi, India, so he came to India on 03.09.2019. Afterward, as the contractual obligations were over with the builder, he returned back to London on 12.03.2021, to carry out his normal business projects in London. While his stay in India he sold the immovable property through a real estate broker on 15.01.2020, which he had inherited from his father. Ashok came after a long time and out of affection, he gifted his nephew, Jay, a sum of 7000 pounds in cash (1 pound = 1.2 USD).

Jay is passionate about trading in the stock market and one fine day he got information (not publicly disclosed) from one of his friends working in a Big Bee Ltd. - relating to the merger of two big corporates – Big Bee Ltd. and Bumble Bee Ltd. Based on such insider trading information, Jay bought plenty of stocks of Big Bee Ltd.

Jay wanted a residential unit in Varanasi and therefore he approached his uncle Ashok to convince the promoter/builder to allot one residential unit from the real estate scheme, of which he was an engineer, at a reduced price. The area in which the building is going to be constructed is having an area of 900 square meters. The project is registered with the authority as per the provisions of RERA. He made all the enquiries regarding the project details, sanctioned plans, and plan layouts. He also cross checked all the listed details on the Authorized website of RERA.

The agreement of sale was signed between the builder and Jay. Jay paid upfront 10% as booking fees of the total amount of ₹ 80 lakhs via account payee cheque and got the unit registered in the name of his wife Chaya. The balance amount of ₹ 72 lakhs was paid by Mr. Jay in installments through cheque, the source of which was, ₹ 50 lakhs, were from his remunerations earned from BSC and ₹ 22 lakhs were from the proceeds of Insider Trading in the stock market which Jay had not disclosed in his Income Tax Return for the relevant financial year. The builder made some minor changes due to structural reasons which were duly verified by Ashok and other allottees and also the changes were duly intimated to all the allottees along with the declaration from the promoter about the same. Jay took physical possession of the apartment within a month of the issue of the occupancy certificate by the relevant authority.

The Enforcement Director under the Prevention of Money Laundering Act, 2002, obtained information related to insider trading in the stock market from the office of SEBI and also got to know that Jay was also a party to the crime who had purchased an immovable property in Varanasi which constituted a reason to believe and after recording the same in writing, the Enforcement Director issued an order provisionally attaching the immovable property acquired by Jay in the name of his wife.

**I. Multiple Choice Questions**

1. By what date BSC should make payment for the machinery imported from Germany?
  - (a) 10.11.2020
  - (b) 10.05.2025
  - (c) 10.08.2020
  - (d) 10.05.2021
2. Ashok can transfer inherited immovable property in India to
  - (a) Person resident in India only
  - (b) Non-resident Indian who is a person citizen in India only
  - (c) Foreign Citizen only
  - (d) Any of from (a) and (b) above
3. How much amount of foreign exchange needs to be surrendered and till what time period, to an authorised dealer by Jay from the amount received as a gift from his uncle Ashok?
  - (a) 5,333 pounds and 180 days
  - (b) 5,333 pounds and 90 days
  - (c) 1,667 pounds and 180 days
  - (d) 5,333 pounds and 7 days
4. Whether the property held in the name of the wife by Jay be considered a Benami transaction?
  - (a) Yes
  - (b) No
  - (c) Partially
  - (d) Can't say
5. If the promoter accepted 10% booking fees from the allottees by entering into an agreement for sale but not getting it registered, then what could be the maximum penalty that could be imposed on the promoter assuming the estimated cost of the real estate project is ₹ 150 crores?
  - (a) ₹ 15 Crores
  - (b) ₹ 7.5 Crores

- (c) ₹ 7.5 Crores + with fine for every day during which default continues
- (d) No Penalty

## II. Descriptive Questions

- 6. (A) Whether the act of BSC, selling silk garments at prices lower than prices prevailing in the market be considered as predatory pricing under the Competition Act, 2002?
- (B) Whether Jay can occupy the property during the period of provisional attachment and if the adjudicating authority passes an order confirming the provisional attachment of the property made under section 5 of the relevant Act, then what remedy is available with Jay if he is aggrieved with the order?
- 7. (A) What would be the residential status of Ashok for the financial year 2019-20, 2020-21, and 2021-22 respectively?
- (B) Whether Ashok can repatriate the sale proceeds of the immovable property outside India?
- 8. (A) One of the allottees to the real estate scheme objected that promoter had not taken prior written consent of the allottees for making the changes to their allotted unit. Examine the statement in the lights of provisions of the Real Estate (Regulation & Development) Act, 2016.
- (B) Non-availability of 'Certificate from a financial institution' by Polylingua Consultants at time of filing application for initiating a corporate insolvency resolution process with adjudicating authority, makes it liable to reject the application. Examine the validity of this statement.
- (C) Can the adjudicating authority reject the application filed by Polylingua Consultants on the ground that the amount claimed is under dispute?

## ANSWERS TO CASE STUDY 20

### I. Answers to Multiple Choice Questions

- 1. (a) 10.11.2020

#### Reason:

Para B.5.1 (i) of the 'Master Direction on Import of Goods and Services' dated January 01, 2016 (updated as on 07.12.2021), provides that remittances against imports should be completed **not later than 6 months** from the date of shipment, except



in case where amounts are withheld towards guarantee of performance, etc. Further, in view of the disruptions due to outbreak of COVID- 19 pandemic, with effect from May 22, 2020, the time period for completion of remittances against normal imports (except in cases where amounts are withheld towards guarantee of performance etc.) has been extended **from six months to twelve months** from the date of shipment for such imports made on or before July 31, 2020.

In the given case, the shipment was made on 10.05.2020 (i.e. before 31.07.2020) hence the remittances should have been made not later than 6 months, so BSC should make remittances not later than the date of 10.11.2020.

2. (d) Any of from (a) and (b) above

**Reason:**

Para 3 of The Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 deals with the matter relating to the Acquisition and Transfer of Property in India by a Non-Resident Indian or an Overseas Citizen of India. Its sub-para (d) and (e) reads as under:

**An NRI or an OCI may-**

- (d) transfer any immovable property in **India to a person resident in India;**
- (e) transfer any immovable property other than agricultural land/ farm house/ plantation property **to an NRI or an OCI.**

Thus, Ashok can transfer the inherited property to either Person resident in India or Non-resident Indian who is a citizen of India.

3. (a) 5,333 pounds and 180 days

**Reason:**

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

**Further, Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015** provides at **Para 3(iii)(b)** which reads as under:

For the purpose of clause (a) and clause (e) of Section 9 of the Act, the Reserve Bank specifies the following limits for possession or retention of foreign currency or foreign coins, namely :-

(iii) Retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques **not exceeding US\$ 2000** or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers' cheques;

- (b) **was acquired by him, from any person not resident in India and who is on a visit to India**, as honorarium or gift or for services rendered or in settlement of any lawful obligation.

In the given case, Jay has received GBP 7000. So first convert it into USD which comes to USD 8400 ( $7000 \times 1.02$ ).

Now after retaining USD 2000 the remaining amount is of USD 6400.

Convert USD 6400 in GBP, which comes to GBP 5333 ( $6400/1.2 = 5333.3333$ ).

Therefore, Jay is required to deposit GBP 5333 within 180 days from the date of receipt to an authorized dealer.

4. (c) Partially

**Reason:**

The benami transaction has been defined under section 9 of the Prohibition of Benami Transactions Act, 1988. The relevant portion of section 9 and its sub-section reads as under:

**Section 9: Benami transaction means**

(A) a transaction or an arrangement—

- (a) where a **property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person**; and
- (b) the **property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,**
  - (iii) any **person being an individual in the name of his spouse** or in the name of any child of such individual and the consideration for such property has been **provided or paid out of the known sources of the individual**;

In the given case, Jay, has purchased the flat in the name of his wife Chaya and part of the consideration was paid out of his undisclosed sources (not shown in the Income Tax Return). Hence transaction is deemed to be partly benami transaction.

5. (b) ₹ 7.5 Crores

**Reason:**

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

Further, section 61 provides that if any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, **he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.**

In the given case, the advance was taken by the promoter without entering into the written agreement, so he is liable for the penalty of 5% of total cost i.e. Rs. 150 crores which comes to Rs. 7.50 crores.

## II. Answers to Descriptive Questions

6. (A) **No**, in the given case the BSC has reduced the prices on account of import of hi-tech machinery, which is cost effective, hence it shall not be treated as predatory pricing under the provisions of the Competition Act.

As per section 4(2)(a) of the said Act, there shall be an abuse of dominant position, which is considered as offence under the Competition Act 2002, if an enterprise or a group-

directly or indirectly, imposes unfair or discriminatory-

- (i) condition in purchase or sale of goods or services; or
- (ii) price in purchase or sale (including predatory price) of goods or services.

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

In the given case, though the price is less than the competitive market **price but not less than cost**. The cost of manufacturing per meter of cloth is ₹ 180 and

the selling price offered is ₹ 350. Hence, the act of BSC offering clothes at prices lower than the price prevailing in the market shall not be considered as predatory pricing under the Competition Act, 2002.

- (B) (i) Section 5 (4) of the Prevention of Money Laundering Act, 2002 provides that nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

*Explanation* - For the purposes of this sub-section person interested in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

Hence, Jay can occupy the property during the period of provisional attachment.

- (ii) Further, as per Section 26 of the aforesaid Act, the Director or any person aggrieved by an order made by the Adjudicating Authority under this Act may prefer an appeal to the Appellate Tribunal.

The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Adjudicating Authority is received and it shall be in such form and be accompanied by prescribed fees.

The Appellate Tribunal may, after giving an opportunity of being heard, entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Hence, the remedy availed with Jay is to file an appeal with the Appellate Tribunal within the period as mentioned in the above provisions.

7. (A) As per Section 2(v) of the Foreign Exchange Management Act, 1999,

*“Person resident in India”* means:

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

- (B) a person who has come to or stays in India, in either case, otherwise than:
- (a) for or on taking up employment in India, or
  - (b) for carrying on in India a business or vocation in India, or
  - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
- (ii) any person or body corporate registered or incorporated in India,
- (iii) an office, branch, or agency in India owned or controlled by a person resident outside India, an office, branch, or (iv) agency outside India owned or controlled by a person resident in India;

In the given case,

- (1) He didn't reside in India during the preceding financial year i.e. in 2018-19. Therefore, Ashok is a 'Person resident outside India' for the financial year 2019-20.
  - (2) Ashok resided for more than 182 days i.e. from 03.09.2019 to 31.03.2020 which comes to 211 days (year 2020 being a leap year) in the preceding financial year i.e. 2019-20, and also his purpose of stay during the financial year 2020-21 is business or vocation. Therefore, Ashok is a 'Person resident in India' for the financial year 2020-21.
  - (3) Ashok resided for more than 182 days i.e. from 01.04.2020 to 12.03.2021, which comes to 346 days in the preceding financial year i.e. 2020-21 but he had gone out of India to continue his business or vocation. Therefore, Ashok is a 'Person resident outside India' for the financial year 2021-22.
- (B) As per regulation 8 to the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018,

A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section. However, if such a person is an NRI or a PIO (as defined in Foreign Exchange Management (Remittance of Assets) Regulations, 2016) resident outside India, he/ she can utilise the remittance facilities available under the Foreign Exchange Management (Remittance of Assets) Regulations, 2016, as amended from time to time.

In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow

repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely :

- (i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
- (ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account, or (b) the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for the acquisition of the property; and
- (iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Thus, Ashok can repatriate the sale proceeds of the immovable property outside India which he had inherited from his father who is assumed to be a person resident in India provided he satisfies all the above-mentioned conditions.

8. (A) As per proviso to Section 14 of the Real Estate (Regulation & Development) Act, 2016, the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

*Explanation.*—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

In the given case, it appears that the changes were minor in nature, necessitated due to architectural and structural reasons and don't appear to be one as excluded from the meaning of "minor additions or alterations". Also, the promoter has duly verified such changes and intimated to all the allottees. Thus, the objection raised by one of the allottees does not seem to be tenable.

- (B) **As per Section 9 of the Insolvency and Bankruptcy Code, 2016,**

The operational creditor shall, along with the application filed in the prescribed form, furnish, inter alia,—

A copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

The words 'if available' used in section 9(3)(c) make it evident that such certificate shall only be submitted if such a copy is available.

Hence, the application of Polylingua Consultants cannot be rejected on the grounds of the non-availability of a 'Certificate from a financial institution'. The given statement is invalid.

In the case of **Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd.** [Civil Appeal No. 15135 of 2017] the **Supreme Court of India**, dated 15.12.2017, opined that Section 9(3) (c) of The Insolvency and Bankruptcy Code, 2016 is directory in nature.

The Apex Court held that "a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor **is certainly not a condition precedent** to triggering the insolvency process under the Code. The expression "confirming" makes it clear that this is only a piece of evidence, albeit a very important piece of evidence, which only "confirms" that there is no payment of an unpaid operational debt. Further, annexure III in the Form also speaks of copies of relevant accounts kept by banks/financial institutions maintaining accounts of the operational creditor, confirming that there is no payment of the unpaid operational debt, only "**if available**". This would show that such accounts are not a pre-condition to trigger the Code, and that if such accounts are not available, a certificate based on such accounts cannot be given,"

(C) **As per Section 5(6) of the Insolvency and Bankruptcy Code, 2016**, dispute includes a suit or arbitration proceedings relating to—

- (a) the existence of the amount of debt;
- (b) the quality of goods or service; or
- (c) the breach of a representation or warranty;

In the case of *Mobilox Innovations (P.) Ltd. v Kirusa Software (P.) Ltd.* [Civil Appeal No. 9405 of 2017], the **Supreme Court of India**, dated 21.09.2017, opined that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(ii)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of

a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

In the given case, BSC sent an email for dispute, post the time period for submitting a notice of dispute under section 8 of the code. In terms of section 8(2)(a), which states that the corporate debtor shall within a period of 10 days of the receipt of the demand notice or copy of invoice bring to the notice of the operational creditor existence of a dispute. The BSC had not replied to the aforesaid notice. BSC sent mail only after the initiation of the CIRP by the operational creditor.

Hence, the adjudicating authority cannot reject the application of Consultants on the ground that the amount claimed is under dispute.



## CASE STUDY 21

Ramesh and Suresh are friends since their childhood. For business purposes, Ramesh went to New Jersey, US and has been settled there for 7 years and Suresh started a real estate business in India by incorporating a company named Tycoon Private Limited (TPL), initially with him and his son Jay as directors in the company by having a combined 100% stake in the company. Jay, only occasionally participated in his father's business.

Ramesh was in possession of a plot of land having an area of approximately 7,800 square meters in his native place Banaskatha, Gujarat acquired by him when he was staying in India. The land was situated on the outskirts of the village. With a view to developing a smart city, the housing board wanted to acquire such land. Eventually, Ramesh sold such land through an agent based in the US for ₹25 crores (equivalent to \$ 3,125,000) to the housing board. Ramesh paid a commission of \$ 70,000 to agent in the US. The State Government on behalf of housing board, then called out for tenders from various real estate companies for acquiring the land on a long term lease and developing a township on the same.

TPL entered into agreements with the local suppliers near Banaskatha that all the material and man power requirements relating to any infrastructure projects were to be supplied only to their company and not to any other party. TPL's bid for the project was selected as it was the most cost-effective amongst all and was offered the contract to develop the township by taking the land on a long term lease. One of the real estate companies, that participated in the tender filed a complaint with the Competition Commission of India that the aforesaid agreement entered into by TPL was anti-competitive in nature, as due to this type of agreement with the local suppliers, the cost of developing township for TPL would have been much lower in comparison to other builders and as a result of which it could offer the lowest bid amongst all. Had they been in the same position as TPL was, they could also have offered such a low bid and could have got the contract. The Competition Commission of India after following the procedure prescribed in the Competition Act, 2002, concluded that the agreement entered into by TPL is anti-competitive in nature and shall stand null and void and TPL shall be responsible to bear the bidding costs. It was also decided that the bidding shall again take place with the participation of TPL allowed subject to compliance of certain conditions by it as stipulated by CCI in the order.

The project was awarded to TPL in the bidding that took place again but this time with no objections against it. Finally, when the contract was offered, Suresh in order to raise more funds converted the company into public limited by calling an initial public offer whereby his stake and that of his son would continue to be 50% in total. Suresh approached Ramesh to invest in his company and also to become a director in it by depositing a sum of ₹1 lakh. Ramesh made the

said deposit which was refunded to him as he was elected as a director in the TPL in the general meeting of the company. He acquired a 10% stake in the TPL through private placement. Ramesh then visited India thrice during the duration of the project as a non-whole time director for the company's work and was paid remuneration for the same along with the reimbursement of the cost of travel and accommodation in accordance with the agreement made with Ramesh.

Jay, being a civil engineer went to the US for the purpose of business travel by drawing \$ 80,000 to study the modern technologies that can be used in the development of the township. Already, during the year he had drawn \$ 1.4 lakhs and his father remitted a further \$ 30,000 to him for his maintenance expenses abroad. Jay made a contract worth \$ 2,000,000 with a consultancy firm in the US on behalf of TPL that can provide consultancy services for the project of the township and remitted an amount of \$ 1,200,000 from India for the same as part payment. By the end of the year, Jay returned back to India and was having \$ 10,000 left with him as an unspent foreign exchange.

The project of development of township included developing 2 commercial buildings, 1 residential building, 1 school, and 1 recreation centre. The project was to be developed in phases and so phase-wise registration was obtained with the authority as per the provisions of RERA. The prospectus of the project was issued by the promoter, Suresh. The properties therein attracted the eyes of various businessmen near the area and in a matter of months of the issue of prospectus, the majority of the units were allotted. One of the allottees, Mr. Jaykant, required certain modifications in the layout plan of his allotted unit, as per the agreement to sale, which was done duly but even then he was not satisfied completely with the modifications made and felt that it was not according to the agreement and wanted to claim a refund of the amount paid till date along with interest.

For some of the units allocated in the project, the promoter – Suresh had taken ₹5 crores in cash from various allottees, which was not disclosed anywhere, from which Suresh bought a property as a joint owner with his mother Shrimati for ₹15 crores and paid ₹10 crores through account payee cheque and ₹5 crores through cash money, he had obtained from allottees. The Initiating Officer issued notice to Suresh and his mother Shrimati to show cause as to why the aforementioned property should not be considered as a Benami property. The Initiating Officer then passed an order provisionally attaching the property with the prior approval of the Approving Authority. On receipt of the reference from the Initiating Officer, the Adjudicating Authority issued notice to Suresh to furnish the necessary papers of the agreement within 30 days from the date of this notice. After taking into account, all the materials furnished, Adjudicating Authority passed an order holding the property to be a Benami property. The Adjudicating Authority after giving Suresh an opportunity of being heard made an order for confiscating the Benami property.

**I. Multiple Choice Questions**

1. The agreement entered into by TPL with the local suppliers near Banaskatha will be termed as \_\_\_\_\_.
  - (a) tie-in arrangement
  - (b) exclusive supply agreement
  - (c) refusal to deal
  - (d) exclusive distribution agreement
2. The deposit made by Ramesh with the company for his nomination as a director and the refund made to him will amount to -
  - (a) Current account transaction requiring prior approval of RBI
  - (b) Current account transaction not requiring prior approval of RBI
  - (c) Permissible capital account transaction
  - (d) Non- Permissible capital account transaction
3. How much amount of additional remittance can be made to Jay without requiring prior approval of RBI?
  - (a) \$ 1,40,000
  - (b) \$ 1,70,000
  - (c) \$ 30,000
  - (d) Nil
4. Whether the property held in the name of his mother by Suresh is considered as benami transaction provided the registry of the property was done by Suresh at a value of ₹10 crores only?
  - (a) Yes
  - (b) No
  - (c) Partially Yes, partially No
  - (d) Can't say
5. Within what period and how much amount of unspent foreign exchange represented in form of foreign currency notes, Mr. Jay shall return to the authorised dealer?
  - (a) \$ 10,000 within 180 days of return
  - (b) \$ 8,000 within 180 days of return

- (c) \$ 10,000 within 90 days of return
- (d) \$ 8,000 within 90 days of return

## II. Descriptive Questions

- 6. (A) What procedure could have been followed by the Competition Commission of India on receipt of the complaint from one of the real estate companies to conclude that the agreement entered into by TPL was anti-competitive in nature?  
(B) Whether the payment of commission amount to an agent in the US by Ramesh and remittance by TPL for consultancy services to a consultancy firm in the US would require prior approval of RBI?
- 7. (A) Whether payments made to Ramesh on his visit to India for the company's work require any permissions of RBI?  
(B) Whether holding of and selling of the immovable property by Ramesh is valid as per the provisions of FEMA Act, 1999, and whether Ramesh can repatriate the sale proceeds of the immovable property outside India?
- 8. (A) Whether Mr. Jaykant can claim a refund of the amount paid for the unit allocated to him in the light of provisions of the Real Estate (Regulation & Development) Act, 2016?  
(B) The prospectus issued by the promoter, Suresh, should contain certain information as required by RERA Act, 2016. Please provide your comments on the same.  
(C) What is the option available with Suresh against the confiscating order of the property passed by the Adjudicating Authority and also describe the procedure to be followed by Suresh for the same?

## ANSWERS TO CASE STUDY 21

### I. Answers to Multiple Choice Questions

- 1. (c) refusal to deal

#### Reason

In terms of explanation (d) attached to section 3 of the Competition Act, 2002 "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or

from whom goods are bought.

In the given case the TPL has entered into agreement with the local suppliers near Banaskatha that **all the material and manpower requirements relating to any infrastructure projects should be supplied only to their company** and not to any other party. It shows that the TPL had made an agreement with the local suppliers to refuse to deal with the other persons.

2. (b) Current account transaction not requiring prior approval of RBI

**Reason**

Schedule III

3. (d) Nil

**Reason**

Schedule III of The Foreign Exchange Management (Current Account Transactions) Rules, 2000 provides that an individual can avail of foreign exchange facility for certain purposes within a limit of USD 250000. In the given case the limit has already been exhausted.  $(80000 + 30000 + 140000 = 250000)$ . Therefore, for any further additional remittance beyond USD 250000, will require prior approval of RBI.

4. (b) No

**Reason**

Section 9 of the Prohibition of Benami Transactions Act, 1988 provides as under:

(A) a transaction or an arrangement—

- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by—**

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

In the given case, Suresh purchased the property in his mother's name, which comes in the exempted category of Section 9(A)(b)(iv). However, as mentioned in the case study that Suresh had taken Rs 5 crores in cash from various allottees which was not disclosed anywhere and this undisclosed income was utilised as part payment in purchasing the flat in the name of his mother. However, the registry was made for Rs 10 cores and this Rs 10 cores was from the known sources of Suresh.

**Therefore, the transaction should not be treated as benamidar, since the full value of the consideration was paid through the account payee cheque, which was from the known sources of income.** If the registry would have been for ₹ 15 crores, then only it would be treated as partly banamidar.

5. (b) \$ 8,000 within 180 days of return

**Reason**

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

Further, Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2015 provides at Para 3(iii) which reads as under:

For the purpose of clause (a) and clause (e) of Section 9 of the Act, the Reserve Bank specifies the following limits for possession or retention of foreign currency or foreign coins, namely :-

(iii) Retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques **not exceeding US\$ 2000** or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers cheques.

In the given case Jay returned back to India and was having \$ 10,000 left with him as an unspent foreign exchange. Jay can retain USD 2000 with him and rest of USD 8000 he is required deposit within 180 days from the date of his return to India.

**II. Answers to Descriptive Questions**

6. (A) As per Section 26 and 27 of the Competition Act, 2002, the procedure that would have been followed by the commission would be as follows:

Section 26 provides that on receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or **information received under section 19**, if the Commission is of the that there exists a *prima facie* case, it shall have direct the Director-General to cause an investigation to be made into the matter.

The proviso states that if the subject matter of information received was, in the opinion of the Commission, substantially the same as or had been covered by any previous information received, then the new information might have been clubbed with the previous information.

The Director General should have on receipt of direction had submitted a report on his findings within such period as may be specified by the Commission.

The Commission then would have forwarded a copy of the report to the parties concerned.

The report of the Director General should have recommended that there is a contravention of any of the provisions of this Act, and the Commission might have called for further inquiry into such contravention in accordance with the provisions of this Act.

After inquiry, the Commission would have found that the agreement referred to in section 3 or action of an enterprise in a dominant position, was in contravention of section 3 or section 4, as the case may be, and it would have passed an order that the agreement would be null and void as per Section 27 of the Competition Act, 2002 and not to re-enter into such agreement again.

- (B) As per rule 5 read with Schedule III of *FEM (Current Account Transactions) Rules, 2000*, every drawal of foreign exchange for transactions included in Schedule III shall be governed as provided therein.

Para 1 of Schedule III provides that individuals can avail of foreign exchange facilities for the purposes mentioned therein within the limit of USD 2,50,000 only in a financial year. Any additional remittance in excess of the said limit for the following purposes shall require prior approval of the Reserve Bank of India. One such purpose mentioned therein is "Any other current account transaction".

Para 2 of Schedule III deals with the matter relating to the facilities for persons other than individual. Its para (iii) states that remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India, shall require prior approval of the Reserve Bank of India.

*Explanation*— the expression “infrastructure’ shall mean as defined in explanation to para 1(iv)(A)(a) of Schedule I of FEMA Notification 3/2000-RB, dated May 3, 2000.

In the given case,

- (1) It has been given Ramesh is settled in the US for the past 7 years, so, his residential status would be considered as a “person resident outside India” and the above rules are applicable for an individual who is a “person resident in India” and hence the question of obtaining prior approval of RBI does not arise in case of Ramesh.
- (2) The limit of remittance specified in case of any consultancy services in respect of infrastructure projects is USD 10,000,000 per project and here the remittance made is USD 1,200,000 which is much below the limit and hence, approval of RBI is not required.

7. (A) Section 3(b) of the FEMA Act, 1999 provides that save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall make any payment to or for the credit of any person resident outside India in any manner.

The RBI has issued general permission permitting any person resident in India to make payment in Indian rupees in few cases, one of which includes the following:

A company or resident in India may make payment in rupees to its non-whole time director who is resident outside India and is on a visit to India for the company’s work and is entitled to payment of sitting fees or commission or remuneration, and travel expenses to and from and within India, in accordance with the provisions contained in the company’s Memorandum of Association or Articles of Association or in any agreement entered into it or in any resolution passed by the company in general meeting or by its Board of Directors, provided the requirement of any law, rules, regulations, directions applicable for making such payments are duly complied with.

Hence, there is no requirement to obtain permission from RBI for remuneration paid to Ramesh along with the reimbursement of the cost of travel and accommodation.



- (B) (1) As per the provisions of the Foreign Exchange Management Act, 1999, A person resident outside India may hold, own, transfer or invest in Indian currency, security, or any immovable property situated in India if such currency, security, or property was acquired, held, or owned by such person when he was resident in India or inherited from a person who was resident in India. [Section 6(5)]

It is given that property was acquired by Mr. Ramesh when he was staying in India, so it can be understood that his residential status at the time of acquisition of the said property would have been person resident in India and hence, as per section 6(5) as aforesaid, the act of holding the property by Ramesh being a person resident outside India is valid.

As per the Regulation 3(b)&(c) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, an NRI or an OCI may,

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

(c) transfer any immovable property in India to a person resident in India.

Hence, the act of Ramesh of transferring the immovable Housing Board is also valid.

- (2) Regulation 8 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that-

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

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

(b) In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a person resident outside

India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:

- (i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
- (ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account, or (b) the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for the acquisition of the property; and
- (iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

Ramesh can repatriate the sale proceeds of the immovable property outside India which he had acquired when he was a person resident in India provided he satisfies all the above-mentioned conditions.

**8. (A)** As per Section 18 of the Real Estate (Regulation & Development) Act, 2016,

- (1) If the promoter fails to complete or is unable to give possession of an apartment, plot, or building,—
  - (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
  - (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

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

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

- (2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.
- (3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

In the given case, it appears the promoter is not able to adhere to the requirements of allottee Mr. Jaykant as per the agreement of sale, and hence as per section 18 as aforesaid, Mr. Jaykant is entitled to claim a refund of the amount paid by him along with the interest as may be prescribed.

- (B) As per Section 11(2) of the Real Estate (Regulation & Development) Act, 2016, provides that the advertisement or prospectus issued or published by the promoter shall mention prominently the website address of the Authority, wherein all details of the registered project have been entered and include the registration number obtained from the Authority and such other matters incidental thereto.

Hence, the prospectus issued by the promoter – Suresh should be in line with the section 11(2).

- (C) As per Section 46 of the Prohibition of Benami Property Transactions Act, 1988 - Any person, including the Initiating Officer, aggrieved by an order of the Adjudicating Authority may prefer an appeal in such form and along with such fees, as may be prescribed, to the Appellate Tribunal against the order passed by the Adjudicating Authority under Section 26(3), within a period of forty-five days from the date of the order.

Section 46(2) provides that the Appellate Tribunal may entertain any appeal after the said period of forty-five days, if it is satisfied that the appellant was prevented, by sufficient cause, from filing the appeal in time.

Section 46(3) states that on receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

Thus, Suresh can file an appeal with the appellate tribunal as specified above and the procedure to be followed by him is produced as follows:

Rule 10 of the Benami Transactions Prohibition Rules, 2016 prescribes the following –

- (1) An appeal to the Appellate Tribunal under section 46 of the Act shall be filed in Form No. 3 annexed to these rules.
- (2) At the time of filing, every appeal shall be accompanied by a fee of ten thousand rupees.
- (3) The appeal shall set forth concisely and under the distinct head the grounds of objection to the order appealed against and such grounds shall be numbered consecutively; and shall specify the address of service at which notice or other processes of the Appellate Tribunal may be served on the appellant and the date on which the order appealed against was served on the appellant.
- (4) Where the appeal is preferred after the expiry of the period of forty-five days referred to in section 46, it shall be accompanied by a petition, in quadruplicate, duly verified and supported by the documents, if any, relied upon by the appellant, showing cause as to how the appellant had been prevented from preferring the appeal within the period of forty-five days.

## CASE STUDY 22

Rahul, Dev, and Raj are brothers, running their family business as directors of their company, RDR Private Limited (RDRPL). An application for initiation of Corporate Insolvency Resolution process against RDRPL, under the Insolvency and Bankruptcy Code, 2016 moved by an assignee of an operational creditor for non-payment of dues. The adjudicating authority admitted his application because there was no intimation of any dispute within the 10 days of the demand notice.

After following all the due procedures prescribed in the Insolvency and Bankruptcy Code, 2016, in the end, adjudicating authority passed an order to liquidate the corporate debtor, on an intimation from the resolution professional to do so, as decided by the committee of creditors by requisite voting, before the approval of any resolution plan.

The relevant information related to RDRPL for the purpose of liquidation is produced as follows:

Share Capital/ Liabilities	.in lakhs	Assets	Rs.in lakhs
Equity Share Capital	300	<b>Fixed Assets:</b>	
Preference Share Capital	200	Land & Building	350
<b>Financial Creditors:</b>		Plant & Machinery	150
Secured	250	<b>Current Assets:</b>	
Unsecured	150	Stocks	100
<b>Operational Creditors:</b>		Trade Receivables	300
Secured	60	Other current Assets	50
Unsecured	70	Cash & Cash equivalents	100
Government Dues	50	Fictitious Assets	190
Workmen's Dues	80		
Employees' Dues	80		
	1240		1240

Other Information:

- (1) Workmen's dues represent the amount payable for the period of 30 months preceding the liquidation commencement date.
- (2) Employee liability includes ₹ 72 lakhs, outstanding to employees for a period of 12 months, preceding the liquidation commencement date.

- (3) Land & Building would realize 110% of its book value, Plant & Machinery would realize 60% of its book value, net of any realization cost. Stock and trade receivables would realize 72% of its book value.
- (4) The secured financial creditors worth ₹ 45 lakhs decided to enforce their security interest in the other current assets and they could realize 80% of its value.
- (5) There has been a pending court case against the company for use of child labour which could result in a penalty of approximately ₹ 30 lakhs. This has been reflected as a contingent liability only. It has been finally decided to pay ₹ 25 lakhs and settle the case.
- (6) Based on the amount realized & distributed, the cost of liquidation and insolvency period cost is computed to be ₹ 20 lakhs and ₹ 12 lakhs respectively.

Meanwhile, when Rahul was engaged in providing professional assistance to the liquidator as per Section 34 of the Code, he and his wife Ms. Simran received a notice from the Initiating officer to start proceedings under the Prohibition of Benami Property Transactions Act, 1988, with respect to the 50,000 unquoted shares of DFL Private Limited (DLFPL), held by Rahul in the name of his wife.

The extract of the last audited financial statements of DLFPL is provided as under:

Particulars	Amount (Rs.in Lakhs)
Land & Building (Market value ₹ 45 lakhs)	35
Plant & Machinery (Gross) (Market Value ₹ 10 lakhs)	20
Stock & trade Receivables	15
Miscellaneous Expenditure deferred for 3 years	3
Income tax paid in advance	2
<b>Total Assets</b>	<b>70</b>
Shareholder's Funds (5 lakh equity shares @ ₹ 3 each)	35
Accumulated Depreciation	5
Trade Payables	12
Income Tax Provision	7
Provision for ascertained liabilities	6
Provision for unascertained liabilities	5
<b>Total Liabilities</b>	<b>70</b>

Other information:

Contingent liabilities - ₹ 3 lakhs (including ₹ 1 lakh relating to arrears on cumulative preference shares).

As a result of the proceedings made by the Initiating officer as per Section 24 of the Prohibition of Benami Property Transactions Act, 1988, after the valuation of the shares was done as per Rule 3 of the relevant rules, the officer came to know that the source of the purchase of shares by Rahul was the sale proceeds of one of the properties of RDRPL which he had fraudulently/ wrongfully removed before 9 months of the insolvency commencement date and accordingly the Initiating officer after taking approval of adjudicating authority informed the Enforcement director under the Prevention of Money Laundering Act, 2002 as now the property appeared to be proceeds of crime. Also, Rahul was prosecuted as per the penal provisions of the Insolvency and Bankruptcy Code, 2016.

### **I. Multiple Choice Questions**

1. What should be the minimum value of the property that is fraudulently removed, in order for the penal provisions under the Insolvency and Bankruptcy Code, 2016, to attract and within how many months immediately preceding the insolvency commencement date, such an act should have occurred?
  - (a) ₹ 1 lakh or more and 12 months
  - (b) ₹ 10,000 or more & 12 months
  - (c) ₹ 10,000 & 12 months
  - (d) ₹ 10 lakhs or more & 9 months
2. Under which laws, Mr. Rahul can be prosecuted for his fraudulent act?
  - (a) The Prohibition of Benami Property Transactions Act, 1988 and the Insolvency and Bankruptcy Code, 2016
  - (b) The Prevention of Money Laundering Act, 2002 and the Prohibition of Benami Property Transactions Act, 1988
  - (c) The Prohibition of Benami Property Transactions Act, 1988, the Prevention of Money Laundering Act, 2002 and the Insolvency and Bankruptcy Code, 2016
  - (d) The Prevention of Money Laundering Act, 2002 and the Insolvency and Bankruptcy Code, 2016
3. As per the given case study, how much amount shall be the distributed to government dues, to secured creditors whose debts remain unpaid following the enforcement of

security interest and for the court case-penalty amount, if the funds available with the liquidator after distribution to unsecured financial creditors is ₹ 64 lakhs?

- (a) ₹ 40 lakhs to government dues, ₹ 4 lakhs to secured creditors with unpaid debt and ₹ 20 lakhs for the court case-penalty amount
  - (b) ₹ 50 lakhs to government dues, ₹ 5 lakhs to secured creditors with unpaid debt and ₹ 9 lakhs for the court case-penalty amount
  - (c) ₹ 39.33 lakhs to government dues, ₹ 5 lakhs to secured creditors with unpaid debt and ₹ 19.67 lakhs for the court case-penalty amount
  - (d) ₹ 50 lakhs to government dues, ₹ 2.33 lakhs to secured creditors with unpaid debt and ₹ 11.67 lakhs for the court case-penalty amount
4. If Mr. Rahul had purchased the shares in the name of his wife out of the sale proceeds of the immovable property held by Rahul, as a joint owner with his mother, then whether it can be termed as a benami transaction?
- (a) Yes
  - (b) No
  - (c) Partially Yes, partially No
  - (d) Can't say
5. What could be the punishment to RDRPL and its officers for the use of child labour as per the provisions of the Prevention of Money Laundering Act, 2002?
- (a) Imprisonment for 3 to 7 years and fine without any limit
  - (b) Imprisonment for 3 to 10 years and fine without any limit
  - (c) Imprisonment up to 2 years and fine up to ₹ 50,000
  - (d) Not an offence under the Prevention of Money Laundering Act, 2002, so not punishable under this Act.

## II. Descriptive Questions

6. (A) Whether the decision made by the adjudicating authority of admitting the application filed by the assignee of an operational creditor is valid as per the provisions of the Insolvency and Bankruptcy Code, 2016?
- (B) How the property held by Rahul in the name of his wife can be considered as proceeds of crime and what action can the Enforcement director take against such property?



7. State the order of priority with notes indicating the relevant section of the Code in which the liquidator shall distribute the proceeds under the Insolvency and Bankruptcy Code, 2016.
8. (A) Assuming that the cost of acquisition and the market value based on discounted cash flow method is ₹ 1.5 lakhs and ₹ 4 lakhs respectively, calculate the fair market value of the shares held by Rahul's wife of DLFPL in accordance with Rule 3 of the Prohibition of Benami Transactions Rules, 2016.
- (B) What are the circumstances, other than the situation mentioned in the case study that may also have to lead the adjudicating authority to pass an order of liquidation?

### ANSWERS TO CASE STUDY 22

#### I. Answers to Multiple Choice Questions

1. (b) ₹ 10,000 or more & 12 months

##### Reason

Section 68 of the IBC provides that where any officer of the corporate debtor has-

- (i) **within the 12 months** immediately preceding the insolvency commencement date-
  - (a) willfully concealed any property or part of such property of the corporate debtor or concealed any debt due to, or from the corporate debtor, **of the value of 10,000/- rupees or more.**

2. (d) The Prevention of Money Laundering Act, 2002 and the Insolvency and Bankruptcy Code, 2016

##### Reason

Chapter VII of the IBC deals with the matter of offences and penalties. In the given case Rahul has fraudulently diverted the money in purchasing the shares in the name of his wife, so the provisions of the IBC under Chapter VII (**Section 68: Punishment for concealment of property, Section 69: Punishment for transactions defrauding creditors**) shall be applicable.

Further **section 3 of the Prevention of Money Laundering Act, 2002** provides that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected

with the **proceeds of crime** including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

Therefore, the IBC and PML Act are applicable.

3. (a) ₹ 40 lakhs to government dues, ₹ 4 lakhs to secured creditors with unpaid debt and ₹ 20 lakhs for the court case-penalty amount

**Reason**

Refer Section 53 of the IBC which describes about the distribution of assets.

4. (b) **No**

**Reason**

Section 2(9) of the Prevention of the Benami Transactions Act, 1988 provides that –

**“benami transaction” means,—**

(A) a transaction or an arrangement—

- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by—**

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

**Situation:** If Rahul purchases shares in the name of his wife from the sale proceeds of the immovable property held jointly by Rahul with his mother. In this case, the money derived from the sale consideration from the joint property is from the known source (assuring that Capital Gains Tax, if any, arising from the sale of the property, has been paid by Rahul), and this sale consideration is

invested in purchasing shares of a company in the name of his wife, which comes within the exempted category of Section 2(9)(A)(b)(iii). It is also presumed that Rahul has utilised the sale consideration of his share only. Even if Rahul utilised the share of sale consideration of his mother, it is presumed that his mother donated that amount to Rahul. Therefore, it shall not be treated as benami transaction.

5. (a) Imprisonment for 3 to 7 years and fine without any limit

**Reason**

Section 2(y)(i) of the PML Act describes the scheduled offence which means the offences specified under Part A of the Schedule.

Paragraph 14 of Part A of the Schedule provides offences under the Child Labour (Prohibition and Regulation) Act, 1986 and Section 14 provides the punishment for employment of any child to work in contravention of the provisions of section 3.

Section 4 of the PML Act provides that whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term **which shall not be less than three years but which may extend to seven years and shall also be liable to fine.**

## II. Answers to Descriptive Questions

6. (A) As per the provisions of the Insolvency and Bankruptcy Code, 2016;

Default means non-payment of debt when whole or any part or installment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. [Section 3(12)]

Operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been **legally assigned or transferred**; [Section 5(20)]

**Serving of demand Notice:** On the occurrence of default, an operational creditor shall first send a demand notice and a copy of the invoice to the corporate debtor.

**On receipt of demand notice by the corporate debtor:** The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about-

- (a) existence of a dispute about the debt, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

- (b) the payment of an unpaid operational debt— It is possible that the corporate debtor might have already paid the unpaid operational debt, in such a situation, corporate debtor will inform within 10 days -
  - (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
  - (ii) by sending an attested copy of a record that the operational creditor has encashed a cheque issued by the corporate debtor.

[Section 8]

If no reply is received or payment or notice of the dispute under section 8(2) from the corporate debtor within ten days from the date of delivery of the notice or invoice demanding payment, the operational creditor can file the application before Adjudicating Authority (NCLT) for initiating a corporate insolvency resolution process as per Section 9 of the Code.

Section 21(5) provides that where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

In the case of M/s Orator Marketing Pvt Ltd Vs. M/s Samtex Sesinz Pvt Ltd, the Supreme Court of India, dated 26<sup>th</sup> July 2021 [Civil Appeal No. 2231 of 2021], the issue involved is whether a person who gives a term loan to a Corporate Person, free of interest, on account of its working capital requirements is not a Financial Creditor, and therefore, incompetent to initiate the Corporate Resolution Process under Section 7 of the IBC.

Thus, based on the aforementioned provisions the decision made by the adjudicating authority of admitting the application filed by the assignee of an operational creditor **is valid** as an operational creditor also includes a person to whom such debt has been assigned.

- (B) Section 2(1)(u) of the Prevention of Money Laundering Act, 2002 defines "**proceeds of crime**" as any property derived or obtained, directly or indirectly, by any person as a result of criminal activity **relating to a scheduled offence** or the value of any such property or where such property is taken/held outside the country, then the property equivalent in value held within the country or abroad.

Paragraph 29 of Part A of Scheduled Offence prescribes offence under section 447 of the Companies Act, 2013.

In the given case, the offence of fraudulently/ wrongfully removing the property of RDRPL and using the sale proceeds for personal benefit is an offence

punishable under section 447 of the Act which is also a scheduled offence mentioned under the provisions of the Prevention of Money Laundering Act, 2002 and any property derived from criminal activity relating to a scheduled offence falls under proceeds of crime as defined above.

The action that can be taken by the Enforcement director against such property is provided on the basis of provisions of section 5 of the Act as follows:

Where the Director or any other officer (not below the rank of Deputy Director authorised by the Director) for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

- (a) any person is in possession of any proceeds of crime; and
- (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to the confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

**Condition for attachment:** The proviso attached to section 5 provides that no such order of attachment shall be made unless, in relation to the scheduled offence:

- a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or
- a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or
- a similar report or complaint has been made or filed under the corresponding law of any other country.

**The Second proviso states that,** notwithstanding anything contained in the first proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

**The third proviso states that** for the purposes of computing the period of one

hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.

Thus, the director can pass an order of provisional attachment of the property for a maximum period of 180 days subject to the conditions as aforesaid.

7. Section 53 of the Code states the provisions relating to the distribution of assets from the sale of the liquidation assets.

(1) **Distribution of proceeds from the sale of the liquidation assets:**

Notwithstanding anything to the contrary in any law enacted by the Parliament or any State Legislation for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period as may be specified, namely —

- (a) the insolvency resolution process costs and the liquidation costs paid in full;
- (b) the following debts which shall rank equally between and among the following;
  - (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and
  - (ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;
- (c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- (d) financial debts owed to unsecured creditors;
- (e) the following dues shall rank equally between and among the following:—
  - (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;
  - (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;
- (f) any remaining debts and dues;

- (g) preference shareholders, if any; and
  - (h) equity shareholders or partners, as the case may be.
- (2) **Disregard of the order of priority:** Any contractual arrangements between recipients with equal ranking, if disrupting the order of priority shall be disregarded by the liquidator.
- (3) **Fees to liquidator:** The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients, and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation:

- (i) It is required to note that, it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full or will be paid in equal proportion within the same class of recipients if the proceeds are insufficient to meet the debts in full; and
- (ii) the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.

Particulars	Amount (₹ in Lakhs)	
Value Realized by Liquidator (350L×110%+150L×60%+100L×72%+300L×72%)		763
Add: Cash		100
<b>Total Amount of Funds Available</b>		<b>863</b>
Less: Section 53(1)(a) Insolvency resolution process costs and the liquidation costs.		
(i) Cost of Liquidation	20	
(ii) Insolvency Professional related costs*	12	
<b>Balance Available</b>		<b>831</b>
Less: Section (53)(1)(b)		
(i) Workmen's dues for the period of 24 months preceding the liquidation commencement date (80 lakhs*24/30)	64	
(ii) Debt owed to a secured creditors:		
(a) Secured Financial Creditors (250 lakhs-45 lakhs)	205	
(b) Secured Operational Creditors	60	

<b>Balance available</b>		<b>502</b>
Less: Section (53)(1)(c) Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date	72	
<b>Balance available</b>		<b>430</b>
Less: Section(53)(1)(d) Financial debts owed to unsecured creditors	150	
<b>Balance available</b>		
Less: Section(53)(1)(e) – Dues to rank equally		
Amount due to the Central Government and the State Government	50	
Penalty for use of child labour - court case	25	
Amount remaining unpaid to secured financial creditors who enforced their security interest (50 lakhs*80% = 40 lakhs, unpaid amount = 45 lakhs-40 lakhs = ₹ 5 lakhs)	5	
<b>Balance available</b>		<b>200</b>
Less: Section(53)(1)(f)		
(i) Workmen's dues pending beyond 24 months of liquidation commencement date	16	
(ii) Employees' liability pending beyond 12 months of liquidation commencement date	8	
(iii) Unsecured operational creditors	70	
<b>Balance available</b>		<b>106</b>
Less: Section(53)(1)(g) Amount to be given to Preference Shareholders	106	
<b>Balance available</b>		<b>Nil</b>
Less: Section(53)(1)(h) Amount to be given to Equity Shareholders	Nil	
<b>Balance available</b>		<b>Nil</b>

8. (A) According to section 2(16) of the Prohibition of Benami Property Transaction Act, 1988, the fair market value", in relation to a property, means—
- (1) the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and
  - (2) where the price referred to in sub-clause (i) is not ascertainable, such



price as may be determined in accordance with such manner as may be prescribed in Rule 3 of the Prohibition of Benami Property Transaction Rules, 2016.

As per the said Rule, the price of unquoted equity shares shall be the higher of-

- (i) its cost of acquisition; (ii) the fair market value of such equity shares determined, on the date of transaction, by a merchant banker or an accountant as per the Discounted Cash Flow method; and
- (iii) the value, on the date of transaction, of such equity shares as determined by the formula given in the Rules. The value of (iii) above is determined as below:

Particulars	Amount (₹ in Lakhs)	Value to be considered for calculation (₹ in lakhs)	Remarks
Land & Building (Market value ₹ 45 lakhs)	35	45	Market value to be considered
Plant & Machinery (Gross) (Market Value ₹ 10 lakhs)	20	15 (20-5)	Book value net of accumulated depreciation
Stock & trade Receivables	15	15	Book value
Miscellaneous Expenditure deferred for 3 years	3	0	Not to be considered
Income tax paid in advance	2	0	Not to be considered
<b>Total Value of Assets</b>		<b>75</b>	
Shareholder's Funds (5 lakh equity shares @ ₹ 3 each)	35	0	Share capital and Reserves not to be considered
Accumulated Depreciation	5	0	Considered in Value of Plant & Machinery above
Trade Payables	12	-12	To be considered
Income Tax Provision	7	0	Not to be considered

Provision for ascertained liabilities	6	-6	To be considered
Provision for unascertained liabilities	5	0	Not to be considered
Contingent Liabilities	3	-1	Arrears (dividend) on cumulative preference shares to be considered
<b>Total Value of Liabilities</b>		<b>-19</b>	
Fair Market Value (Asset-Liabilities) *Paid-up Equity Capital/ Paid-up value of equity shares		<b>56</b>	
Value of equity shares acquired i.e. 10% of total (50,000/5,00,000)		<b>5.6</b>	

In the said question, the cost of acquisition is assumed at ₹ 5 lakhs, the value, on the date of transaction, of such equity shares as determined by the formula given in the rules is ₹ 5.6 lakhs and the market value based on discounted cash flow method is given as ₹ 4 lakhs. Thus, the fair market value of the acquisition in DLFPL will be ₹ 5.6 lakhs being the highest of above.

- (B) It is given in the case study that before passing the resolution plan, the committee of creditors decided to liquidate the corporate debtor, so accordingly the other circumstances mentioned hereunder are related to situations where the resolution plan has not been passed or it has been passed but rejected.

Section 33 of the Code, inter alia, provides that where the Adjudicating Authority shall pass an order requiring the corporate debtor to be liquidated in the manner as laid down

- (a) **Not received a Resolution plan:** Before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process u/s 12 or the fast track corporate insolvency resolution process u/s 56, as the case may be, does not receive a resolution plan u/s 30(6); or
- (b) **Resolution plan rejected u/s 31** for the non-compliance of the requirements specified therein, it shall pass an order requiring the corporate debtor to be liquidated.

## CASE STUDY 23

The Adjudicating Authority, under the Foreign Exchange Management Act, 1999, based on the complaints received in writing from the officer authorized by the Central Government, had issued show cause notices to various persons accused of committing contravention under the act, to show cause as to why an inquiry should not be held against them as follows:

Sr. No.	Notice issued to whom	Nature of contravention committed by the accused person as mentioned in the show-cause notice issued
1	M/s. Saye Enterprises	Received payment from a person resident outside India in UK pounds without a corresponding inward remittance
2	Mr. Raj	Mr. Raj came to India for holiday after 10 years on 05.05.2019 and left for the US on 28.07.2020. While on his stay, he traded in transferable development rights received as compensation from the State Government for the surrender of his inherited land.
3	Wohts LLP	Donation of USD 90,000 made to a reputed institute in the US in the field of activity of the donor Company, without prior approval of RBI, as its foreign exchange earnings during the preceding 3 financial years was USD 7,500,000
4	Lernandes Pvt. Ltd.	Payment of commission of 23,500 pounds (1 pound= 1.3 USD) to an agent abroad, for sale of commercial property located in Jaipur, for which INRs 4.2 crores were realized. (1 USD = INRs 70) (1 pound = INRs 91)
5	TFL Pvt. Ltd.	Non-remittance against the import of goods from a supplier based in Ireland for a period of more than 14 months from the date of shipment of goods, shipped on 25.03.2020.
6	BMT Associates (An US-based firm)	A firm formed outside India invested in an entity engaged in the real estate business in India.
7	Mrs. Sridevi	She is a person resident outside India in possession of immovable property in India and how she obtained that property in her name is not known.
8	Mr. Pasha	He was in possession of the immovable property in the US jointly with a relative outside India and it was observed that there was an outflow of funds from India equivalent to USD 300,000.

The aforementioned persons made reply to the alleged contraventions as follows:

Sr. No.	Notice issued to whom	Reply and supporting documents provided
1	M/s. Saye Enterprises	Payment was received by us through authorized person and invoice was also issued in UK pounds, produced herewith. (Inward remittance could not be produced)
2	Mr. Raj	I was a person resident in India for PY 2020-21 and producing herewith, flight bookings and visa documents and accordingly, trading in transferable development rights was not prohibited to me.
3	Wohts LLP	As the donation was less than USD 5,000,000, there was no requirement to take RBI approval to support which the donation receipt for the same is provided.
4	Lernandes Pvt. Ltd.	Accepted the contravention made and producing herewith, a copy of the application filed with the office of the Directorate of Enforcement for compounding the contravention made.
5	TFL Pvt. Ltd.	The company is in the corporate insolvency resolution process due to the application filed by a supplier in Ireland for non-payment and producing herewith, a copy of the moratorium order passed by the adjudicating authority under the Insolvency and Bankruptcy Code, 2016.
6	BMT Associates	The real estate company is engaged in the business of development of township to support which, the website address of the Authority, wherein all details of the registered project have been entered and also the registration number obtained from the Authority under the RERA Act, 2016, is produced herewith.
7	Mrs. Sridevi	The property was acquired by my father who is a person resident in India in my name but I was not aware of it.
8	Mr. Pasha	The outflow of funds to the extent of USD 250,000 was from the Resident Foreign Currency (RFC) account held in my name to support the relevant bank statement is produced herewith.

The adjudicating authority considered the replies made. In the case of Mr. Pasha, the adjudicating authority held an inquiry in which it was found that USD 50,000 were sent out of India from the earnings by Mr. Pasha out of the proceeds from the sale of opium without a license, and accordingly the director under the Prevention of Money Laundering Act, 2002 was informed about the same who after recording the reasons in writing took action as prescribed in the provisions of the Prevention of Money Laundering Act, 2002.

**I. Multiple Choice Questions**

1. What was the maximum amount of remittance that was allowed to Lernandes Pvt. Ltd. without prior approval of RBI?
  - (a) USD 25,000
  - (b) USD 30,550
  - (c) USD 30,000
  - (d) USD 250,000
2. Which of the following transaction is not prohibited for a non-resident Indian?
  - (a) Investment in a real estate company engaged in the construction of plantation property
  - (b) Subscription to permitted chit fund through banking channel and on non-repatriation basis
  - (c) Acquisition of immovable property in India from an NRI who is not a relative
  - (d) Acquire a property outside India jointly with a relative in India whereby funds are transmitted out of India after obtaining approval of RBI
3. The adjudicating authority under the Insolvency and Bankruptcy Code, 2016 on the admission of application for corporate insolvency resolution process does not make an order for –
  - (a) Appointment of Interim Resolution Professional
  - (b) Declaration of Moratorium period
  - (c) Causing a public announcement for initiation of the corporate insolvency resolution process
  - (d) Formation of the Committee of Creditors
4. Whether the property held in the name of Sridevi by her father be considered as q benami transaction considering the fact that Sridevi got aware of the ownership of the property after receipt of notice from the adjudicating authority under the Foreign Exchange Management Act, 1999?
  - (a) Yes
  - (b) No
  - (c) Partially
  - (d) Can't say

5. If the credit period allowed by the importer for payment to TFL Pvt. Ltd. was 3 months, then what was the maximum time limit available with TFL Pvt. Ltd. as per the provisions of the Foreign Exchange Management Act, 1999 to make payment to the importer?
- (a) 3 months
  - (b) 6 months
  - (c) 9 months
  - (d) 12 months

## **II. Descriptive Questions**

6. In the lights of the provisions of the Foreign Exchange Management Act, 1999 and its regulations, please examine the validity of the contentions made by:
- (i) M/s. Saye Enterprises
  - (ii) Mr. Raj
  - (iii) Wohts LLP
7. (A) Proceedings instituted by adjudicating authority by the issue of show cause notice to TFL Pvt. Ltd. under the provisions of Foreign Exchange Management Act, 1999 cannot be prohibited because of going on of corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016. Please comment on the same.
- (B) What shall be the amount of penalty that could be levied against Lernandes Pvt. Ltd. and if the offence is compounded by the relevant authority, whether the adjudicating authority can take any further action in respect of the show-cause notice issued to Lernandes Pvt. Ltd.?
8. (A) The property owned by Sridevi was acquired by his father but Sridevi was not aware of the ownership of such property. Examine the statement in the light of provisions of the Foreign Exchange Management Act, 1999 and the Prohibition of Benami Properties Transactions Act, 1988?
- (B) What are the possible actions that can be taken against Mr. Pasha for the offence committed by him under the provisions of the Prevention of Money Laundering Act, 2002?
- (C) BMT Associates in its reply provided the website address of the authority under RERA wherein registration details of the project can be obtained. What is the responsibility of the authority under RERA with respect to such a grant of registration?

**ANSWERS TO CASE STUDY 23****I. Answers to Multiple Choice Questions**

1. (c) USD 30,000

**Reason**

The commission, per transaction, to agents abroad for the sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is higher.

5% of ₹ 4.2 Crores will be INRs 21 Lakhs, at the exchange rate of ₹ 70 per USD, this will come to USD 30,000, which is more than 25,000 hence answer is USD 30,000.

2. (b) Subscription to permitted chit fund through banking channel and on non-repatriation basis

**Reason**

FEMA, 1999

3. (d) Formation of the Committee of Creditors

**Reason**

Section 13(1) **The Adjudicating Authority**, after admission of the application under section 7 or section 9 or section 10, shall, by an order –

- (a) **declare a moratorium** for the purposes referred to in section 14;
- (b) **cause a public announcement** of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15; and
- (c) **appoint an interim resolution professional** in the manner as laid down in section

Section 21(1) of the IBC provides that **the interim resolution professional** shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, **constitute a committee of creditors**.

It means, the Adjudicating Authority do not constitute CoC, it is constituted by the IRP.

**4. (a) Yes****Reason**

Section 2(9) of the Prevention of the Benami Transactions Act, 1988 provides that –

**“benami transaction” means,—**

(A) a transaction or an arrangement—

- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by—**

- (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual
  - (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.
- (C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership.

Thus, the property held in the name of Sridevi by her father comes under the exempted category of section 2(9)(A)(iii) and shall not be treated as benami transaction, provided the consideration paid for purchase of such property was made out of the known sources of income. However, when Sridevi has denied of having property in her name [(as per section 2(9)(C))], then certainly it comes within the definition of benami transaction.



5. (b) 6 months

**Reason**

The remittances against imports should be completed, not later than six months from the date of shipment, except in cases where amounts are withheld towards the guarantee of performance, etc.

Further, in view of the disruptions due to the outbreak of COVID- 19 pandemic, with effect from May 22, 2020, the time period for completion of remittances against normal imports (except in cases where amounts are withheld towards the guarantee of performance, etc.) has been extended from six months to twelve months from the date of shipment for such imports made on or before July 31, 2020.

**II. Answers to Descriptive Questions**

6. (i) As per sub-section (c) of Section 3 of the Foreign Exchange Management Act, 1999, no person shall receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

*Explanation—* For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

Analysis and conclusion of the given case

Even though M/s. Saye Enterprises told that the payment was received by them through an authorised person but due to non-production of inward remittance, it would be deemed that such payment has been received otherwise than through an authorised person and accordingly the contentions made by M/s. Saye Enterprises are not valid.

- (ii) As per Section 2(v) of the Foreign Exchange Management Act, 1999, “*Person resident in India*” means
- (i) a person residing in India for more than 182 days during the course of the preceding financial year but, inter alia, does not include
    - (B) a person who has come to or stays in India, in either case, otherwise than –

- (a) for or on taking up employment in India, or
- (b) for carrying on in India a business or vocation in India, or
- (c) for any other purpose, in such circumstances, as would indicate his intention to stay in India for an uncertain period

As per Regulation 4 of the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, a person resident outside India is prohibited to engage, inter alia, in trading in transferable development rights, either directly or indirectly.

Analysis and conclusion of the given case

Even though the stay of Mr. Raj during the course of the preceding financial year was more than 182 days but his purpose of stay in India was a holiday and not the one as aforementioned, so his residential status for the financial year 2020-21, is a 'Person resident outside India' and accordingly trading in transferable development rights was prohibited to him. The contentions made by him are not valid.

- (iii) As per Para 2 of Schedule III read with Rule 5 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000,

The remittances by persons **other than individuals** that require prior approval of the Reserve Bank of India, inter alia, includes:

Donations exceeding one percent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, for

- (a) Creation of Chairs in reputed educational institutes,
- (b) Contribution to funds (not being an investment fund) promoted by educational institutes; and
- (c) Contribution to a technical institution or body or association in the field of activity of the donor Company.

Analysis and conclusion of the given case

1% of the foreign exchange earnings during the previous three financial years (USD 7,500,000) of Wohts LLP comes to USD 75,000 Or USD 5,000,000, whichever is less.

As obtained above, if the donation made by Wohts LLP exceeds USD 75,000 then prior approval of RBI is required. Here, a donation of USD 90,000 has been made, and hence prior approval was required, the contention is not valid.

7. (A) According to section 14 (1) of the Insolvency and Bankruptcy Code, 2016, on the insolvency commencement date, the Adjudicating Authority shall by order, declare a moratorium prohibiting all of the following, namely
- (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority;
  - (b) Transferring, encumbering, alienating, or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
  - (c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
  - (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

*Explanation.*-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period.

Analysis and conclusion of the given case

As per Section 14(1) (a) of the Code, the proceedings instituted by adjudicating authority by the issue of show cause notice to TFL Pvt. Ltd. under the provisions of Foreign Exchange Management Act, 1999 will be prohibited due to declaration of a moratorium on the commencement of insolvency period. The statement given is not valid.

- (B) (i) As per Section 13 of the Foreign Exchange Management Act, 1999, If any person contravenes any provisions of this Act, or contravenes any rule, regulation, notification, direction, or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the

amount is not quantifiable, and where such contravention is a continuing one, a further penalty which may extend to five thousand rupees for every day after the first day which the contravention continues.

As per section 42 of the Foreign Exchange Management Act, 1999, where a contravention of any of the provisions of this Act or of any rule, direction, or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officers of the company, such director, manager, secretary or other officers of the company shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Here, Lernandes Pvt. Ltd. ought to have taken permission for remitting 23,500 pounds or USD 30,550 as it exceeded the prescribed limits (i.e. 5% of ₹ 4.2 Crores will be ₹ 21 Lakhs, at the exchange rate of ₹ 70 per USD, this will come to USD 30,000, which is more than 25,000 hence allowed limit is USD 30,000). Here the sum involved in such contravention is quantifiable, and the amount in the contravention is USD 550 (i.e. USD 30,550 – USD 30,000). Therefore the penalty amount is USD 1,650 (i.e. 1269.23 pounds or ₹ 1,15,500).

- (ii) The adjudicating authority cannot take any further action in respect of the show-cause notice issued to Lernandes Pvt. Ltd. because as per section 15 of the Foreign Exchange Management Act, 1999, where a contravention has been compounded, no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded.

8. (A) As per the Regulation 3 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, an NRI or an OCI may, inter alia, acquire immovable property in India other than agricultural land/ farmhouse/ plantation property:

Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

Provided further that no payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

As per section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, Benami transaction, inter alia, means, a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership

Analysis and conclusion of the given case:

Here, the consideration for the immovable property is paid by the father of Sridevi and the owner is Sridevi.

Sridevi, being an NRI, can acquire property in India only if the consideration for the same is through the mode specified above. Since the consideration is paid by her father it can be considered that it would have been paid in Indian rupees which is not the mode specified above, thereby violating the condition of the aforementioned regulation and can be prosecuted further by the adjudicating authority under the Foreign Exchange Management Act, 1999.

Also, Sridevi is not aware that she is the owner of such property in India making it a benami transaction and consequently the property will be considered as a "benami property". Accordingly, Sridevi's father can be prosecuted under the provisions of the Prohibition of Benami Properties Transaction Act, 1988.

**(B)** Following actions can be taken against Mr. Pasha involved in Money Laundering:-

- (a) Attachment of property under Section 5,  
Seizure/ freezing of property and records under Section 17; or  
Search of persons under Section 18.

The property also includes property of any kind used in the commission of an offence under the Prevention of Money Laundering Act, 2002, or any of the scheduled offences. If required, for taking possession of the property in the US, a letter of request can be transmitted under Section 57 if there is an agreement made by the Central Government of India with the Government of the US under section 56 of the Act.

- (b) As it is a scheduled offence committed under the Narcotics and Psychotropic substances Act, 1985 the punishment shall be imprisonment for a term which shall not be less than three years but which may extend up to ten years and shall also be liable to fine.
- (c) As per Section 19(1), the Director may by passing an order, arrest him and shall inform him of the grounds for such arrest.

These are the possible actions that can be taken against Mr. Pasha in the above case for their offences.

(C) Grant of Registration - Section 5 of the Real Estate (Regulation & Development) Act, 2016:

- (1) This section provides that the Authority shall within a period of thirty days,
- (a) grant registration subject to the provision of the Act and the rules and regulations made thereunder and provide a registration number including a Login Id and password to the applicant for accessing the website of the authority and to create his webpage and to fill therein the details of the proposed project, or
  - (b) reject that application for reasons to be recorded in writing, if such application does not conform to the provisions of the Act or the rules and regulations made thereunder.

However, no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

- (2) This section also provides that if the Authority fails to grant the registration or reject the application, as provided within thirty days, the project shall be deemed to have been registered and the Authority shall within seven days of the expiry of the said thirty days, provide a registration number and a Login ID and password to the promoter.

Thus, the responsibility of the authority under RERA includes providing a registration number including a Login Id and password to the applicant/ promoter and in case the application is ought to be rejected then an opportunity of being heard must be given to the promoter after recording the reasons in writing.

## CASE STUDY 24

IOWE Limited, engaged in the business of real estate, is under a corporate insolvency resolution process that commenced from 15.09.2019, in which Mr. Tapan, has been appointed as the resolution professional, who is conducting the entire resolution process and managing the entire operations of the corporate debtor.

Mr. Tapan made an invitation for the names of prospective resolution applicants under clause (h) of sub-section (2) of section 25 of the Insolvency and Bankruptcy Code 2016 (here-in-after referred as to the Code) pursuant to which the candidates who submitted their names, are as follows:

Name	Status of the person
Tryl ARC Ltd.	An asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which is managing one of the receivable accounts of IOWE Limited classified as NPA since 05.08.18 and also possesses 21% equity shares of IOWE Limited obtained against convertible debentures of IOWE Limited prior to 31.03.2019.
Raj	He is a brother in law of Mr. Deepak who shall be the managing director of IOWE Limited during the time of implementation of the resolution plan and Mr. Raj, himself is disqualified to act as a director under the Companies Act, 2013
Prem	He was CEO of IOWE Limited when the adjudicating authority under section 44 of the Code passed an order requiring the resolution professional, Mr. Tapan, to release the security interest created in favour of one of the operational creditors on 25.02.2019.
Bhavesh	He is a spouse of the sister of Mrs. Asmita who shall be the woman director, going to be involved in the management of IOWE Limited during the time of implementation of the resolution plan, and Mr. Bhavesh, being a person resident in India was convicted under the provisions of FEMA Act, 1999, with imprisonment for 2 years and only 1 year has expired from the date of his release of imprisonment, for not paying penalty arose due to retaining possession of foreign currency notes of USD 560,000 for more than the prescribed period acquired as payment of services provided in the USA.
Jayesh	He was an ex-director of IOWE Limited, convicted under the provisions of the Prohibition of Benami Property Transactions Act, 1988, as he was a beneficial owner of a property in which his friend, an ex-employee of IOWE Limited, Mahesh, was made benamidar of the property, with

	imprisonment for 3 years and only 6 months have expired from the date of his release of imprisonment.
Urmila	She is a spouse of the nephew of Mr. Raman, who shall be the promoter of IOWE Limited during the time of implementation of the resolution plan, and Mrs. Urmila, herself, was convicted under the provisions of the Competition Act, 2002, for violating the order of the commission by re-entering into an agreement of anti-competitive nature on behalf of PKC Private Limited in which she was the managing director, with imprisonment for 2.5 years and 2 years have expired from the date of her release of imprisonment.

Mr. Tapan rejected a few of the prospective applicants' candidature as they were not found to be eligible under section 29A of the Insolvency and Bankruptcy Code, 2016 and few were not satisfying the criteria laid down by him i.e. not having experience in the real estate industry for minimum 2 years.

Mr. Tapan provided the eligible resolution applicants with access to all the relevant information including the financial position of IOWE Limited as follows:

Share Capital/ Liabilities	(₹ in lakhs)	Assets	(₹ in lakhs)
Equity Share Capital	150	Fixed Assets:	
Preference Share Capital	50	Land & Building	120
Financial Creditors (Secured)	80	Plant & Machinery	60
Operational Creditors (Unsecured)	38	Current Assets:	
Government Dues	20	Stocks	40
Workmen's Dues pending for 27 months before 15.09.2019	18	Trade Receivables	90
Employees' Dues	22	Other current Assets	38
		Cash & Cash equivalents	30
	<b>378</b>		<b>400</b>

Based on the information provided, Mr. Tapan received 3 resolution plans from the approved resolution applicants wherein all the 3 plans provided for:

1. The insolvency resolution process costs, estimated at ₹ 40 lakhs,
2. Payment of the debts of operational creditors at ₹ 38 lakhs provided by Plan no. 1 and Plan no. 2 respectively whereas Plan no. 3 provided at ₹ 28 lakhs only.
3. All the plans included the provisions for matters such as payments of debts to financial creditors who do not vote in favour of the plan as per the priority order mentioned in section 53 of the code, management of the affairs of the Corporate debtor after



approval of the resolution plan, implementation and supervision of the resolution plan and conformed to such other requirements as may be specified by the Board.

4. With regards to the comment on the contravention with any of the provisions of the law for the time being in force in the plan, in the plan no. 2, it was mentioned that as one of the mortgaged properties which were in favour of a financial creditor of IOWE Limited got provisionally attached under section 5 of the Prevention of Money Laundering Act, 2002 after the insolvency commencement date, but the proceedings of which were going on before the insolvency commencement date, that particular financial creditor would be treated as unsecured. In Plan no. 1 and Plan no. 3, it has been considered that attachment of property under section 5 of PMLA Act, 2002 will not have effect during the IBC proceedings and that financial creditor will continue to be a secured creditor.

It is also to be noted that the aforementioned mortgaged property was not purchased from “proceeds of crime”. It was purchased and mortgaged in favour of a financial creditor prior to the crime period.

Prior to the insolvency commencement date, Mr. Jayesh who was a past director in IOWE Limited, purchased a property out of the cash money earned by him, which were not disclosed anywhere in order to avoid Income tax, registered in the name of Mahesh, an ex-employee of IOWE Limited, after making an oral agreement with him in exchange of some commission in cash. In the proceedings under the Prohibition of Benami Property Transactions Act, 1988, it was held that the property is benami in nature after which the shareholders of IOWE Limited in the general meeting removed Jayesh and Mahesh from the company and IOWE Limited filed a suit against Jayesh and Mahesh claiming that the property purchased by Jayesh in the name of Mahesh was from the cash illegally earned by Jayesh from the company and so IOWE Limited being the real owner of the property be given the title and possession of the property.

### **I. Multiple Choice Questions**

1. If Mr. Prem had created a security interest in favour of one of the operational creditors to substitute its existing operational debt with financial debt then whether it can be considered as a preferential transaction and within what time Mr. Prem should have entered into such transaction?
  - (a) Yes, during the period of two years preceding the insolvency commencement date
  - (b) No
  - (c) Yes, during the period of one year preceding the insolvency commencement date
  - (d) Cant' say, it depends

2. By the decision of which authority, Mrs. Urmila would have been convicted with imprisonment for 2.5 years under the provisions of the Competition Act, 2002?
  - (a) Competition Commission of India
  - (b) Chief Metropolitan Magistrate
  - (c) Director General
  - (d) The Central Government
3. Which of the following relations, between persons mentioned hereunder, will not fall under the meaning of relative as per the provisions of the Insolvency and Bankruptcy Code, 2016?
  - (1) Raj and Deepak
  - (2) Bhavesh and Asmita
  - (3) Urmila and Raman
  - (4) Jayesh and Mahesh
  - (a) 1,3 & 4
  - (b) 3 & 4
  - (c) 4
  - (d) 2 & 4
4. Had IOWE Limited filed a suit or claim, prior to the initiation of proceedings under the Prohibition of Benami Property Transactions Act, 1988, that it is the real owner of the property purchased by Jayesh, then to whom notice was required to be issued for adjudication of benami property and by which authority?
  - (a) Initiating officer shall issue notice to Jayesh, Mahesh and IOWE Limited
  - (b) Adjudicating Authority shall issue notice to Jayesh and Mahesh
  - (c) Initiating officer shall issue notice to Jayesh and Mahesh
  - (d) Adjudicating Authority shall issue notice to Jayesh, Mahesh and IOWE Limited
5. How much amount of foreign currency, Mr. Bhavesh, ought to have surrendered to the authorized dealer to avoid the penalty under the FEMA Act, 2002, assuming that Bhavesh had received USD 290,000 out of USD 560,000 in India, in rupees (INR) from a bank account in the US, maintained with an authorized dealer?
  - (a) \$ 270,000
  - (b) \$ 268,000

- (c) \$ 560,000
- (d) \$ 290,000

**II. Descriptive Questions**

6. Who among the candidates named above are eligible to be resolution applicant to submit a resolution plan and also mention the reasons for their eligibility or ineligibility in the lights of the provisions of the Insolvency and Bankruptcy Code, 2016?
7. (A) You are the resolution professional and need to comment that which of the resolution plans as aforementioned in the case study according to you confirms the requirements as per the provisions of the Insolvency and Bankruptcy Code, 2016.
- To support your answer, please prepare an estimated calculation showcasing the priority with respect to payments as per Section 53 of the Code, based on the balance sheet as provided above, assuming the estimated value that can be realized from the sale of assets, if sold, is ₹ 180 lakhs. (Ignore the fact that plan no. 2 has considered a certain amount of financial creditors as unsecured.)
- (B) How the commission would have come to know about the violation of the order by the company in which Mrs. Urmila was a managing director and what penalty could have been imposed on her?
8. (A) Whether the provisional attachment under section 5 of the PMLA Act, 2002, of property of IOWE Limited could be justified considering the fact that it was mortgaged in the favour of one of the financial creditor and that it was purchased and mortgaged prior to the crime period? Provide your answer based on the decision of relevant case law.
- (B) Whether the act of IOWE Limited of filing suit against Jayesh and Mahesh claiming that the company is the real owner of the property and be given the title and possession of the property is valid in the lights of the provisions of the Prohibition of Benami Property Transactions Act, 1988?

**ANSWERS TO CASE STUDY 24****I. Answers to Multiple Choice Questions**

1. (c) Yes, during the period of one year preceding the insolvency commencement date

**Reason**

**Section 43(4)(b)** of the OBC provides that a preference shall be deemed to be given at a relevant time, if –

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

**Hence, the option (c) is correct.**

2. (b) Chief Metropolitan Magistrate

**Reason**

Section 52Q of the Competition Act, 2002 provides that without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding rupees one crore or **imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit.**

**Hence, the option (b) is correct.**

3. (b) 3 & 4

**Reason**

Explanation (a) attached to section 24A of the IBC provides that “relative”, with reference to any person, means anyone who is related to another, the following manner, namely: (i) members of a HUF, (ii) Husband, (iii) wife, (iv) father, (v) mother, (vi) son, (vii) daughter, (viii) son’s daughter and son, (ix) daughter’s daughter and son, (x) grandson’s daughter and son, (xi) grand daughter’s daughter and son, (xii) brother, (xiii) sister, (xiv) brother’s son and daughter, (xv) sister’s son and daughter, (xvi) father’s father and mother, (xvii) mother’s father and mother, (xviii) father’s brother and sister, (xix) mother’s brother and sister; and

(b) wherever the relating is that of a son, daughter, sister or brother, their spouses shall also be included.

In the given case:

Option 3: Urmila and Jayesh → Urmila is a spouse of the nephew of Mr. Raman

Option 4: Jayesh and Mahesh → Jayesh was an ex-director of IOWE Limited, and his friend Mahesh is an ex-employee of IOWE Limited,

Both the options of 3 and 4 do not come in the category of the definition of relative as provided under the provisions of IBC.

4. (c) **Initiation Officer** shall issue notice to Jayesh and Mahesh

**Reason**

Section 24(1)&(2) of the PBTP Act, 1988 provides as under:

- (1) Where the **Initiating Officer**, on the basis of material in his possession, has reason to believe that any person is a *benamidar* in respect of a property, he may, after recording reasons in writing, **issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.**
- (2) Where a notice under sub-section (1) specifies any property as being held by a *benamidar* referred to in that sub-section, a **copy of the notice shall also be issued to the beneficial owner if his identity is known.**

In the given case, Jayesh is beneficial owner and Mahesh is the benamidar. As mentioned in the case that IOWE Ltd has itself filed a suit prior to the initiation of proceedings under the PBTP Act, 1988, so the notice shall be served by the Initiating Officer to Jayesh and Mahesh.

5. (b) **\$ 268,000**

**Reason**

$$[(\$560,000 - \$290,000) - \$2,000] = \$268,000$$

USD 2000 can be retained by Bhavesh, so it has been reduced and the net USD to be surrendered comes to USD 268000.

## II. Answers to Descriptive Questions

6. The eligibility criteria for a resolution applicant is mentioned in section 29A of the Code and accordingly the question is answered on the basis of its provisions as follows:

Name	Eligible to be resolution applicant?	Reason
Tryl ARC Ltd.	Yes	As per clause (c) of Section 29A of the Code, a person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person-

		<p>At the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor.</p> <p>Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan.</p> <p>Provided further that <b>nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.</b></p> <p>As per Explanation I to the said clause, the related party shall not include a financial entity of the corporate debtor, if it is a financial creditor of the corporate debtor and is a related party solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.</p> <p>Further, Explanation II of section 29A(j)(d), provides that the financial entity includes an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.</p> <p>Hence, Tryl ARC Ltd. is eligible.</p>
Raj	Yes	<p>As per Section 29A(e), a person is ineligible if he is disqualified to act as a director under the Companies Act, 2013:</p> <p>Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I.</p>

		<p>Explanation I. — For the purposes of this clause, the expression "connected person" means—</p> <ul style="list-style-type: none"> <li>(i) any person who is the promoter or in the management or control of the resolution applicant; or</li> <li>(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or</li> <li>(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):</li> </ul> <p>Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor.</p> <p>Raj is the brother-in-law of Deepak so it is a related party of Deepak, in terms of section 5(24A)(a) &amp; (b) of the Code, who shall be the managing director of IOWE Limited during the time of implementation of the resolution plan and hence, Mr. Raj is eligible even though he is disqualified to act as a director.</p>
Prem	No	<p>As per clause (g) of Section 29A, Mr. Prem being the CEO will be considered in the management of the company at the time when the preferential transaction had taken place and in respect of which an order has been made by the Adjudicating Authority under this Code. Therefore, Mr. Prem is ineligible.</p>
Bhavesh	Yes	<p>As per clause (d) of Section 29A, Mr. Bhavesh has been convicted for an offence punishable with imprisonment for two years or more under the FEMA Act, 1999, specified under the Twelfth Schedule but this clause is not applicable to a person who is a connected person referred to in clause (iii) of Explanation I, which includes a related party of a person who shall be in management of the business of the corporate debtor during the time of implementation of the resolution plan and Mr. Bhavesh being sister's spouse will be considered as a related party to Mrs. Asmita as per section 5(24A) of the Code, who</p>

		shall be in the management of IOWE Limited as a woman director, during the time of implementation of the resolution plan and hence, Mr. Bhavesh is eligible.
Jayesh	No	As per clause (d) of Section 29A, Mr. Jayesh has been convicted for an offence punishable with imprisonment for two years or more under the Prohibition of Benami Property Transactions Act, 1988 specified under the Twelfth Schedule and since only 6 months have expired from the date of imprisonment, Mr. Jayesh is ineligible.
Urmila	Yes	As per clause (d) of Section 29A, Mrs. Urmila has been convicted for an offence punishable with imprisonment for two years or more under the Competition Act specified under the Twelfth Schedule and 2 years have expired from the date of imprisonment, Mrs. Urmila is eligible.

7. (A) The following calculation is done on an estimated basis according to the provisions of section 53 of the Code.

Particulars	(₹ in lakhs)
Value Realized by Liquidator	180
Add: Cash	30
Total Amount of Funds Available	210
Less: Section 53(1)(a) Estimated Insolvency resolution process costs	40
Balance Available	170
Less: Section (53)(1)(b)	
(i) Workmen's dues for the period of 24 months preceding the liquidation commencement date (18 lakhs*24/27)	16
(ii) Debt owed to a secured financial creditors	80
Balance available	74
Less: Section(53)(1)(c) Wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date	22
Balance available	52
Less: Section(53)(1)(d) Financial debts owed to unsecured creditors	-
Balance available	52



Less: Section(53)(1)(e) –	
Amount due to the Central Government and the State Government	20
Balance available	32
Less: Section(53)(1)(f) (Pending payable amount = ₹ 2 lakhs + ₹ 38 lakhs = ₹ 40 lakhs)	
(i) Workmen's dues pending beyond 24 months of liquidation commencement date (2 lakhs * 32/40)	1.6
(ii) Unsecured operational creditors (38 lakhs * 32/40)	30.4
Balance available	Nil
Less: Section(53)(1)(g) Amount to be given to Preference Shareholders	Nil
Balance available	Nil
Less: Section(53)(1)(h) Amount to be given to Equity Shareholders	Nil
Balance available	Nil

**Comments:**

Plan no. 2 contravenes the provisions of the IBC, 2016 as treating secured creditor as unsecured one because of attachment of property under section 5 is incorrect and against the law, thereby it is not eligible.

Plan no. 3 provides for payment to operational creditors at ₹ 28 lakhs whereas they should be paid at a higher of: amount to be paid in the event of a liquidation of the corporate debtor under section 53 i.e. liquidation value (not given in question) or amount to be paid in order of priority under section 53, i.e. ₹ 30.4 lakhs. Since plan no. 3 provides only for ₹ 28 lakhs payment, hence it is ineligible.

Plan no.1 satisfies all the requirements of section 30(2) of the Code and therefore is an eligible resolution plan.

**(B)** Section 42 of the Competition Act, 2002, deals with the matter of Contravention of orders of Commission. It reads as under:

- (1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.
- (2) If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be punishable with fine which may

extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

- (3) If any person does not comply with the orders or directions issued or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit. Provides that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.

Section 48 deals with the matter relating to the contravention by companies. It reads as under

- (1) Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, an order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

- (2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act, or of any rule, regulation, an order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officers of the company, such director, manager, secretary or other officers shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

Analysis and conclusion of given case

The commission might have caused inquiry that whether PKC Pvt. Ltd. is complying with the provisions of the order passed by it, by which it would have come to know about the violation by the company and Mrs. Urmila being a managing director of the company would have been involved in it because of which she was also punished.

The penalty that would have been imposed would be imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may have deemed fit, for not complying with the order of the commission.

8. (A) The facts in the given case commensurate with the case of *M/s. PMT Machines Ltd. vs The Deputy Director, Directorate of Enforcement, Delhi*, for which the key ratio decidendi is produced hereunder,
1. The Appellate Authority of the Prevention of Money Laundering Act, 2002 (PMLA) has upheld the prevalence of the IBC over the provisions of PMLA.
  2. The PMLA Appellate Tribunal, distinguished between the objectives of the PMLA and IBC, and was of the view that "the objective of the PMLA was to deprive the offender from enjoying the 'illegally acquired' fruits of crime by taking away his right over property acquired through such means. The Bench opined that the IBC's objective on the other hand was maximization of value of assets, to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders."
  3. The Appellate Bench observed that, if the attachment, in this case, were lifted, the RP would be able to take steps to get a viable Resolution Plan. It was noted that the attachment order was passed in relation to mortgaged properties in favour of banks, which were not purchased from "proceeds of crime", as they were purchased and mortgaged with the banks prior to the crime period.

Analysis and conclusion of a given case

Based on the decision given by the appellate tribunal in the above case, it can be understood that the act of the provisional attachment under section 5 of the PMLA Act, 2002, of property of IOWE Limited cannot be justified as there is the prevalence of the IBC over the provisions of PMLA and the attachment needs to be lifted so that the resolution professional would be able to take steps to get a viable Resolution Plan.

- (B) As per Section 4 of the Prohibition of Benami Property Transactions Act, 1988,
- (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.
  - (2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

Since the property acquired by Jayesh is held to be benami, the filing of a suit by IOWE Limited is not a valid act because as per section 4 of the Act, no such suit shall lie against the person in whose name the property is held to be benami or against any other person.

## CASE STUDY 25

Tri-Bros Private Limited is an IT company, incorporated on 20.03.2015, by three college friends, Jack, Joe, and Sam respectively, having an equal stake in the company. The company provides anti-virus software to its clients, mostly to companies, according to their IT security requirements.

Jack has a brother, Hemant, who left India on 12.08.2015, for pursuing business studies in Ireland for 4 years. On 01.09.2017, Hemant came to India for 3 months for vacation, during holidays, from Ireland and his father spent ₹ 1,20,000 (equivalent to USD 2,000) on account of his expenses relating to boarding, lodging, and travel within India. Hemant, after completing his graduation, returned to India on 30.09.2019. He was appointed as the director in Tri-Bros Private Limited and to financially support the company, he acquired a 7% stake in the company, from his earnings through part-time jobs in Ireland.

WFH Limited is also an IT company that developed unique software, “WFH monitor” during the Covid pandemic that can monitor the movement of employees working from home and provide their work reports to their employers. WFH Limited’s software was in high demand, due to which it imposed a condition on sale to its customers that they would require to purchase anti-virus software provided by Tri-Bros Private Limited along with WFH monitor software, and simultaneously it made an agreement with Tri-Bros Private Limited on 15.09.2018 that it would be sharing 50% profits with it, that is earned by its selling anti-virus software to the customers of WFH Limited.

Tri-Bros Private Limited faced a financial crisis due to which it had undergone a corporate insolvency resolution process, which got completed on 08.07.2018 and the company was revived. Even after its revival, the company was not performing well, due to which the directors of Tri-Bros Private Limited., decided to enter into such an agreement with WFH Limited, as aforementioned.

But this could not stay longer, when one of the IT companies filed a complaint with the Competition Commission of India relating to the agreement between Tri-Bros Private Limited and WFH Limited, whereby, the CCI after following the due procedures prescribed in the Competition Act, 2002, passed an order on 31.12.19, that the agreement between Tri-Bros Private Limited and WFH Limited and also the agreements made by WFH Limited with its customers shall be null and void and they shall not re-enter into such agreements.

Due to the cancellation of the above agreement of Tri-Bros Private Limited., it faced a financial crunch, whereby, it was not in a position to pay its debt dues because of which it made an application for corporate insolvency resolution process on 20.02.2020, which got admitted on

15.03.2020. The adjudicating authority made all the necessary orders on the admission of the application.

The committee of creditors was constituted by the interim resolution professional, Mr. Yash, who was further appointed as resolution professional, as follows:

Name of financial creditor	Debt owed (₹ in crore)
TDF Bank	17
ALC Bank	10
Finco Private Limited	15
TSB Bank	20
Mr. G (related party)	15
KM LLP	5
Ti-Fin Corp.	18
Debts owed in aggregate to 20 unrelated parties (₹ 1 crore each)	20

TDF Bank, ALC Bank, and Finco Private Limited provided consortium finance (individual contributions as mentioned above) and they appointed Mr. Verma, an insolvency professional as their authorised representative. Also, the adjudicating authority approved the name of the insolvency professional, Mr. Bhargav, suggested by Mr. Yash to act as the authorised representative under section 21(6A)(b) of the Code, for the 20 financial creditors to whom ₹ 20 crores in the aggregate are owed.

Mr. Yash presented the resolution plan to the committee of creditors which got approved by the requisite majority and then after was submitted to the adjudicating authority which also approved the plan. Accordingly, Tri-Bros Private Limited has revived once again.

Meanwhile, a sting operation was conducted in a bank, in which Mr. Sam has an account, in which the undercover reporters of the media channel, "Satark Rahiye" approached its employees representing themselves to be customers who required to open a bank account to deposit black money belonging to a businessman and for laundering the same. The video indicated that officials of the banks had expressed willingness to accept deposits of black money. Consequently, the director issued letters to the respondent bank asking it to provide certain information under Section 12A of the Prevention of Money-Laundering Act, 2002, in reference to the sting operation.

Director while scrutinizing the information received from the respondent bank observed some suspicious transactions made by Sam with the bank that gave a hint that some money laundering activities are going on and Sam was issued summons under section 50 of the

Prevention of Money-Laundering Act, 2002, to attend the office of the director with the supporting documents for the transactions with the bank.

### I. Multiple Choice Questions

- What could be the penalty that could be imposed by the Competition Commission of India for the profits earned by Tri-Bros Private Limited and WFH Limited due to the agreement entered into by them, if the average turnover during the period of such agreement of Tri-Bros Private Limited was ₹ 22,00,00,000 and the profits earned were ₹ 1,32,00,000?
  - ₹ 2,20,00,000
  - ₹ 3,96,00,000
  - ₹ 1,32,00,000
  - ₹ 66,00,000
- By what voting share the resolution plan would have considered being passed if the financial creditors voted as follows;

Name of financial creditor	Type of vote given
TDF Bank	In favour
ALC Bank	Not in favour
Finco Private Limited	In favour
TSB Bank	In favour
Mr. G (related party)	-
KM LLP	Not in favour
Ti-Fin Corp.	In favour
Debts owed in aggregate to 20 parties (11 parties were in favour and 9 voted against the plan)	The Authorised representative voted accordingly

- 75%
- 85.71%
- 77.14%
- 67.5%

3. In case, if Mr. G was not a related party and had abstained from voting, and out of the 20 unrelated parties, 10 voted in favour, 3 voted against the plan and the remaining didn't vote, then by what voting share the resolution plan would have considered being passed if other details remain same as per question no. 2 above?
- (a) 75.00%
  - (b) 66.67%
  - (c) 81.63%
  - (d) 67.5%
4. On inquiry under section 50 of the Prevention of Money-Laundering Act, 2002, Sam was found to be using a forged passport, which can be penalized under which of the following Scheduled offence?
- (a) Offences under the Emigration Act, 1983
  - (b) Offences under the Passports Act, 1967
  - (c) Offences under the Indian Penal Code
  - (d) Offences under the Foreigners Act, 1946
5. Which of the following entities is not obligated to provide information under section 12A of the Prevention of Money-Laundering Act, 2002?
- (a) Department of posts
  - (b) Real estate investment trust
  - (c) Real estate agents
  - (d) Person running a casino

## **II. Descriptive Questions**

6. (A) Please comment in the light of the provisions of the Foreign Exchange Management Act, 1999 that whether Hemant's father making a payment towards hospitality expenses of Hemant and acquisition of a stake in Tri-Bros Private Limited by Hemant are valid transactions or not?
- (B) Who shall be liable to pay remuneration to the authorised representatives, Mr. Verma and Mr. Bhargav respectively, and whether a single creditor in the committee of creditors can appoint an insolvency professional as his authorised representative and who shall borne fees for the same?



7. (A) Please comment in the lights of the provisions of the Competition Act, 2002, about the nature of the agreements entered into by WFH Limited with Tri-Bros Private Limited and by WFH Limited with its customers and how it affected the competition in the relevant market?
- (B) Whether the director's act of issuing letters to the respondent bank under the PMLA Act, 2002 based on the video of a sting operation was valid and if yes, then what authority does the director have in case he finds that the bank has failed to comply with the obligations imposed on it by the Act?
8. (A) What could have been the consequences, if, Mr. Sam after receiving the summons under section 50 of the Prevention of Money-Laundering Act, 2002, omits to attend? Would there be any difference, if, Mr. Sam intentionally refrains from attending the office of the director?
- (B) The resolution plan submitted by Mr. Yash got approved by the adjudicating authority. What is the consequence of the same and what is the duty of the resolution professional with respect to the same?
- (C) Tri-Bros Private Limited had already undergone a corporate insolvency resolution process and again it went into the insolvency resolution process. Whether it was entitled to do so? Please comment and also provide in which circumstances a person is not entitled to make an application to initiate the corporate insolvency resolution process?

## ANSWERS TO CASE STUDY 25

### I. Answers to Multiple Choice Questions

1. (a) ₹ 2,20,00,000

#### Reason

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

In the given case, the average turnover for last 3 years is gives as ₹ 22,00,00,000 and 10% of it comes ₹ 2,20,00,000.

## 2. (c) 77.14%

**Reason****Section 21(2) of the IBC reads as under**

The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors

**Section 30(4) of the IBC reads as under:**

The committee of creditors may approve a resolution plan **by a vote of not less than sixty-six per cent. of voting share of the financial creditors**, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board.

Name of financial creditor	Type of vote given	Debts	Voting % total Debt
TDF Bank	In favour	17	16.19
ALC Bank	Not in favour	10	9.52
Finco Private Limited	In favour	15	14.29
TSB Bank	In favour	20	19.04
Mr. G (related party)	-	To be ignored	--
KM LLP	Not in favour	5	4.78
Ti-Fin Corp.	In favour	18	17.15
Debts owed in aggregate to 20 parties (11 parties were in favour and 9 voted against the plan)	The Authorised representative voted accordingly	11	10.47
		9	8.57
	Total	105	100.00

The FCs who voted in favour of Resolution Plan

$16.19 + 14.29 + 19.04 + 17.15 + 10.47 = 77.14\%$

[Note: Since Mr G is related party, hence his debt has not been counted in total of debt for the purpose of arriving at the voting share. ]

3. (c) **81.63%**

**Reason**

Name of financial creditor	Type of vote given	Debts	Voting % total Debt
TDF Bank	In favour	17	14.16
ALC Bank	Not in favour	10	8.33
Finco Private Limited	In favour	15	12.50
TSB Bank	In favour	20	16.67
Mr. G (Treating it as not related party)	Remained absent from voting	15	12.50
KM LLP	Not in favour	5	4.17
Ti-Fin Corp.	In favour	18	15
Debts owed in aggregate to 20 parties 10 parties were in favour 3 voted against the plan 7 absented	The Authorised representative voted accordingly	10 3 7	8.33 2.50 5.84
	Total	120	100.00

Section 5(28) of the IBC provides that “voting share” means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor.

Further the Regulation 2(1)(f) of (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has been OMITTED by Notification No. IBBI/2018-19/GN/REG032, dated 5th October, 2018 (w.e.f. 05.10.2018), which had provided that “dissenting financial creditor” means a financial creditor who voted against the resolution plan or abstained from voting for the resolution plan, approved by the committee;”.

Since the Regulation 2(1)(f) has been omitted, we may ignore in counting the votes who remained absented then re-calculate the voting share of the FCs who were present in the CoC meeting and voted in favour of the Resolution plan.

Name of financial creditor	Type of vote given	Debts	Voting % total Debt
TDF Bank	In favour	17	17.35
ALC Bank	Not in favour	10	10.21
Finco Private Limited	In favour	15	15.30
TSB Bank	In favour	20	20.40
Mr. G (Treating it as not related party)#	Remained absent from voting	xxx	
KM LLP	Not in favour	5	5.10
Ti-Fin Corp.	In favour	18	18.37
Debts owed in aggregate to 20 parties 10 parties were in favour 3 voted against the plan 7 absented#	The Authorised representative voted accordingly	10 3 xxx	10.21 3.06
	Total	98	100.00

# Not counted in the total voting share.

$$17.35 + 15.30 + 20.40 + 18.37 + 10.21 = 81.63\%$$

4. (d) Offences under the Foreigners Act, 1946

#### Reason

Paragraph 19 of Part A of Schedule of PML Act deals with the offences under the Foreigners Act, 1946. Under this section 14B of the Foreigners Act, 1946 deals with the penalty for using forged passport.

5. (b) Real Estate Investment Trust

## II. Answers to Descriptive Questions

6. (A) (i) Section 3(b) of the FEMA Act, 1999, provides that save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall make any payment to or for the credit of any person resident outside India in any manner.

The RBI has issued general permission permitting any person resident in India to make payment in Indian rupees in few cases, one of which includes the following:

Any person resident in India may make payment in rupees towards meeting expenses on account of boarding, lodging, and services related thereto or travel to and from and within India of a person resident outside India who is on a visit to India

Accordingly, made by Hemant's father towards hospitality expenses is a valid transaction.

- (ii) Under Section 6(2), the RBI has issued the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, that specify the list of transactions, which are permissible in respect of person resident outside India in Schedule-II, which, inter alia, includes:

Investment in India by a person resident outside India, that is to say, issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and

Hence, the acquisition of a stake in Tri-Bros Private Limited by Hemant is also a valid transaction.

- (B) As per section 21(6)(c) of the Insolvency and Bankruptcy Code, 2016, the cost of appointment of authorised representative in case of consortium finance shall be borne by financial creditors themselves who provided consortium finance i.e. TDF Bank, ALC Bank and Finco Private Limited shall bear the cost of appointing, Mr. Verma, as their authorised representative.

As per Section 21(6B) of the Code, the remuneration payable to authorised representative appointed under section 21(6A)(b), shall form part of the insolvency process costs.

Accordingly, the remuneration of Mr. Bhargav shall be form part of the insolvency process costs.

As per section 24(5) of the Code, subject to sub-sections (6), (6A), and (6B) of section 21, any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:

Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor.

Hence, a single creditor in the committee of creditors can appoint an insolvency professional as his authorised representative and he shall bear fees for the same.

7. (A) As per section 4 of the Competition Act, 2002, there shall be an abuse of dominant position if an enterprise or a group - directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or services; or makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

WFH Limited in the agreements with its customers imposed a condition that they would be required to purchase anti-virus software provided by Tri-Bros Private Limited along with WFH monitor software. Hence it is a tie-in arrangement that WFH Limited entered in order to earn more profits, and the same is anti-competitive under section 3 of the Act.

The agreement entered into by WFH Limited with Tri-Bros Private Limited for sharing 50% of the profits earned by it, from selling anti-virus software to the customers of WFH Limited, will also be considered as an agreement of anti-competitive nature under section 3 of the Act.

Through both these agreements, WFH Limited is abusing its dominance to earn more profits.

Due to this agreement, the market share of other companies selling anti-virus software might have got affected, and also the customers of WFH Limited might have been deprived of using anti-virus software of better quality provided by other companies than that of Tri-Bros Private Limited

- (B) As per section 12A of the Prevention of Money Laundering Act, 2002:

1. The Director may call for from any reporting entity any of the records referred to in section 11A, sub-section (1) of section 12. Sub-section (1) of section 12AA, and any additional information as he considers necessary for the purposes of this Act.
2. Every reporting entity shall furnish to the Director such information as may be required by him under sub-section (1) within such time and in such manner as he may specify.
3. Save as otherwise provided under any law for the time being in force, every information sought by the Director under sub-section (1), shall be kept confidential.

As per section 13 of the Prevention of Money Laundering Act, 2002:

The Director may, either of his own motion or on an application made by any authority, officer or person, may make such inquiry or cause such inquiry to be made, as he thinks fit to be necessary, with regard to the obligations of the reporting entity, under this chapter.

Further, if the Director, in the course of any inquiry, finds that a reporting entity or its designated director on the Board or any of its employees has failed to comply with the obligations under this Chapter, then, without prejudice to any other action that may be taken under any other provisions of this Act, he may:

- (a) issue a warning in writing; or
- (b) direct such reporting entity or its designated director on the Board or any of its employees, to comply with specific instructions; or
- (c) direct such reporting entity or its designated director on the Board or any of its employees, to send reports at such interval as may be prescribed on the measures it is taking; or
- (d) by order, impose a monetary penalty on such reporting entity or its designated director on the Board or any of its employees, which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.

By combined reading of above 2 sections, it can be understood that the director's act of issuing letters to the respondent bank under the PMLA Act, 2002 based on the video of a sting operation was valid, as the director may on his own motion make an inquiry with regard to the obligations of the reporting entity and section 12A provides him authority to call for records and information from reporting entity.

If the director finds that the bank has failed to comply with the obligations imposed on it by the Act, then he has the authority to take aforesaid actions as per section 13.

8. (A) As per Section 63(2)(c) of the Prevention of Money-Laundering Act, 2002, provides that, if any person, to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at the place or time, he shall pay, by way of penalty, a sum which shall not be less than 500 rupees but which may extend to 10,000 rupees for each such default or failure.

Section 63(4) provides that if a person who intentionally disobeys any direction issued under section 50 shall also be liable to be proceeded against under section 174 of the Indian Penal Code 1860.

Hence, Mr. Sam shall face the consequences, as aforementioned, in both cases.

- (B) As per section 31 (3) of the Insolvency and Bankruptcy Code, 2016 (the Code), consequent to the order of adjudicating authority regarding approval of the resolution plan,

- (a) Moratorium order passed by adjudicating authority under section 14 of the code shall cease to have effect; and
  - (b) The resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.
- (C) As per Section 11 of the Insolvency and Bankruptcy Code, 2016 (the Code), the following persons shall not be entitled to make an application to initiate the corporate insolvency process;
- (a) A corporate debtor (which includes a corporate applicant in respect of such corporate debtor) undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process; or
  - (aa) A financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or
  - (b) A corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
  - (ba) A corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or
  - (c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
  - (d) Corporate debtor in respect of whom a liquidation order has been made.

Explanation I: For the purpose of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

Explanation II.- For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

Tri-Bros Private Limited had undergone a corporate insolvency resolution process which had completed on 08.07.2018 and again the application for corporate insolvency resolution process was made on 20.02.2020 which got admitted on 15.03.2020 i.e. after more than 18 months, Tri-Bros Private Limited again went for insolvency process. It was entitled to do so, as 12 months had elapsed from the date of completion of the previous insolvency resolution process.



## CASE STUDY 26

Mr. Suresh Agarwal is a Jaipur-based banker, who joined the Samridhi National Bank in the year 2008, as an executive. He got his first posting at the Jodhpur branch. After five years in the job, he was transferred and promoted as Assistant Manager at a branch in Bikaner of Samridhi National Bank. One day, he happened to meet, Ms. Archana, a director in the Newtech Software Company, who visited the bank frequently to discuss some loan issues of her company with the branch manager and then, slowly they started meeting each other and eventually both got married, as they decided to move forward.

After marriage, Archana needed to visit America for some business meetings with a foreign client. So, they both planned their personal trip alongside the business trip, to America. Archana got an international credit card in the name of her company, for meeting all her expenses abroad. After two days of prolonged business meetings, Archana finally got free to enjoy the trip with her husband. They went to Las Vegas and purchased some lottery tickets for which she paid USD 2,000 with the forex card. They hardly won any amount out of it. They enjoyed shopping and had all the fun. After 10 days of stay, they returned back to India. Archana returned the business card, back to the company.

Back to their daily routine, they both got busy with their respective work schedules. As an Assistant Manager, Mr. Suresh got some gifts in form of cash as well as in-kind, all year round. He came in contact with many influential and successful business persons from different walks of life. They all were happy with his services as mostly they got their work done through a single phone call. In the year 2016, post demonetization, Mr. Suresh helped many of his bank customers in exchanging their old currency notes against newly issued currency for a charge of 10 percent commission. Mr. Suresh also had helped Mr. A.K. Bajaj, a businessman, to exchange his old currency notes at the bank, through the IDs' of Mr. Bajaj's workers. Mr. Bajaj had employed nearly 200 workers of his manufacturing units to get the demonetized notes exchanged. The demonetization period became a blessing in disguise for Mr. Agarwal as he was able to amass huge profits out of it.

Mr. Chetan Singh, a director of XYZ Ltd., used to share good relations with Mr. Suresh. Mr. Chetan, one day came to Mr. Suresh for getting a loan sanctioned of INR 0.50 crores. However, the documents required to process the loan were incomplete and hence, were found ineligible. The branch manager refused to sanction the loan without completing all the formalities. Mr. Chetan had a talk with Mr. Suresh and promised him to pay, 5% of the total sanctioned loan

amount, as commission and so, both of them arranged for some concocted documents to complete the file, with help of Mr. Piyush Sharma, an accountant friend of Mr. Suresh. After the completion of all the formalities, Mr. Suresh gave his clearance regarding the completion of the documents, after which his branch manager sanctioned the loan. The deal brought all of them close to each other. After that Suresh, Chetan and Piyush became good friends.

As Piyush was an accountant and an employee in a financial advising company, he used to meet many people. He got a couple of loans sanctioned with the help of Mr. Suresh. As a result, on a performance evaluation basis, Mr. Suresh got the promotion as a branch manager of the bank and was transferred to the other branch in Bikaner.

During his period of service in the bank, Mr. Suresh was able to accumulate INR 30 lakhs from his unaccounted and unauthorized sources. With this money, he bought a plot in his hometown, Jaipur, in his mother's name. The cost of the plot was INR 50 lakhs. To cover up the balance money, he took a loan of INR 20 lakhs from his bank.

Since Mr. Suresh and his wife are working individuals, hence his niece, Ms. Anu (an Indian Citizen) takes care of Mr. Suresh's mother. Ms. Anu is very close to Mr. Suresh's mother hence she treats Anu like her daughter. Ms. Anu came to India just six months back after the completion of her studies in Australia, where she used to reside with her parents. Anu holds the status of a person resident outside India. Mr. Suresh's mother thought of gifting the said plot bought on her name, to Anu.

With the passing of time, his wife, Archana, was appointed in 2016, as a director in Zippy International Limited, a foreign based company. For a couple of months, she stayed in Italy for attending board meetings and for giving financial advice regarding business transactions. For meeting her expenses abroad, she remitted USD 280,000 during the financial year apart from the money, the company gave to her.

In 2017, Archana again went to Italy for some business of the company. She stayed there for a duration of six months. With a view to investing abroad, she bought a flat there, through outward remittance.

Mr. Suresh and his wife Archana went on a tour to Qatar and Dubai in 2018. They booked the flight tickets online through their credit cards; the rest all the expenses of lodging and boarding were borne by Oyster Tour and Travel Agency, a company which recently opened its new branch office in Dubai. The company's AD bank is the bank in which Mr. Suresh is the branch manager. He made all the transactions of Oyster Tour and Travel Agency, smooth and easy. Whenever exchange was required by the branch office in Dubai, it was easily released for them.

Subsequently, Mr. Chetan had a plan to earn money through the conduct of new export and import business. He submitted a fake factory proposal of garment manufacturing to the bank whose branch manager was Mr. Suresh. Mr. Chetan had a plot in the outskirts of the city, where he made some constructions to give it a factory look. As per the mutual understanding between both of them, a loan of INR 2 crore was sanctioned for shipment of the machines and other products from abroad. Some fake invoices were prepared to show the dispatch of garment orders on record but in reality, had sent almost nothing. Mr. Suresh and Mr. Chetan jointly did all the invoice manipulation.

### **I. Multiple Choice Questions**

1. Archana went to Italy for some business of the company and bought a flat there, through outward remittance. Whether Archana can hold such property, had such property acquired by her in the status of a person resident outside India?
  - (a) With the permission of the Reserve Bank of India, she can hold the property acquired abroad.
  - (b) Without the permission of the Reserve Bank of India, she can hold the property acquired abroad.
  - (c) The property needs to be sold and the funds should be repatriated back to India.
  - (d) The property needs to be sold out and the funds should be repatriated to her FCNR account.
2. In the given case, the plot was bought by Mr. Suresh from his income, in his mother's name. Mr. Tarun, an NRI made a proposal to Mr. Suresh, for the purchase of that plot. Advise Mr. Tarun with respect to purchasing of such plot.
  - (a) Mr. Tarun can buy the plot only with the permission of RBI.
  - (b) Mr. Tarun can buy the plot through normal banking channels in India without RBI permission.
  - (c) Mr. Tarun can purchase the plot in foreign currency with the permission of RBI.
  - (d) Mr. Tarun cannot purchase the plot as this purchase of the plot will be not considered valid.
3. For meeting her expenses abroad, Archana remitted USD 280,000 during the financial year apart from the money, the company gave to her, without any permission from RBI. Whether she is liable to any penalty under the provisions of the Foreign Exchange Management Act 1999, and if yes, please state the amount as well.

- (a) Yes, USD 30,000
  - (b) Yes, USD 90,000
  - (c) Yes, USD 8,40,000
  - (d) No, she is not liable to any penalty
4. Whether there is any contravention of the provisions of the Foreign Exchange Management Act, 1999 in respect of payment made by Archana of USD 2,000 for purchase of some lottery tickets with the forex card?
- (a) There is no contravention of any of the provisions of the Foreign Exchange Management Act, 1999 as the money was issued to her in an official capacity for her trip.
  - (b) Yes, as the card has been used for a transaction prohibited under the provisions of the Foreign Exchange Management Act, 1999
  - (c) There is no contravention of any of the provisions of the Foreign Exchange Management Act, 1999 as the transaction was within the permissible limit.
  - (d) They would be liable under the Foreign Exchange Management Act, 1999 only if they had won more than USD 2000 and the excess amount was not remitted back to India.
5. Post demonetization, Mr. Suresh helped many of his bank customers in exchanging their old currency notes with newly issued currency. Is he liable for punishment under any of the provisions of the law applicable in India, if the total value involved in such transactions is less than INRs 1 crore?
- (a) Mr. Suresh is not liable for any punishment under any of the provisions of the law applicable in India.
  - (b) Mr. Suresh is liable for the commission of offence under the Indian Penal Code, 1860 as well as under the Prevention of Money Laundering Act, 2002.
  - (c) Mr. Suresh is liable to be punished under the Indian Penal Code, 1860 for the commission of offence but he is not liable under the Prevention of Money Laundering Act, 2002 as the total value involved is less than INRs 1 crore.
  - (d) Mr. Suresh is liable under the Foreign Exchange Management Act, 1999 for non-compliance with regulations related to foreign exchange.

**II. Descriptive Questions**

6. Provide your opinion. Mr. Suresh bought a plot in his mother's name. He decided to further lease the said plot to a foreign company that wants to open its liaison office in India. Whether a foreign company can take such immovable property in India?
7. Can Mr. Suresh's mother gift the plot, bought in her name, to Anu?
8.
  - (i) Whether the property brought by Mr. Suresh in the name of his mother, can be considered as a Benami property?
  - (ii) If in case, Mr. Suresh Agarwal transfers the plot to a third party prior to the issue of notice under section 24 by the Initiating Officer, then whether confiscation of such property can take place after it is held to be 'benami' by the Adjudicating Authority?

**ANSWERS TO CASE STUDY 26****I. Answers to Multiple Choice Questions**

1. (b) Without the permission of the Reserve Bank of India, she can hold the property acquired abroad.

**Reason**

Section 6(4) of the FEMA provides that a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

Therefore, as per section 6(4) of FEMA no permission is required by a person resident in India, acquiring immovable property when he was resident outside India.

2. (d) Mr. Tarun can purchase the plot as this purchase of the plot will be not considered valid.

**Reason**

In the terms of Section 2(9) of the PBTA "benami transaction" means,—

- (A) a transaction or an arrangement—

- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by—**

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

In the given case the Suresh has purchased the property in his mother's name only and not in joint name of him and mother.

Further in terms of Regulation 3 of FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 which reads as under:

AN NRI or an OCI may

- (a) acquire immovable property in India other than agricultural land/ farm house/ plantation property:

Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

Therefore, Tarun cannot purchase the immovable property from this mother (transaction being a benami transaction)

3. (b) Yes, USD 90,000

**Reason**

Section 13(1) of the FEMA provides that if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, **be liable to a penalty up to thrice the sum involved in such contravention** where such amount is quantifiable, or up to two lakh rupees where

the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

Amount in the contravention is USD 30,000 (i.e. USD 280,000 – USD 250,000), hence the amount of penalty shall be USD 90,000 (i.e. three times to USD 30,000, because here the amount in the contravention is quantifiable)

4. (b) Yes, as the card has been used for a transaction prohibited under the provisions of the Foreign Exchange Management Act, 1999

**Remittance**

Para 3 of Schedule I of the FEM (Current Account Transactions) Rules, 2000, Remittance for purchase of lottery tickets, banned / proscribed magazines, football pools, sweepstakes etc., is prohibited.

5. (b) Mr. Suresh is liable for the commission of an offence under the Indian Penal Code, 1860 as well as under the Prevention of Money Laundering Act, 2002.

**Reason**

Mr. Suresh shall be charged under sections 417 & 418 of Indian Penal Code 1860. Both these sections are considered as a scheduled offence under Paragraph 1 to part A of schedule to the Prevention of Money Laundering Act, 2002.

In addition to these, charges shall be framed under the Banking Regulation Act, 1949 (as well as under service rule) apart from the Prevention of Corruption Act, 1988 (because he comes under the definition of public officer).

**II. Answers to Descriptive Questions**

6. A body corporate incorporated outside India (including a firm or other association of individuals), desirous of opening a Liaison Office (LO) / Branch Office (BO) in India has to obtain permission from the Reserve Bank under provisions of the Foreign Exchange Management Act, 1999. The establishment of Project Offices/Liaison Offices in India is regulated in terms of Section 6(6) of Foreign Exchange Management Act, 1999 read with Notification No. FEMA 22/2000-RB dated May 3, 2000.

Section 6(6) of the FEMA provides that without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

Further, Regulation 3 of the Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2000 provides that no person resident outside India shall, without prior approval of the Reserve Bank, establish in India a branch or a liaison office or a project office or any other place of business by whatever name called.

So, if the foreign company wants to establish a Liaison Office in India, it cannot acquire immovable property. However, the company needs to acquire property by way of a lease not exceeding 3 years, for its Liaison Office.

A liaison office of a foreign company in India should be established only with requisite approvals wherever necessary and is eligible to take any immovable property on lease, in India which is necessary for its activities, provided that all such applicable laws, rules, regulations, or directions in force are duly complied with.

Hence, the foreign company can take such immovable property in India on lease provided the above conditions are duly satisfied.

7. As per regulation 3 to the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a Non-Resident Indian (NRI) or Overseas Citizen of India (OCI), may acquire any immovable property in India by way of gift from a person resident in India provided the property is not agricultural land/ farmhouse/ plantation property.

It appears from the information given in the case study that Mr. Suresh's mother is a person resident in India, in the name of whom the plot was bought, and Anu, being a person resident outside India, but Indian citizen (as specifically mentioned in case) can acquire immovable property (plot in this case) by way of gift from Mr. Suresh's mother, but Mr. Suresh's mother can't transfer to said plot to her.

Original transaction wherein plot was bought by Mr. Suresh from his income, in his mother's name is **benami transaction**.

Since Mr. Suresh's mother is benamidar hence her right to right to re-transfer the property back to Mr. Suresh or any other person (like Ms. Anu in this case) is prohibited under section 6 of The Prohibition of Benami Property Transactions Act, 1988.

8. (i) Section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, lays down the definition of a Benami Transaction. It says it is a transaction where a property is transferred to a person and consideration paid by another person and



the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration. Further, one of the exceptions to a benami transaction provides that when the property is held in the name of any person who is individual's lineal ascendant or descendant and such a lineal ascendant or descendant appear as a joint owner in the property and the consideration has been paid from known sources of the individual. Mother is a lineal ascendant.

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

In the given case, the plot purchased by Mr. Suresh is not held jointly held by him and his mother. And for the exception to apply the property is held jointly along with the individual's lineal ascendant or descendant. Further, in the given case studies the consideration to the extent of INRs 30 lakhs out of INRs 50 lakhs is made from unaccounted and unauthorized sources, making it a benami transaction and consequently, the property will be considered as a benami property.

- (ii) As per section 6 of the Prohibition of Benami property transactions Act, 1988, no person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.

In the case where any property is re-transferred in contravention of the aforesaid provision, the transaction of such property shall be deemed to be null and void. In case, if after the issuance of the initial notice by the Initiating Officer, the property in question, is transferred to a third party secretly, the said transaction shall be deemed to be null and void and confiscation of such property can take place.

However, as per proviso to section 27 of the said Act, nothing contained in section 27(1) shall apply i.e. no confiscation order shall be passed if the property is held or acquired by a person from the benamidar for adequate consideration, prior to the issue of notice under section 24 without his having knowledge of the benami transaction.

Hence, if in case, Mr. Suresh transfers the plot to a third party prior to the issue of notice under section 24 by the Initiating Officer, then confiscation of such property cannot take place if the said property was acquired by the said third party for adequate consideration and without his having knowledge of the benami transaction.

## CASE STUDY 27

Mr. Mukesh Shroff is one of the biggest business tycoons of Delhi. His wife's name is Mrs. Sanjana Shroff. They got married in the year 1989. At that time Mr. Shroff was working as a manager in a finance company. After his marriage, Mr. Shroff decided to quit his job. He decided to start a business on his own. He laid the foundation of the company, Shroff Limited, in the year 1990.

Mr. and Mrs. Shroff have three children. Their elder son's name is Anuj who did MBA (Finance) from Stanford and has a wife named, Amrita, and they both have two children named, Somya and Ronit.

Mr. Mukesh Shroff's daughter's name is Ranjana, who got married in the year 2014 to a foreign national, named, Mr. George Samuel, a citizen of London, United Kingdom. Mr. Mukesh Shroff's youngest son is Rohit and his wife's name is Ashima. They have one child, who is four years of age, named, Anshul.

Mr. Mukesh Shroff's Company became a leading company and a well-known brand in its market segment. One of the units of his company manufactures cement in India. Since 2002, Mr. Shroff's company has become the second-largest company in India in the field of cement manufacturing. The other four top companies of India in cement manufacturing include Rajasthan Cement, Alen Cement, Rudra Cement, and J.V.P. Cement Company respectively. Jointly, all these five companies (including Shroff Ltd.) owned 82% of market shares in cement manufacturing in India. All these companies are not only leading manufacturers, but they also directly deal in the distribution and selling of cement in India. In the year 2013, all these five companies made an oral agreement and raised cement price by 2%. All these companies restricted the production and supply of cement against the available capacity of production.

Again in the year 2014, the above-mentioned companies raised the sale price of cement by 1.5%. Despite the increase in prices, production never increased. As a result, the cost of real estate went high, and due to which the real estate business got affected terribly. The "All Indian Builders Association" raised their objections to the constant rise in the prices. They concluded it to be a monopolistic and restrictive trade practice and they all decided to file a complaint with CCI.

Mr. Anuj is a director of Shroff Limited and has a huge passion for investing in lucrative properties as an individual. In the year 2017, he wanted to invest in two flats, located near the lush green vicinity of Noida. The project in which he wanted to buy the two flats was constructed by Rainbow Estate Construction Company. The area in which the building was

going to be constructed was 700 Square meters. The project was registered with the authority as per the provisions of RERA. He had made all the enquiries regarding the project details, sanctioned plans, and plan layouts. He had also cross-checked all the details, listed on the authorised website of RERA.

The stage-wise schedule for completion of the work listed in the plan. The work commencement certificate was issued in February 2017. The carpet area of the 3BHK flat was 1340 sq. meters with a modular kitchen. The agreement of sale was signed between the builder and Mr. Anuj. Mr. Anuj paid ten percent of the total amount via cheque. The proposed date for the completion of the project was December 2019. But the builder was not able to complete the work as per the stage-wise schedule listed in the plan, due to some unavoidable circumstances. The builder held the meeting of all the allottees to intimate them about such delay and also apologised for it.

In the nearby state, there are eight sugar mills under the control of State Sugar Corporation Limited. The concerned State Government, after making numerous unsuccessful attempts for rehabilitation of these mills, decided to disinvest part of their stake in State Sugar Corporation Limited. But that strategy didn't work out, hence State Government finally decided to sell all these 8 mills to private companies. The government invited the bids. Shroff Limited submitted the tender and got qualified as a bidder for four of such mills. Mr. Shroff participated in the bidding and got two bids finally in his name. Against the total expectation of INRs 370.30 crore, only INRs 183.80 crore was realized, resulting in a short realization of INRs 186.5 crore.

There were three other bidders named Sakshi Sugar Mill Company, Triveni Company, and Amar Sugar Company. It was found that 5 of the directors were common in these 3 companies and made an agreement with each other before the bidding process. Amar Sugar Company is the holding company of Triveni Company. So the correspondence address, email-id, and contact numbers of both, Triveni Company and Amar Sugar Company were the same. Amar Sugar Company held 79.6% of the equity shares in the Triveni Company. A case was filed by the Union of workers of two mills challenging the bidding process and the privatisation policy of the State Government with the civil court. The CCI on a report published by CAG, suo-moto initiated an investigation on the slump sale and found that there were serious irregularities in the process.

Mrs. Ranjana who is married to Mr. George Samuel visited India last year in January 2018 to meet her family. Mrs. Ranjana wanted to invest in a farmhouse near Gurugram. The lush green farmhouse is widespread having a total area of 25 acres. Both Mr. George and Mrs. Ranjana agreed to buy the farm house as it deemed to be a fruitful investment. An agreement to sell was signed between the farm house owner and Mr. & Mrs. Samuel. Thereafter the property got jointly registered in the name of Mr. & Mrs. Samuel. They organised a grand party

there and flew back to London after a month. In December 2019, Mrs. Ranjana and Mr. George visited back to India as Mr. Shroff met with an accident. While their visit to India they came across a very lucrative deal. A 4BHK was available in Mumbai at a cost of INRs 8 crore. The property was sea facing and in one of the posh localities of Mumbai. They met the promoter and finalised the deal. The flat was jointly registered in the name of Mr. & Mrs. Samuel.

Mr. Mukesh Shroff incorporated Gizmo Limited last year, which manufactured mobile phones in India. The company was managed by Mr. Shroff's youngest son, Mr. Rohit Shroff, who became the CEO of this company. Mr. Rohit on 20<sup>th</sup> November 2019, signed an agreement with one of the leading e-commerce giants in India to sell mobile phones through its platform. One of the consumers, who wanted to purchase this phone made a complaint to CCI that these e-commerce websites have been indulging in anti-competitive practices by making exclusive agreements with the sellers of goods/services. The informant further stated in his application that the consumer was left with no option and was bound to either purchase the product as per the terms of the website or not to purchase the same.

#### **I. Multiple Choice Questions**

1. All the five Companies including Shroff Ltd., twice raised the price of cement by a total of 3.5%. The All India Builders Association filed a complaint with CCI against it. Determine the correct statement according to the provisions of the Competition Act, 2002?
  - (a) The Companies marginally increased the price so it doesn't affect the competition in India in the relevant market.
  - (b) There is no such written agreement between the companies, by which it can be proved that it had adversely affected the market.
  - (c) The rise in price by all the five companies will adversely affect competition in India and is void.
  - (d) Only the cement manufacturing companies, which are affected by such an increase in price can file a complaint.
2. Considering the provisions of the Competition Act 2002, choose the correct statement out of the following.
  - (a) Exclusive agreement between e-commerce platform and Gizmo Limited violates the provision of section 3(4).
  - (b) Exclusive agreement between e-commerce platform and Gizmo Limited is not violating section 3.

- (c) Under section 3(1) the exclusive agreement in respect of manufacturing, supply, and sale via e-commerce platform, will cause an appreciable adverse effect on competition within India.
  - (d) The e-commerce platform being leading e-commerce giants is misusing its position as per section 4 of the Competition Act.
3. Mr. George Samuel, being a foreign national and resident, acquired 4BHK, jointly with his spouse, in Mumbai. Identify the correct statement out of following;
- (a) Mr. George can't acquire any property, only NRI or OCI can purchase property in India apart from Indian residents.
  - (b) Mr. George can acquire property other than agricultural land/ farm house/ plantation property in India but jointly with his spouse.
  - (c) Mr. George can acquire any property in India but jointly with his spouse.
  - (d) Mr. George can acquire any property in India Individually
4. Mr. George and his wife, Mrs. Ranjana, jointly purchased a farm house near Gurugram. Identifying the correct statement out of following;
- (a) Mr. George Samuel, being a foreign national and resident can acquire any property in India, but jointly with his NRI spouse only.
  - (b) Mrs. Ranjana being NRI can acquire any property in India, but only in joint ownership with any resident individual.
  - (c) Mrs. Ranjana being NRI can acquire any property in India, but such acquisition shall not in joint ownership with her husband (Mr. George Samuel), who is a foreign national and resident
  - (d) Mrs. Ranjana being NRI can't acquire a farm house in India.
5. It seems that three companies i.e. Sakshi Sugar Mill Company, Triveni Company, and Amar Sugar Company are involved in some sort of arrangement within themselves for sugar mill tenders and acquisition process. In what perceptive will you view this transaction?
- (a) The agreement between the companies may be viewed as a partial agreement of understanding.
  - (b) The agreement between the companies can be viewed as an exclusive agreement, adversely affecting the process and manipulating the bidding completely.

- (c) The agreement between the companies was to share the market or source of production by way of allocation of the geographical area of the market after bidding.
- (d) The agreement between the companies can be viewed as a collateral agreement only to restrict the price of each mill before bidding.

## II. Descriptive Questions

- 6. The Rainbow Estate Construction Company assured the allottees of the flats that they will be given possession on time. But it was unable to complete the construction on time. In light of the provisions of the relevant Act, explain the remedies available to Rainbow Estate Construction Company in the said situation.
- 7. The Competition Commission of India on its own motion, issued a notice to all the bidders under Section 41(2) and Section 36(2) of the Competition Act, 2002, regarding the entire tendering process. None of the bidders replied to the notice, and took a plea that the said case is pending with the civil court, and the matter is sub-judice. Whether the commissioner has the power to make an inquiry into the matter or not, on its own, in such a case, and what orders commission can pass if there appears contravention after an inquiry? Whether the pending matter in the civil court will affect the investigation to be conducted by the CCI? Analyse the given situation according to the provisions of the Competition Act, 2002.

## ANSWERS TO CASE STUDY 27

### I. Answers to Multiple Choice Questions

- 1. (c) The rise in price by all the five companies will adversely affect competition in India and is void.

#### Reason

In **case No. 29 of 2010 based upon information furnished by Builders Association of India against 11 cement companies**, the Competition Commission of India (CCI) vide its **order** found that the act and conduct of the cement companies to be a '**Cartel**' as the cement companies were acting together to limit, control, and also attempted to control the production and the price of cement in the market in India.

It was alleged that these 11 companies collectively control around 65% of the market, whereas the remaining 43 players have control over only 35% of the

market share, hence these 11 companies collectively capable to control the price by controlling the production and supply.

In terms of Section 2(c) of the Competition Act, 2002, “cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Further in terms of section 3(3) cartel is shall be presumed to have an appreciable adverse effect on competition.

In the given case all the five cement companies increased the prices which comes in the category of cartel and thus have an appreciable adverse effect on competition.

2. (b) Exclusive agreement between e-commerce platform and Gizmo Limited is not violating section 3.

**Reason**

In Re **Mr. Mohit Manglani and M/s Flipkart India Private Limited and 4 Ors.** (Case No. 80/2014), it was alleged that e-commerce websites are indulged in anti-competitive practices through **exclusive natured agreements** with sellers/manufacturers. Consumers either have to buy as per the term of reference mentioned by the e-commerce portal or not buy.

E-commerce platforms replied that consumer has the option to switch to near substitute products hence relevant market (which include substitute products) not force customer ‘not to buy’ secondly their agreement are not of exclusive nature with sellers, the same seller can sell through other platforms and means.

The Commission observed that e-commerce platforms provide an opportunity for consumers to compare the prices as well as the pros and cons of the product. Furthermore, it offers delivery right at the doorsteps of consumers. Therefore, **it does not appear that the exclusive arrangement between manufacturers and such e-commerce platforms leads to an appreciable adverse effect on competition** in the market.

3. (b) Mr. George can acquire property other than agricultural land/ farm house/ plantation property in India but jointly with his spouse.



**Reason**

Regulation 3 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that

An NRI or an OCI may-

- (a) acquire immovable property in India other than agricultural land/ farm house/ plantation property:

Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

- 4. (d) Mrs. Ranjana being NRI can't acquire a farm house in India.

**Reason**

Regulation 3(a) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that

An NRI or an OCI may **acquire immovable property in India other than agricultural land/ farm house/ plantation property.**

- 5. (b) The agreement between the companies can be viewed as an exclusive agreement, adversely affecting the process and manipulating the bidding completely.

**Reason**

Section 3(4)(b) of the Competition Act, 2002 provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including **exclusive supply agreement**, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

**II. Answers to Descriptive Questions**

- 6. Delay in handing over of projects by the developer within the stipulated time frame has been a major woe of the buyers and hence the Real Estate (Regulation and Development) Act, 2016 came in as a saviour for the buyers. All the promoters or

builders at the time of registration have to specify a time line during which they will complete and hand over the project to the buyer. The builder or promoter should be very particular about the date of completion, because if he fails to do so within the stated time, then there are rigorous provisions prescribed in this Act. As per section 7 of the said act, his registration would be revoked and his project would be usurped by the Regulatory Authority apart from other actions and penalties.

Section 4(2)(l)(C) provides that while making application for registration of real estate, the promoter shall enclose the various documents along with the application, one of which is to mention the time period within which he undertakes to complete the project or phase thereof, as the case may be.

According to section 6, the registration granted under section 5 may be extended by the Authority on an application made by the promoter due to **force majeure**, in such form, and on payment of such fee as may be prescribed.

The first proviso to section 6 provides that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, **not exceed a period of one year**.

The second proviso to section further states that the no application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

The explanation to section 6 provides the meaning of **Force majeure**. It shall mean a case of war, flood, drought, fire, cyclone, earthquake, or any other calamity caused by nature affecting the regular development of the real estate project.

Hence in the above-mentioned case, the date of completion of the project may be extended on the application made to the Regulatory Authority by Rainbow Estate Construction Company. The promoter needs to mention in the application all the reasonable causes of delay and how much time is needed to extend the date of completion of the project.

7. According to Section 19 of the Competition Act, 2002, the Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of Section 3 or sub-section (1) of Section 4 either on its own motion or on –
  - (a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulation, from any person, consumer or their association or trade association; or

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

Section 26(1) provides that on receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter.

Sub-section (3) of section 26 states that the Director General shall, on receipt of direction, submit a report on his findings within such period as may be specified by the Commission.

Sub-section (4) of section 26 states that the Commission shall forward a copy of the report referred to in sub-section (3) to the parties concerned.

As per section 27 of the Competition Act 2002, where after an inquiry the Commission finds that agreement referred to in section 3 or action of any enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders:-

- direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be.
- **impose such penalty** as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.
- **direct that** agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
- direct the enterprises concerned to abide by such other orders as the commission may pass and comply with the directions, including payment of costs if any.
- Such other order or issue such directions as it may deem fit.

**Competition Act, 2002 to have overriding effect:** Section 60 states that the provisions of this Act shall have an overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Section 61 further lays down that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Further, as per section 62, the provisions of this Act shall be in addition to and not barring application of other laws.

Section 38(3) of the RERA states that where an issue is raised relating to agreement, action, omission, practice or procedure that-

- (a) has an appreciable prevention, restriction or distortion of competition in connection with development of a real estate project; or
- (b) has effect of market power of monopoly situation being abused for affective interest of allottees adversely,

then the Authority, may, suo moto, take reference in respect of such issue to the Competition Commission of India.

Hence, the plea made by the bidders that the matter is under litigation with the civil court and so the commission is not having jurisdiction to investigate the said matter is not valid. Therefore, matters pending in civil court will not affect CCI's power of investigation.

## CASE STUDY 28

Mr. Aditya Chopra is a renowned industrialist. He is the CEO of Bangalore based Avon Limited. Last year, Mr. Aditya Chopra went to Italy along with his daughter Ruhi for her admission to the Fine Arts College of Italy. Mr. Chopra on 25th April 2019 remitted USD 50,000 from his current account for the education of Ruhi in Italy. Ruhi did shopping for USD 5,000 on the same date. While returning from Italy, Mr. Chopra bought one painting and artefacts of Italian marble worth USD 25,000. All these shopping and purchasing of paintings and artefacts were done via Mr. Chopra's International Credit Card. Ruhi wanted to participate in the famous sweepstake of Italy. To see her daughter happy, Mr. Chopra did a payment of USD 500 via his International Credit Card. After returning to India, Mr. Aditya Chopra transferred USD 150,000 to Ruhi for purchasing a flat in Italy for her comfortable stay. He also remitted USD 25,000 to Ruhi for purchasing a car in Italy. After six months, Ruhi met with an accident in Italy. She was hospitalised in Italy and then Mr. Chopra further remitted USD 80,000 for her medical expenses.

Mr. Aditya Chopra owns a construction company called, Chopra Real Estate Developers Limited (CREDL), which is one of the biggest names among the real estate companies. CREDL is a subsidiary of Avon Limited. The turnover of CREDL is INRs 500 crores. In the last five years, CREDL has completed many successful projects in its name, both for the development of housing plots as well as construction and development projects. In 2014, CREDL won the award for the best Real Estate Company in India.

Mr. Aditya Chopra decided to construct and develop a township on the Bengaluru-Mumbai highway. The land is just 5 km away from Bengaluru city. Mr. Chopra purchased this land at a price of INR 40 crores in the year 2017. Due to a shortage of funds, he was not able to start the project. So, in September 2018, Mr. Chopra thought to start the project with the investment in a Joint venture with a foreign company. He was having talks with foreign-based companies and in the end, two companies were short-listed. One is the Val Group of Companies and the other one is the Aviance Group of Companies. After few rounds of meeting with both the companies, Mr. Chopra finalised a joint venture with Aviance Group of Companies.

Aviance Company is a Swedish company dealing in Steel manufacturing, cable wire manufacturing, and Infrastructure building company. On 3<sup>rd</sup> October 2018, the joint venture deal was signed between both companies. The Aviance Company agreed to invest USD 5 Million and will hold a 42 percent share in the joint venture. All the necessary work permission approvals had been taken including the building/layout plans, developing internal and peripheral areas and other infrastructures facilities, external development, and other changes

and complying with all other requirements as prescribed under applicable rules/ by-laws/ regulation of the State government/ Municipal Bodies/Local body concerned.

Avon Limited wanted to build a world-class facility-based township. For this purpose, it hired “Alex Architectural and landscaping consultancy” a UK-based firm. Alex consultancy will receive USD 200,000 according to the contractual agreement for the project. To facilitate smooth working in India, Alex consultancy planned to open its branch office in India as it will be an ongoing project for 3 to 4 years.

Alex Consultancy was in search of some good property. After few days of search, the company was able to locate a good property which belonged to Mr. Naveen who is working as an IT professional in a company in Mumbai for 5 years. After few talks with Mr. Naveen, Alex Consultancy finalised the lease for four years, with a rent of Rs. 15 Lacs per annum. In July 2019, Mr. Naveen’s company gave him a promotion and send him to its U.S.A branch and Mr. Naveen got shifted to the U.S.A. on 1st August 2019.

Mr. James Demello was appointed as head of the team in India to lead the above project by Alex Consultancy. He visited India on 20th April 2019 with his team. He held a joint meeting and discussion with Mr. Chopra and other officials of Aviance Company about the layout plan and the whole look of the project. He went back to the U.K. on 8th May 2019. He again came back to India on 14th June 2019 and decided to stay in India, as the project was in the initial stage and he needed to be at the project site for monitoring all the details of the ongoing construction. Due to some urgent personal work, he went back to the U.K. on 1st September 2019 and returned on 25th September. On 20th December 2019, he went to the U.K. for Christmas and New Year's vacation. After his vacation, Mr. Demello came back to India on 15th January 2020. He went back to London on 28th February 2020.

Meanwhile, Mr. Chopra got an invitation from abroad to attend the International Conference, to be held in London. Mr. Chopra sent one of the company's directors, Mr. Avinash to attend the International Conference. Mr. Avinash was issued a multicurrency forex travel card of value 50,000 USD from the company. Out of USD 50,000, ninety percent of the amount was loaded into the card, and the rest of USD 5,000 was given in cash. After he returned back to India, Mr. Avinash had unspent USD 2,000, left with him, which he kept with himself for future use.

In April 2020, Mr. Demello came back to India to resolve some issues pertaining to the structure of the floors. This time his wife, Mrs. Heena Demello accompanied him who is an NRI. Mrs. Demello with her husband went to see the property in her native place which she inherited from her maternal grandmother. She refreshed and shared some memories of her childhood with Mr. Demello. Mr. Chopra organised a party for Mr. and Mrs. Demello wherein the cultural group performed the traditional dance on the folk songs. Mr. Demello impressed with the performance, that he invited the cultural group to perform in London on the annual

day function of Alex Consultancy. Mr. Demello during this visit bought a 3BHK flat in the same project (in which he is working) jointly with his wife, because of the serene view and lake-facing location. After a couple of weeks, he went back to carry on his employment with Alex Consultancy to work on other projects. Before leaving, he gave necessary instructions to his team for the ongoing construction work.

### **I. Multiple Choice Questions**

1. Mr. Aditya Chopra went to Italy for Ruhi's admission to Fine Arts College. Including the total fees of college, purchase of artefacts and painting, house and car bought by Ruhi in Italy along with all her medical expenses has exceeded the prescribed limit of USD 250,000 during the financial year. Advise Mr. Chopra with the correct course of action
  - (a) Mr. Aditya Chopra needs to submit the estimate from the college university and also an estimate from the hospital/doctor abroad, to the authorised dealer.
  - (b) Mr. Aditya Chopra can transfer USD 130,000 in excess of the limit of USD 250,000, without permission of RBI and without submitting any evidence.
  - (c) Mr. Aditya Chopra can transfer any amount to meet expenses abroad.
  - (d) Mr. Aditya Chopra will need RBI approval for remittance beyond USD 250,000.
2. Presuming in the given case, the Aviance Company has appointed an agent in Sweden for the sale of units in the township near Bengaluru, and commission @ 6% per property sold was agreed with him after deduction of taxes applicable in India. The sale price of each unit is much more than USD 500,000. In light of provisions of the Foreign Exchange Management Act, 1999 is there any prior permission required for his appointment in consideration of the limit of commission to be paid to him? (Ignore the provisions contained under the Real Estate (Regulation and Development) Act 2016)
  - (a) No prior approval is required as the property is situated in India.
  - (b) Prior approval of Central Government is required as the commission exceeds limit of five percent.
  - (c) Prior approval of RBI is required as the commission exceeds the limit of five percent.
  - (d) No prior permission is required as agent commission will be remitted after deduction of taxes applicable in India.

3. Mr. Demello invited the cultural group to perform in the London, Does any prior permission required for drawl of foreign exchange for the same?
- (a) Since it is an unofficial cultural tour they don't require any prior permission.
  - (b) The cultural group will require prior permission from the concerned State government.
  - (c) The cultural group will require prior permission from RBI.
  - (d) The cultural group will require prior permission from the Central Government.
4. Whether the rental income received by Mr. Naveen can be repatriated outside India to the U.S.A.?
- (a) The lease was finalised when Mr. Naveen was a resident Indian, hence the income cannot be repatriated.
  - (b) The rental income can be freely repatriated outside India subject to payment of applicable taxes.
  - (c) The rental income cannot be repatriated outside India without prior approval of RBI.
  - (d) The rental income can only be repatriated after making an application to AD Bank.
5. Naveen got a promotion in his company and on 1st August 2019, he went to the USA. Determine his residential status in terms of the Foreign Exchange Management Act, 1999. Pick the correct option out of the following;
- (a) Mr. Naveen shall be a person resident in India for the financial year 2019-20 only.
  - (b) Mr. Naveen shall be a person resident in India for the financial year 2020-21 only.
  - (c) Mr. Naveen shall be a person resident in India for both the financial years, 2019-20 and 2020-21.
  - (d) Mr. Naveen neither a person resident in India for the financial year 2019-20 nor during 2020-21.

<b>II. Descriptive Questions</b>
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6. Enumerate the legal position of the given situations in the light of the Foreign Exchange Management Act, 1999;



- (i) The transaction done by Mr. Chopra using International Credit Card (ICC) for purchase of sweepstake. Also state the consequences of the same, if any.
  - (ii) Mr. Avinash had unspent USD 2,000 with him after he returned to India. He didn't submit the unspent money to the company.
7. Enumerate the legal position of the given situations in the light of the Foreign Exchange Management Act, 1999:
- (i) Mr. Demello bought a 3BHK flat jointly with his wife. Determine the residential status of Mr. Demello for F.Y. 2020-21 and being a foreign national, whether he is eligible to buy a flat in India jointly with Mrs. Demello?
  - (ii) Mrs. Demello has inherited a property from her grandmother here in India. Justify how being a person resident outside India, she can repatriate the sale proceeds of immovable property outside India?

## ANSWERS TO CASE STUDY 28

### I. Answers to Multiple Choice Questions

1. (d) Mr. Aditya Chopra will need RBI approval for remittance beyond USD 250,000.
- Reason**
- Para 1(viii) of Schedule III of FEM (Current Account Transactions) Rules, 2000 provides that individuals can avail of foreign exchange facility for the **studies abroad within the limits of USD 250000**. Any additional remittance in excess limit for the aforesaid purpose shall require prior approval of the RBI.
2. (c) Prior approval of RBI is required as the commission exceeds the limit of five percent .
- Reason**
- Para 2 Schedule III of FEM (Current Account Transactions) Rules, 2000 provides that certain remittance by persons other than individuals shall require prior approval of the RBI. Its sub-para (ii) provides that the Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India **exceeding USD 250000 or 5% of the inward remittance, whichever is more**, require prior approval of RBI.

3. (d) The cultural group will require prior permission from the Central Government.

**Reason**

Schedule II of FEM (Current Account Transactions) Rules, 2000 provides the list of transactions which require prior approval of the Central Government. S. No. 1 of this Schedule states that for Cultural Tours, the approval of the Ministry of Human Resources Development (Dept. of Education and Culture) is required.

4. (b) The rental income can be freely repatriated outside India subject to payment of applicable taxes.

**Reason**

Para 3(f) of Schedule I of Foreign Exchange Management (Deposit) Regulations, 2016 provides that Current income in India due to the account holder, subject to payment of applicable taxes in India.

5. (a) Mr. Naveen shall be a person resident in India for the financial year 2019-20 only

**Reason**

Section of 2(v) of FEMA reads as under:

**“person resident in India” means—**

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

- (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

Section 2 (w) "person resident outside India" means a person who is not resident in India;

In the given case, Mr. Naveen got shifted to the U.S.A. on 1st August 2019. So he remained in India for a period of 243 days in FY 2019-20.

For the FY 2020-21, Naveen remained out of India for the full FY.

So Naveen shall be resident in India for the FY 2019-20 only.

## **II. Answers to Descriptive Questions**

6. (i) Para A.21- International Credit Cards of Master Circular on Miscellaneous Remittances from India –Facilities for Residents, RBI/2015-16/91 Master Circular No.6/2015-16 dated 01.07.2015 provides as under:

- 21.1 The restrictions contained in Rule 5 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 will not be applicable for use of International Credit Cards (ICCs) by residents for making payment towards expenses, while on a visit outside India.
- 21.2 Residents can use ICCs on internet for any purpose for which exchange can be purchased from an Authorised Dealer in India, e.g. for import of books, purchase of downloadable software or import of any other item permissible under Foreign Trade Policy (FTP).
- 21.3 ICCs cannot be used on internet or otherwise for purchase of prohibited items, like lottery tickets, banned or proscribed magazines, participation in sweepstakes, payment for call-back services, etc., since no drawal of foreign exchange is permitted for such items/activities.
- 21.4 There is no aggregate monetary ceiling separately prescribed for use of ICCs through internet.
- 21.5 Resident individuals maintaining foreign currency accounts with an Authorised Dealer in India or a bank abroad, as permissible under extant Foreign Exchange Regulations, are free to obtain ICCs issued by overseas banks and other reputed agencies. The charges incurred against the card either in India or abroad, can be met out of funds held in such foreign currency account/s of the card holder or through remittances, if any, from India only through a bank where the card holder

has a current or savings account. The remittance for this purpose should also be made directly to the card issuing agency abroad, and not to a third party.

21.6 The applicable limit will be the credit limit fixed by the card issuing banks. There is no monetary ceiling fixed by the Reserve Bank for remittances, if any, under this facility.

21.7 Use of ICC for payment in foreign exchange in Nepal and Bhutan is not permitted.

- (ii) According to Foreign Exchange Management Act, 1999, Mr. Avinash must surrender the unused foreign exchange within 180 days of his return from abroad. However, if he so desires, **he can keep foreign exchange up to USD 2,000** in his Resident Foreign Currency (Domestic) or RFC (Domestic) Accounts. He can also keep the said amount in form of foreign currency notes or traveler cheque for use in the future course of time. Residents are permitted to hold foreign currency up to USD 2,000 or its equivalent provided the foreign exchange was acquired by him from an authorised person for travel abroad and represents the unspent amount thereof. [Refer FAQ 7 Misc Forex Facilities, updated upto 21.10.2021]

Accordingly, Mr. Avinash has not contravened any provisions of the Foreign Exchange Management Act, 1999. The unspent money which is left with him belongs to the company and he needs to submit it back to the company within the stipulated time. Hence, according to the provisions of the Foreign Exchange Management Act, 1999, he is not liable for any punishment.

7. (i) Section of 2(v) of FEMA reads as under:

**“person resident in India” means—**

- (i) a person residing in India for more than 182 days during the course of the preceding financial year **but does not include—**
- (A) a person **who has gone out of India or who stays outside India**, in either case—
- (a) for or on taking up employment outside India, or
- (b) for carrying on outside India a business or vocation outside India, or

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

As per facts stated in the case study, Mr. Demello resided in India for more than 182 days in the financial year 2019 -20. However, during 2020-21, he went back to carry on his employment with Alex Consultancy. Therefore, Mr. Demello will be considered as a person resident outside India for the financial year 2020-21.

Further, as per regulation 6 of the Foreign Exchange Management (Acquisition and transfer of Immovable Property in India) Regulation 2018, a person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non-Resident Indian or an Overseas Citizen of India may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse subject to the conditions laid down.

Hence, a foreign national who is a person resident outside India may acquire one immovable property, jointly with his NRI spouse.

Hence, Mr. Demello despite being a person resident outside India and a foreign national is eligible to acquire a flat in Bengaluru in joint ownership with Mrs. Demello.

**Note** – It is presumed other conditions provided under regulation 6 is fulfilled.

- (ii) According to the provisions of the Foreign Exchange Management Act, 1999:

Section 6(5) of FEMA provides that a person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person **when he was resident in India or inherited from a person who was resident in India.**

Regulation 8 of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that-

- (a) A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.
- (b) In the event of sale of immovable property other than agricultural land/farm house/plantation property in India by a person resident outside India who is a citizen of India or a person of Indian origin, the authorised dealer may allow repatriation of the sale proceeds outside India, provided the following conditions are satisfied, namely:
  - (i) the immovable property was acquired by the seller in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations;
  - (ii) the amount to be repatriated does not exceed (a) the amount paid for acquisition of the immovable property in foreign exchange received through normal banking channels or out of funds held in Foreign Currency Non-Resident Account, or (b) the foreign currency equivalent, as on the date of payment, of the amount paid where such payment was made from the funds held in Non-Resident External account for the acquisition of the property; and
  - (iii) in the case of residential property, the repatriation of sale proceeds is restricted to not more than two such properties.

So, in the above-mentioned case, Mrs. Demello can repatriate the sale of such property provided the above-mentioned conditions are duly satisfied.

## CASE STUDY 29

Mr. Hardeep Suri is a renowned businessman from Indore. He worked as a senior manager in a company for 7 years. After that, he thought to establish his own company. He established Exotic Limited in the year 1995. Mr. Suri has two sons, Sanjay and Sagar. His wife, Mrs. Ashima Suri, is a socialite and philanthropist.

Mr. Hardeep Suri started manufacturing paper with a startup capital of ₹ 30 lakhs. He took INs 15 lakhs loan from the bank. Initially, like any other company, there were so many ups and downs. However, after 5 years of running the company, profits started pouring in. Around 2005, the company became a household name. The company had its head office in one of the best locations in Mumbai at Nariman Point. The shareholders of the company include Mr. Suri, his wife Mrs. Suri, both his sons, Sanjay and Sagar, and 3 other persons. Mr. Suri and his family held 90% of the total shares of the company.

Exotic Limited acquired a couple of companies to grow globally. Mr. Suri now owes an empire worth ₹ 500 crores. He wanted to earn more and more money and he also started an export-import business. The export-import business started flourishing in a year. Out of greed, Mr. Suri thought to take a loan from the banks to expand his business. His management contacted some of the nationalized banks for approval of the loan. After several rounds of meetings with Mr. Suri, five national banks agreed for lending him money, based on the letter of credit, export contract, and copy of the purchase order.

A number of front and fictitious companies were formed, to carry out illegal activities by the company, which submitted forged documents to obtain the money from the banks. The amount sanctioned for a particular export order was diverted to a different offshore company and later the money was remitted back into Mr. Suri's company without executing an export order.

Further, Mr. Suri and his son, Mr. Sanjay, started taking orders from other Asian countries for the supply of pulses and wheat. Some genuine transactions were also done to hide other fractionous transactions. The credit sanctioned for export order received from Malaysia for the supply of pulses and wheat was diverted to a Malaysian based firm but the money was later remitted back to Exotic Limited So, most of the transactions of the company was done with a limited number of buyers, sister companies and sellers. As Mr. Suri frequently needed to travel to Malaysia, so, he bought a flat there. It was purchased with transmittals beyond the permissible limit under the Liberalized Remittance Scheme.

Further, Mr. Suri registered one more company in the name of his son, Sagar. It was an iron bar manufacturing company. It is a sister concern to Exotic Limited. In order to show that the company is genuine initially, it manufactured some goods and exported them to other Asian countries for around a year's duration. After 1 year, Sagar's company approached a

consortium of banks to sanction 100 crore rupees as a loan. The bank credited the loan on basis of the performance evaluation of its sister concern, Exotic Limited. The money disbursed by the bank for procurement of goods and some other export materials was not utilized for the said purpose and no export order was executed by Sagar's company.

Mr. Hardeep, Suri's maternal uncle who resided in London since 2005, expired in the year 2018. While writing his will in the year 2017, he wrote his eastern London house worth USD 150,000 in name of Mr. Suri out of natural love and affection. Rejoice of inheriting a house in London was not sufficient to overcome the grief, because Mr. Suri was so connected to his uncle.

In between, Mr. Sagar went on a vacation to Macau. He took USD 7,000 along with him. On returning back, he had USD 3,300 unspent with him. Out of this amount, he gave USD 1,000 to his friend, who is going abroad next month.

Mr. Sagar during his visit to Macau came to know from one of his friends about a Macau-based company known as Ozone Sportswear which is a subsidiary of Ozone Group of Companies. The net worth of the company is USD 45,000. Ozone Sportswear wanted to start its business operations in India by incorporating a company, through a Joint Venture, with an Indian company. Sagar approached the company and held meetings with its management. The company agreed to the startup but before starting the joint venture, it wanted to study the market of India. The company wanted to study policies regarding exports and imports from/to India and other technical /financial collaborations between both companies. For that purpose, the company opened its office in India. All the expenses of the company would be met by inward remittance.

One day, Mr. Sagar met Mr. Rudra, his childhood friend who owns a big real estate company. Mr. Rudra suggested Mr. Sagar to invest in the real estate business as it gives good financial returns within a couple of years. Out of ₹ 100 crores amount received by Mr. Sagar, he invested ₹ 20 crores into his business and from the remaining amount, he bought 50 acres farmhouse worth ₹ 50 crore in a lush green vicinity near Noida. Mr. Sagar also bought two flats in the new project started by Mr. Rudra in Khar, Mumbai, for ₹ 10 crores, in the name of his two company employees. He planned to transfer the same to his name later on. The left-over amount was transferred through a mediator to the shell companies abroad.

Mr. Suri was interested in building assets as he was having a huge amount of bank loans in his hand. One of his friends advised him to buy a zinc mine that was going to be auctioned by the Government of Rajasthan. Mr. Suri bought this mine by paying a sum of ₹ 30 crores, near Udaipur, Rajasthan to extract zinc. To earn more profit, Mr. Suri agreed to source zinc from other mines as well, from some associates like Shiv Kumar and Ramesh Shetty, whose job was to illegally mine zinc from mines. The job of these associates was to create layers to mask the actual source, for which, they were paid the money.



Zinc was sold to exporters, who deposited the money in one of the five bank accounts of Mr. Suri's company. Exotic Limited transferred money to Mr. Shiv Kumar and Mr. Ramesh. In one of the five bank accounts of Exotic Limited, there was a combined credit and debit of 64 crore rupees between the years 2015 to 2017. Mr. Shiv and Mr. Ramesh issued cheques to persons who may be either fictitious or under benami names or unregistered dealers of zinc. These individuals make withdrawals on the same date, in most cases in denominations of ₹ 6 lakh. The same happens on the credit side.

Exotic Limited exported 9520 tons of zinc at below market price to A.S Trading International, a Hong Kong registered company. Mr. Suri is the director of A.S Trading International which is owned by his wife, Mrs. Ashima, a company registered in the Isle of Man. A.S Trading International in return sold the zinc to an outside party at market price. So now it can move the profit to its companies in tax havens, which are owned by Mr. Suri's family members.

The CBI registered a case after receiving a complaint from one of the consortium banks against Exotic Limited, its director, Mr. Suri, his wife Ashima Suri, son Sanjay and Sagar, and unidentified other persons. It is alleged that the accused had cheated a consortium of five banks by siphoning off bank loans to the tune of ₹ 600 crores.

The enforcement directorate (ED), also registered a case against the promoters of Exotic Limited. In their investigation, it has been found that the proceeds of the crime were subsequently used by the accused to create illegal assets and black money. In a further investigation by ED, they found there is the large increase in cash turnover and sales. No commercial reasons were mentioned for money inflows. Most of the transactions didn't have supporting documents, and don't fit the company's profile.

### **I. Multiple Choice Questions**

1. On returning from Macau, Sagar had unspent USD 3300. He gave USD 1000 to his friend who was leaving for abroad next month. Is he permitted to do so?
  - (a) Sagar needs to give a declaration to the authorised agent that he gave USD 1000 of the amount remaining with him to his friend.
  - (b) Sagar cannot do so, as he needs to deposit the amount exceeding USD 2000 to AD within specified days.
  - (c) Sagar needs to surrender all the remaining USD 3300 to the AD within specified days.
  - (d) Sagar can do so, as he bought this amount from AD.
2. Assuming that Exotic Limited procured consultancy services from abroad for his export and import of grains business and paid them USD 1,200,000 from its current account. Choose the correct answer.

- (a) Since it is a current account transaction, Exotic Limited needs no prior approval from the Reserve Bank of India.
  - (b) Exotic Limited requires prior approval of the Reserve Bank of India before remittance of the said amount.
  - (c) The service is covered under schedule II of the Foreign Exchange Management Act, 1999, so Ministry of Finance (Department of Economic Affairs) permission is required
  - (d) Central Government prior permission is required before remittance of the said amount.
3. Ozone Sportswear, a company registered in Macau wanted to start its business operations in India; but wanted to study policies regarding exports and imports from/to India. For that purpose, the company opened its office in India. Presuming it took a building on lease for 10 years. Pick the correct statement out of the following;
- (a) Being a foreign company based in Macau, it can't acquire immovable property or any sort of right in any immovable property in India.
  - (b) It can acquire a lease right of immovable property for any number of years, but can't acquire immovable property (freehold), even with prior permission from RBI.
  - (c) It can acquire immovable property on lease for a period exceeding 5 years, with the prior permission of RBI.
  - (d) Being a legal entity, Ozone Sportswear is not covered in the term 'Citizen' hence can acquire any immovable property, without prior permission from RBI.
4. Property seized under section 17 by the director or any other officer, not below the rank of deputy director authorised by the Director can be retained for
- (a) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can't be extended
  - (b) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can be extended by Adjudicating Authority.
  - (c) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can be extended by the enforcement directorate.

- (d) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can be extended in case offence committed comes under schedule I of PMLA.
- 5. The flat purchased by Sagar in the name of his company's employees, was transferred to a third party by entering a sale agreement. Such a transfer shall be;
  - (a) Valid as sale agreement is entered.
  - (b) Valid provided the company's employees were aware that the property was registered in their name.
  - (c) Null and void.
  - (d) Voidable at the option of the third party to whom property is sold

## **II. Descriptive Questions**

- 6.
  - (i) Can Mr. Suri acquire and hold immovable property situated in London through inheritance from his uncle? Can Mr. Suri transfer that such property to some foreign resident or national according to the provisions of the Foreign Exchange Management Act, 1999? If not, state the penalty for contravention.
  - (ii) Exotic Limited exported zinc to A.S Trading International. The profit earned by the company was never brought back to India. According to the provisions of the Prevention of Money Laundering Act, 2002 advice the company as to what nature of the crime it is and the legal consequences to be faced by him under the said Act?
- 7. Mr. Suri bought a flat in Malaysia beyond the permissible limit of transmission of amount under Liberalized Scheme. So, in context to the fact given in the case study, answer the following;
  - (i) What legal consequences Mr Suri will have to face under the provisions of the Act?
  - (ii) What remedy can Mr. Suri seek to safeguard himself from any legal action that can be taken against him for the aforesaid offence?

## **ANSWERS TO CASE STUDY 29**

### **I. Answers to Multiple Choice Questions**

- 1. (b) Sagar cannot do so, as he needs to deposit the amount exceeding beyond USD 2000 to AD within specified days.

**Reason**

In terms of Para 3 of the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000, for the purposes of clause (a) and clause (e) of section 9 of FEMA, the RBI has specified limits for possession or retention of foreign currency or foreign coins. Its sub-para (iii) specifies that retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques **not exceeding US\$ 2000** or its equivalent in aggregate.

2. (b) Exotic Limited requires prior approval of the Reserve Bank of India before remittance of the said amount.

**Reason**

Para 2(iii) of the Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000, states the remittances exceeding USD 10,00,000 per project for any consultancy services in respect of infrastructure project and USD 10,00,000 per project, for other consultancy service procured from outside India, shall require prior approval of the RBI.

3. (c) It can acquire immovable property on lease for a period exceeding 5 years, with the prior permission of RBI.

**Reason**

Regulation 4 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 deals with the matter relating to the acquisition of Immovable Property for carrying on a permitted activity.

The provision attached to Regulation 4(b) provides that no person of Pakistan or Bangladesh or Sri Lanka or Afghanistan or China or Iran or Hong Kong or Macau or Nepal or Bhutan or Democratic People's Republic of Korea (DPRK) shall acquire immovable property, **other than on lease not exceeding five years, without prior approval of the Reserve Bank.**

4. (b) For a period not exceeding one hundred and eighty days from the day on which such property was seized and this period can be extended by Adjudicating Authority.

**Reason****Section 20(1) of the PML Act provides that –**

Where any property has been seized under section 17 or section 18 or frozen under sub-section (1A) of section 17 and the officer authorised by the Director in this behalf has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded by him in writing) that such property is required to be retained for the purposes of adjudication under section 8, such property may, if seized, be retained or if frozen, may continue to remain frozen, **for a period not exceeding one hundred and eighty days** from the day on which such property was seized or frozen, as the case may be.

5. (c) Null and void.

**Reason**

It is a benami transaction in terms of Section 2(9) of the PBTA, 1988. As per section 6(2) of the PBTA re-transfer of benami property shall be deemed to be null and void.

**II. Answers to Descriptive Questions**

6. (i) Regulation 5 (1) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015, provides that –

A person resident in India may acquire immovable property outside India by way of gift or **inheritance** from a person referred to in sub-section (4) of Section 6 of the Act or referred to in clause (b) of regulation 4.

Further section 6(4) of the Foreign Exchange Management Act 1999, a person resident in India may hold, own, transfer or invest in foreign currency, foreign security, or any immovable property situated outside India if such currency, security, or property was acquired, held or owned by such person when he was resident outside India or **inherited** from a person who was resident outside India.

In the above-mentioned case, the property was inherited (acquired) by Mr. Suri from his uncle according to the provisions of the Foreign Exchange Management Act, 1999, hence Mr. Suri is legally entitled to hold the property.

Further, section 6(4) of said Act, allows Mr. Suri to transfer such property to any person including foreign resident or foreign national. Mr. Suri is required to realise and repatriate the sale proceeds from such transfer (if the transfer is in form of sale) as per provision of provisions of the Foreign Exchange Management Act, 1999 or applicable regulations thereunder.

- (ii) The nature of crime committed by the company is an offence of cross border implications that has been defined u/s 2(1)(ra) of the Prevention of Money Laundering Act, 2002. It means-
- (i) as any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person transfers in any manner the proceeds of such conduct or part thereof to India; or
  - (ii) any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India.

Part C of the Schedule to the PMLA, 2002 includes an offence which has cross-border implications. Para 4 of Part C of the schedule states that the offence of willful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 is termed as an offence of cross border implications.

Hence, Mr. Suri is guilty under Part C of the Schedule to the PMLA as making export through a sister concern in tax heaven amounts to offence of willful attempt to evade tax. He would be held guilty under section 3 of the Prevention of Money Laundering Act, 2002, and will be liable to punishment under section 4 of the said Act.

7. (i) Section 4 of the Foreign Exchange Management Act, 1999, states that save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess, or transfer any foreign exchange, foreign security, or any immovable property situated outside India.

Under the Liberalised Remittance Scheme, Authorised Dealers may freely allow remittances by resident individuals up to USD 250,000 per Financial Year (April-March) for any permitted current or capital account transaction or a combination of both. As per para 6 of the LRS, an individual is permitted to purchase immovable property abroad.

However, if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall under section 13(1) of the Foreign Exchange Management Act, 1999, upon adjudication shall be liable to a

penalty upto thrice the sum involved in such contravention where the amount is quantifiable. If the amount is not quantifiable, a penalty upto two lakhs rupees and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

The Adjudicating Authority adjudicating the contravention can also order confiscation of any currency, security or any other money, or property in respect of which the contravention has taken place. He can also direct that foreign exchange holdings of any person committing the contravention shall be brought back to India or retained outside as per directions.

The term 'property' in respect of which contravention has taken place shall include deposits in bank or Indian currency where the contravening property has been converted into bank deposits/Indian currency. It also includes any other property which has resulted out of the conversion of the contravening property. [Section 13(2) of the Foreign Exchange Management Act, 1999]

In other words, if the contravening property is converted into bank deposits, Indian currency or another property, such deposit/Indian currency/other property can also be confiscated.

Besides, Section 37A of the Foreign Exchange Management Act, 1999 specifies Special provisions relating to assets held outside India in contravention of section 4, states that upon receipt of any information or otherwise if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property.

The order of seizure along with relevant material shall be placed before the Competent Authority. The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of the seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate directions in the adjudication order with regard to further action as regards the seizure made above.

In this case, the purchase of a flat by Mr. Suri in Malaysia was beyond the permissible limit of transmission of amount under the liberalised remittance Scheme, so the said transaction is in contravention to the provision of the Act. Therefore, Mr. Suri will be liable for prosecution & penalty in the light of the aforesaid provisions of the Foreign Exchange Management Act, 1999.

- (ii) Under section 15 of the Foreign Exchange Management Act, 1999, which deals the matter relating to the compound of contravention, Mr. Hardeep Suri can seek the following remedy in case of contravention under section 13 of the Foreign Exchange Management Act, 1999:
- (1) he can make an application for the compound of such offence within one hundred and eighty days from the date of receipt of an application by the Director of Enforcement or any other officers of the Directorate of Enforcement and Officers of the Reserve Bank.
  - (2) Where a contravention has been compounded, then no further proceeding, shall be initiated or continued, against the person committing such contravention, in respect of the contravention so compounded.



## CASE STUDY 30

Raj pursued his bachelor's degree from the Indian Institute of Technology, Delhi in computer science. After completing his bachelor's degree, he went to London for higher studies. Raj belonged to a middle-class family and knew that his father, Mr. Dev, had taken some loans by mortgaging his land, house, and jewellery to fund his five children's education. So, Raj decided to do some part-time jobs in London together with his studies. Raj was 3<sup>rd</sup> amongst his 5 siblings. His two elder brothers Brijesh and Bharat were practicing lawyers in Delhi and were in the early stage of their career and struggle. His younger brother and youngest sister wanted to become doctors. Before going to London, Raj opened an NRE account with a nationalized bank so that he can help his family financially by transferring some money to his parents through that account.

Raj reached London in July 2005. By doing a part-time job in London, Raj managed to send some money to his family in India apart from fund his own education and stay there. In due time, Raj finished his studies and got a good job in London. Meanwhile in India, both his brothers also started earning well and they too helped Dev financially. Within a period of five years (by the end of 2010), Mr. Dev managed to repay his entire loan and got freed his mortgaged properties along with jewellery of his wife, Mrs. Kusum from the money lender.

In the year 2011, Raj got married to Nirmala. After their marriage, Nirmala also moved to London with Raj and she also got a good job there. Raj's younger brother, Shiv, and youngest sister, Radhika, both got admission in M.B.B.S. In the final year of Radhika's studies, she got married to Dr. Krishna on 16<sup>th</sup> May 2015. At the time of his sister's wedding, Raj gave his father an amount equal to USD 7,500 as a contribution towards her marriage expenses. Apart from this, he also gifted his sister and her husband all-inclusive tickets for their Europe tour as a wedding gift costing USD 22,500. Raj and his family's tickets to/from India to/from London in business class cost him around USD 20,000.

For their Europe trip, Krishna and Radhika purchased USD 10,000 from an authorized dealer. On 16<sup>th</sup> July 2015, they came back to India after a 15 days trip. At the time of their return, they were having unspent USD 2,500 with them. After Radhika's wedding, Mr. Dev left his job as a marketing officer with a real estate development company named Vinayak Developers. At the time of his retirement, he was having some savings in his kitty and he got 25 lakhs rupees as retirement benefits from his employer. With all these and a bank loan of INRs 7 lakhs, he purchased a flat for INRs 40 lakhs in October 2015.

Later in the month of November 2015, Dev and his wife decided to go to London. Raj again spent USD 10,000 for their trip. Raj's parents came back to India in December 2015.

In the month of February 2016, Raj's son went to America for his studies. For this Raj shell out USD 100,000 towards his fee, tickets, and other expenses.

In late August 2016, Dev's ex-employer Vinayak Developers ('promoters') approached him to appoint him as their real estate agent for their upcoming real estate project "Ganesha", consisting of a multistoried building having 12 floors with 3 flats on each floor. Dev agreed upon and in a detailed discussion regarding the strategy that should be adopted/ followed to pre-sell their flats and to collect the maximum amount from prospective buyers without attracting any interest burden. It was decided to make a cartel with other builders that until they (Vinayak Developers) are done with 90-95% booking of their flats, they (other developers) will not launch any new project in that area so that maximum booking can be ensured. He also suggested that in turn the promoters, Vinayak Developers, will also do the same at the time of launch of other builder's projects. The motto behind forming such type of cartel was to ensure a limited supply of flats, so that buyers won't be left with more choices to choose from and will go for bookings in the upcoming project of Vinayak Developers, "Ganesha". Apart from this, it was also decided that every builder who has agreed to become part of such a cartel will be given a certain % share of the booking amount received.

Promoters past track record, location of the project added by Dev's idea helped the project in becoming a big success, and as soon as the promoters launched the scheme through advertisement in print and electronic media enquiries regarding flats poured in. The brochures containing the details of the upcoming project mentioned that the new project "Ganesha" spread in an area of 10,000 sq. ft., would accommodate a park, a gym, a swimming pool, lifts, parking slot, and a small shopping center. In October 2016, on the occasion of Navratri, booking of flats started and soon all the flats were booked. The price of each flat consisting of 2 BHK was fixed at INRs 1.2 crores and slab wise different discounts were offered to the customers.

The buyers' agreements were signed in November 2016. The project took off smoothly. Although the project was fully sold out, yet enquiries related to flats kept coming in, so the promoters decided to increase the height of the building by two more floors by fulfilling all the legal formalities related to it. Possession of the flats was handed over to all the allottees within the grace period with all the amenities as promised.

In this project, not only the promoters but also Dev made a handsome amount. In a couple of years, Mr. Dev accumulated more wealth and at beginning of 2019, he decided to invest such in an upcoming housing project being developed by one of his known developers. The price of the flat which Dev booked was INRs 2.5 crore rupees. Each flat was proposed to be delivered with a separate terrace, a small kitchen garden, and every possible modern household amenity. The builder of the housing project by a written contract signed by both the parties gave the order for the supply of all the required electronic items for this project to Arihant Electronics, who after receiving 15% amount of the contract value as advance payment, made supplies as per the contract without receiving any further payment.

On the other hand, the promoter/builder on the pretext of assured return of INRs 2,25,000 per month, convinced Dev and some other buyers, to pay the full amount at one go. This assured

return was to be credited on monthly basis, after deducting tax at source, for the period starting from the date of receiving the payment till the date of handing over the flat. A written contract for the same was also signed by them (Dev and other buyers) and the promoter, when they (Dev and other buyers) made the full and final payment on 1<sup>st</sup> January 2019. They received only one monthly installment of assured return, net of tax. Then all the reminders for payment went unanswered and the promoter even expressed his inability to hand over the possession of the flats to the buyers/allottees. Later, he came to know that creditors of that promoter including Arihant Electronics have filed for insolvency proceedings against him as he had denied payments to them also. This was shocking for Dev and he could not bear it.

On 15<sup>th</sup> April 2019, Dev had a major heart attack which proved fatal for him. On 20<sup>th</sup> April, he died and within a period of 15 days from Dev's death, Kusum also passed away. Dev and Kusum had left a will which provided that all their properties i.e. flat, ancestral house, and one 5 acres agricultural land in their ancestral village were to be sold out and money received from such sale should be distributed amongst all the four brothers and jewellery of Kusum to be given to Radhika. After 15 days of their mother's death, Raj and Nirmala decided to leave for London and it was mutually agreed between all the brothers that their two elder brothers will sell the properties and will distribute the amount, amongst all of them.

#### **I. Multiple Choice Questions**

1. Assuming in the given case, Raj is required to remit USD 110,000 to his son in the US for some major medical expenses on 30<sup>th</sup> March 2015 although no such estimate for the same is provided by the medical institute in the US. From the following, tick the correct option;
  - (a) Raj can remit as much amount as he is required to, because he is not a person resident in India, so the provisions of liberalized remittance scheme do not apply to him-
  - (b) Raj can remit the whole USD 110,000 to his son without any permission because the remittance is for his medical expenses.
  - (c) Raj cannot transfer more than USD 90,000 to his son because he has already spent USD 160,000 for different purposes.
  - (d) Raj should remit only partial amount before 31<sup>st</sup> March 2015 and balance amount after 31<sup>st</sup> March so that he won't attract any remittance limitation restrictions.
2. In respect to the unspent US dollars left with Radhika and her husband, from the following tick the correct option;
  - (a) They can keep the whole unspent amount of USD 2,500 with them till the time they wish to do so, as they have been gifted the same and are not purchased by them.

- (b) They shall surrender the whole unspent USD 2,500 to the authorized dealer within a period of 90 days from the date of receipt of foreign currency.
  - (c) They can keep upto USD 2,000 in the form of currency notes with them for their future use and the balance USD 500 shall be surrendered to the authorised dealer within 90 days from the date of receipt of foreign currency.
  - (d) They can keep upto USD 2,000 in the form of currency notes and travelers cheque with them for their future use. However, the balance USD 500 shall be surrendered to the authorised dealer within a period of 180 days from the date of their return to India.
- 3. Assuming in the given case, for the sale of inherited agricultural land, Raj and his brothers got an offer from Mr. John, a citizen of Hong Kong, but the resident in India who was trying to get Indian citizenship, then with respect to such offer, from the following which option is correct:-
  - (a) Mr. John can acquire the agricultural land in India, with the prior permission of RBI.
  - (b) Mr. John being a foreign national can't acquire agricultural land in India.
  - (c) Mr. John can acquire agricultural land in India on lease for a period not exceeding 5 years.
  - (d) Mr. John being a citizen of Hong Kong can't acquire agricultural land in India.
- 4. In the given case, at least how much amount should be transferred to a separate account at the initial stage if INRs 25,92,00,000 booking amount was collected?
  - (a) INRs 4,53,60,000
  - (b) INRs 18,14,40,000
  - (c) INRs 25,92,00,000
  - (d) INRs 6,48,00,000
- 5. In the given case, if the formation of such cartel was being informed to the Competition Commission of India, then the Commission is empowered to impose a penalty of;
  - (a) Upto three times of its profits for each year of the continuance of such agreement on each member of the cartel.
  - (b) Ten percent of its turnover for each year of the continuance of such agreement on each member of the cartel
  - (c) Higher of (a) & (b)
  - (d) Lower of (a) & (b)

**II. Descriptive Questions**

6. In the given case, Vinayak Developers has raised the floors in their residential project after fulfilling all the legal formalities. (i) You are required to narrate the formalities associated with such an increase. (ii) Narrate the consequences, if the promoters had not fulfilled the formalities before raising the height of the project?
7. If Mr. Dev was alive then can he file an application for initiation of the insolvency proceedings against the developer, who promised assured return to them?

**ANSWERS TO CASE STUDY 30****I. Answers to Multiple Choice Questions**

1. (a) Raj can remit as much amount as he is required to, because he is not a person resident in India, so the provisions of liberalized remittance scheme do not apply to him.

**Reason**

LRS scheme is for the resident individuals, since Raj is not the resident individual hence the provisions of the LRS is not applicable on him.

2. (d) They can keep upto USD 2,000 in the form of currency notes and travelers' cheque with them for their future use. However, the balance USD 500 shall be surrendered to the authorized dealer within a period of 180 days from the date of their return to India.

**Reason**

Para 3 of the Foreign Exchange Management (Possession and Retention of Foreign Currency) Regulations, 2000 provides that for the purpose of clause (a) and clause (e) of section 9 of FEMA, the RBI has specified the limit for possession or retention of foreign currency or foreign coins.

Sub-para (iii) provides that retention by a person resident in India of foreign currency notes, bank notes and foreign currency travellers' cheques **not exceeding US\$ 2000** or its equivalent in aggregate, provided that such foreign exchange in the form of currency notes, bank notes and travellers' cheques.

3. (a) Mr. John can acquire the agricultural land in India, with the prior permission of RBI.

**Reason**

A person who is a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong-Kong, or Macau or DPRK would require prior approval of the Reserve Bank of India for acquiring any immovable property (including agricultural land) in India and such requests are considered by Reserve Bank in consultation with the Government of India.

Students are also advised to note that foreign nationals, even if residing in India, for acquiring immovable property have to obtain the approvals, and fulfill the requirements if any, prescribed by other authorities, such as the concerned State Government (because the land is a matter of state list), etc.

4. (b) INRs 18,14,40,000

**Reason**

Section 4(2)(I)(D) of the RERA provides that **seventy per cent. of the amounts realised for the real estate project from the allottees**, from time to time, shall be deposited **in a separate account** to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose.

The 70% of Rs 25,92,00,000/- comes to Rs. 18,14,40,000/-

5. (c) higher of (a) & (b)

**Reason**

The proviso to section 27(b) of the Competition Act, 2002 provides that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of:

- ◆ up to three times of its profit for each year of the continuance of such agreement; or
- ◆ ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.

**II. Answers to Descriptive Questions**

6. (i) Section 14 (1) of RERA, 2016 deals with the matter relating to the adherence to sanctioned plan and project specifications by the promoter. It provides that-

The proposed project shall be developed and completed by the promoter in

accordance with the sanctioned plans, layout plans and specifications as approved by the competent authority.

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

- (ii) Section 61 of the RERA 2016 provides that if any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to 5% of the estimated cost of the real estate project as determined by the Authority.

- 7. Provisions of the Insolvency and Bankruptcy Code, 2016 provides that the corporate insolvency resolution process may be initiated against any defaulting corporate debtor by making an application adjudicating authority. The application can be made by a financial creditor, operational creditor, or the corporate debtor himself. On 6<sup>th</sup> June 2018, the Insolvency and Bankruptcy Code, 2016 was amended through the Insolvency and bankruptcy code (Amendment) Ordinance, 2018. Following the ordinance, home buyers and allottees under the Real Estate (Regulation and Development) Act, 2016 got the status of financial creditors under IBC 2016 (pursuant to the amendment to the definition of financial debt) which enabled the home buyers and other allottees to be able to invoke Section 7 of IBC, allowing financial creditors, either individually or jointly to file an application in NCLT, for initiating corporate insolvency resolution process against the defaulting promoters.

The Second proviso to section 7(1) of the IBC provides that provides that for financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less.

The amendments made by the Ordinance inter alia bring IBC in closer sync with Section 18 of the RERA which gives the allottees the right to demand a refund of the entire amount paid by them together with interest at prescribed rates. They can also demand interest to be claimed for any delayed possession.

In the case of **Pioneer Urban Land and Infrastructure Ltd & Anr Vs. Union of India & Ors, the Supreme Court of India**, dated 9<sup>th</sup> August, 2019 [Writ Petition (Civil) No. 43 of 2019], the Apex Court held that remedies given to allottees of flats are concurrent and they are in a position to avail remedies under the CPA, RERA as well trigger the IBC.

So, in the given case, if Mr. Dev was alive, he could have applied for initiation of insolvency proceedings against the promoter for not paying him assured returns.



## CASE STUDY 31

Mr. Alpha is the promoter of a real estate project based in East Delhi, named Aashiyana. The project plan constituted building, in total, 50 apartments consisting of 20 3BHK apartments and 30 2BHK apartments. Mr. Alpha's son, Surendar is a Chartered Accountant as well as a RERA consultant. Mr. Alpha discussed with his son, the applicability of various provisions under the Real Estate (Regulation & Development) Act, 2016, and of the rules made thereunder on Aashiyana.

Mr. Alpha enquired about the process of registration (approval) and creation of his webpage, after getting login ID and password. Also, Mr. Alpha wanted to know the requisite contents as per law, of the advertisement to be published for the said project.

The draft advertisement specified a condition of making advance payment prior to entering into agreement for sale which shall not be less than 15% of the cost of the apartment and only after payment of such advance, the promoter will enter into an agreement for sale with the allottee.

Mr. Alpha refrained from disclosing any stage-wise time schedule of the completion of the project, including the provisions for civic infrastructure like water sanitation & electricity at the time of booking and issue of allotment letter to allottees. He forgot to include any terms for cancellation of allotment in the agreement of sale made with allottees. The construction started and afterward, the promoter made some major alterations in the sanctioned plans & layout plans as well as in the nature of fittings, without any previous approval from allottees. Mr. Alpha also made minor changes in an apartment allotted to Mr. Abhay which were duly recommended and verified by an authorised architect after proper declaration and intimation to the allottee, Mr. Abhay.

Mr. Alpha intended to transfer, project Aashiyana to Mr. Beta (third party) without obtaining any approval.

### **Queries raised by Mr. Alpha**

- ◆ Is Mr. Alpha mandatorily required to maintain a webpage on the website of RERA Authority?
- ◆ What are the requirements for the registration of Project Aashiyana?
- ◆ Can an advertisement be published with or without mentioning the website address?

### **Queries raised by the allottees**

- ◆ Can Mr. Alpha transfer the project to Mr. Beta on his own or there is any role of allottees or RERA authority? And if projects are transferred to a third party, can re-allotment.

- ◆ Is the promoter having any rights to not provide any details on the stage-wise time schedule of completion of the project, at the time of booking, to the allottees?
- ◆ Is the promoter correct while putting an upfront condition that 15% of the cost of the apartment shall be paid before entering into an agreement for sale?

Few apartments were purchased in the project by some NRIs' as follows

- ◆ Mr. X purchased a residential apartment for ₹ 50 lacs jointly in his and his sister's name. The source of such payment was not known and not routed through the banking channel. The sister of Mr. X is an Indian resident and national.
- ◆ Mr. Y purchased a residential apartment for ₹ 60 lacs in joint ownership with his wife, for which he paid from his NRE Account.
- ◆ Mr. P purchased a residential apartment for ₹ 50 lacs in the name of his wife, who is an Indian resident. Payment of ₹ 20 lacs was made from Mr. P's NRE account, ₹ 30 lacs were paid from unknown sources. The registry was done at a value of ₹ 45 lacs considering ₹ 20 lacs from known sources and ₹ 25 lacs from unknown sources.

### I. Multiple Choice Questions

1. Mr. Alpha shall not transfer or assign his majority rights & liabilities in respect of a real estate project to a third party without obtaining:
  - (a) Prior written consent from two-thirds of the allottees;
  - (b) Prior written consent from two-thirds of the allottees; except the promoter
  - (c) Prior written consent from two-thirds of the allottees; except the promoter and prior written approval of the Authority.
  - (d) Prior written consent from two-thirds of the allottees; except the promoter and prior written approval of the Authority. However, such transfer or assignment shall not affect the allotment or sale of the apartments.
2. The authority under RERA would have operationalised web-based online system for submitting applications for registration of the project within a period of \_\_\_\_\_.
  - (a) One year from the date of its establishment.
  - (b) One year from the date of its commencement.
  - (c) One year from the date of its initiation.
  - (d) One year from the date of its starting.
3. Mr. Alpha at the time of the booking and issue of allotment letter to the allottees shall be responsible for making available, which of the following information to them?
  - (a) Sanctioned Plans

- (b) Layout Plans
  - (c) Stage-wise time schedule of completion of the project.
  - (d) All of these.
4. Mr. Alpha shall be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project Aashiyana, by \_\_\_\_\_.
- (a) The allottees;
  - (b) The third party;
  - (c) The association of the allottees;
  - (d) None of the above.
5. Identify the nature of the transaction undertaken by Mr. X as per the provisions of Prohibition of Benami Property Transactions Act, 1988?
- (a) It is a benami transaction.
  - (b) Not a benami transaction
  - (c) Can't say from the given information.
  - (d) Partially a benami transaction

## **II. Descriptive Questions**

6. Mr. Alpha upon receiving login ID and password from RERA Authority created his webpage on the website of the authority and entered all details of the proposed project for public viewing. What information is required to be disclosed on the webpage as per statutory requirements?
7. Examine whether the transaction undertaken by Mr. P as aforementioned can be considered as a benami transaction or not (ignore the provisions of Foreign Exchange Management Act, 1999)?
8. (i) What shall be the responsibility of Mr. Alpha if the project Aashiyana developed on a leasehold land?
- (ii) Whether Mr. Alpha can cancel the allotment even if in the agreement of sale with the allottees, terms of cancellation of such allotment are not included?

**ANSWERS TO CASE STUDY 31****I. Answers to Multiple Choice Questions**

1. (d) Prior written consent from two-third allottees; except the promoter and prior written approval of the Authority. However, such transfer or assignment shall not affect the allotment or sale of the apartments.

**Reason**

Section 15(1) of RERA provides that the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party **without obtaining prior written consent from two-third allottees**, except the promoter, **and without the prior written approval of the Authority**.

Provided that such transfer or assignment shall not affect the allotment or sale of the apartments, plots or buildings as the case may be, in the real estate project made by the erstwhile promoter.

2. (a) One year from the date of its establishment.

**Reason**

Section 4(3) of the RERA provides that the Authority shall operationalise a web based online system for submitting applications for registration of **projects within a period of one year from the date of its establishment**.

3. (d) All of these

**Reason**

Section 11(3) of the RERA provides that (3) The promoter, at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:—

- (a) **sanctioned plans, layout plans**, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;
- (b) **the stage wise time schedule of completion of the project**, including the provisions for civic infrastructure like water, sanitation and electricity.

4. (c) The association of the allottees

**Reason**

Section 11(4)(d) of the RERA provides that the promoter shall be responsible for providing and maintaining the essential services, on reasonable charges, **till the**

taking over of the maintenance of the project by the association of the allottees.

5. (a) It is a benami transaction

**Reason**

Section 2(9) of PBTA provides the definition of the benami transaction. In the given case Mr. X had purchased a residential apartment for ₹ 50 lacs jointly in his and his sister's name. The source of such payment was not known and not routed through the banking channel. The sister of Mr. X is an Indian resident and national. Since the purchase transaction is not covered under the exempted category benami transaction [i.e. under section 2(9)(A)(b)(iv) & (C)] and the consideration of purchase transaction is not from the known sources of income, hence it termed as benami transaction.

**II. Answers to Descriptive Questions**

6. As per section 11(1) of RERA, 2016, the promoter shall, upon receiving his Login Id and password under clause (a) of sub-section (1) or under sub-section (2) of section 5, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing, including—

- (a) details of the registration granted by the Authority;
- (b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;
- (c) quarterly up-to-date the list of number of garages booked;
- (d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;
- (e) quarterly up-to-date status of the project; and
- (f) such other information and documents as may be specified by the regulations made by the Authority.

Thus, Mr. Alpha is required to disclose the aforesaid information for public viewing on his webpage created on the website of the RERA Authority.

7. As per Section 2(9) of the Prohibition of Benami Property Transactions Act, 1988, "Benami transaction" means,

**(A)** a transaction or an arrangement-

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

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

**except when the property is held by –**

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

In the case, Mr. P had purchased a residential apartment for ₹ 50 lacs in the name of his wife, who is an Indian resident. Payment of ₹ 20 lacs was made from Mr. P's NRE account and the remaining ₹ 30 lacs were paid from unknown sources. The registry was done at a value of ₹ 45 lacs considering ₹ 20 lacs from known sources and ₹ 25 lacs from unknown sources.

Had Mr. P paid the consideration from his known sources of income for purchase of property in the name of wife, it would have come under the exempted category of benami transaction under section 2(9)(A)(b)(iii). Since the part consideration of ₹ 30 is paid from undisclosed sources, hence it can be treated as benami transaction. Further the registry should have been done on the basis of the purchase consideration, and the purchase has done the registry for the lessor amount, he may also be liable under the provisions of Indian Stamp Act, 1899 and any rules framed thereunder of the concerned State.

8. (i) As per section 11(4)(c) of the Real Estate (Regulation & Development) Act, 2016, the promoter shall be responsible to obtain the lease certificate, where the real estate project is developed on leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees.

Thus, Mr. Alpha's responsibility shall be as aforesaid if the project Aashiyana, is developed on leasehold land.

- (ii) As per provisions of the section 11(5) of the Real Estate (Regulation & Development) Act, 2016, the promoter may cancel the allotment only in terms of the agreement for sale.

Provided that the allottee may approach the Authority for relief if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral, and without any sufficient cause.

Thus, Mr. Alpha cannot cancel any of the allotments made without first including the terms of cancellation in the executed agreement of sale.

## CASE STUDY 32

Mr. Rajeev was born in 1988 in a small village in Gujarat. His father, Mr. Raju, is a farmer who used to cultivate paddy, jowar, and ragi crops in a plot of land which was owned by him. He had bought the agricultural plot of land at Verna, Goa, with his hard earned money. Since Mr. Rajeev was the only child of Mr. Raju, he would ensure to fulfil all his wishes. Mr. Raju's brother, Mr. Suresh, was a graduate in Science and his sister, Mrs. Alka, was a graduate in Economics, and both were settled in South Africa. Mr. Raju's brother and sister used to help Mr. Raju with his farming in India by sharing with him skills that were undertaken in South Africa. Mr. Raju was very keen to learn these techniques and ensuring their effective implementation in his field. Because of the support of his brother and sister, to acknowledge them, Mr. Raju thought to send gifts to their families. But the officers in the village used to haunt him by stating that the legal laws relating to foreign exchange are draconian. Mr. Rajeev was a bright student and through scholarships, he earned a graduate degree from a foreign university. Mr. Rajeev was very good at sports activities, extra-curricular activities in the school. He used to participate in interschool chess and football competition and win accolades for his school.

On 10<sup>th</sup> June 2012, Mr. Rajeev acquired a residential house in Maharashtra for a value of ₹ 2 crores from a widow who was in dire need of money and one commercial property in Kerala for ₹ 3 crores. He acquired both these properties through his funds earned in India. He had two saving bank accounts in India, one in Bank of Baroda and the other in Canara Bank. Both the bank accounts together had a balance of ₹ 10 lakhs. On 10<sup>th</sup> April 2018, he left for South Africa for a better career opportunity. He got married there to a foreign national named, Loreana D' costa. Loreana has obtained her Master's degree from Stanford University. She works in a Fortune 500 company in South Africa. Her designation is Head-Product Marketing. On 28<sup>th</sup> April 2018, Mr. Raju remitted USD 25,000 and on 29<sup>th</sup> April 2018, another USD 25,000 through Liberalised Remittance Scheme to Mr. Rajeev for his maintenance.

On 28<sup>th</sup> November 2018, Mr. Rajeev visited his village along with Mrs. Loreana. Loreana loved the Indian culture since her childhood age. She always had a dream of getting married in India as per the Hindu Rituals. Thus, Rajeev and Loreana again got married in India as per the Hindu Traditions. They undertook various wedding rituals in India which lasted for 10 days. Mr. Rajeev opened a Liaison Office in India by the name "Shiv Shakti Trading Inc". The Liaison Office in India transferred funds to Mr. Rajeev's company in Hong Kong as it was in immediate need of funds. Further, it received back the said funds after six months. The auditor of the Liaison Office pointed out to the Authorised Representative that the aforesaid transfer of funds is not in line with the RBI policies. The Authorised Representative of the Liaison office was totally shocked by seeing the auditor's remarks and was completely unaware of the RBI policies pertaining to Liaison Office. The said Liaison Office was planning to open more bank

account to route all the salary payments through the new account.

Since Mr. Rajeev was a rich man and a foreign return, he was invited as the guest speaker in a small function organised by the Gram Panchayat, in his village.

He addressed the crowd with warm greetings and gave the following speech:

It was my father's dream to see the village progresses in all the directions - be it cleanliness, modern techniques of farming, education .....I will try my best to fulfil his wish. Thus, I have prepared a model plan for this year as under:

- ◆ To set up five schools in the village where education is compulsory to be taken by all the boys and girls.
- ◆ To ensure that there is a toilet in every 500 meters and all the villagers will compulsorily have to use the toilets only.
- ◆ To undertake agriculture through modern techniques-Intensive tillage, monoculture, application of inorganic fertilizer, irrigation, chemical pest control, and genetic manipulation of crop plants.

I shall call a famous agriculturist, Mr. Parekh, who will visit each and every farm in our village and examine the land in detail and guide the farm owners on how to maximise the cultivation and ensure effective use of land.

I have created a blog "My Village – My Dream", for which I request you all to give your views on the activities to be undertaken in our village."

After the function got over, he gave donations to various NGO'S for purposes as mentioned hereunder:

- ◆ Swatch Bharat Mission - ₹ 1 Lakh
- ◆ Development of schools in villages - ₹ 10 lakhs
- ◆ Organisation of cultural festivals - ₹ 5 lakhs

All these donations were made through the funds lying in his foreign bank accounts which he had earned in South Africa.

Since Mr. Rajeev generously contributed to various charitable activities; he, in turn, got a favour done from the head of the Panchayat of his village. On 30<sup>th</sup> November 2018, he paid ₹ 50 lakhs to buy a house in Gujarat which was bought in the name of the head of the Panchayat, Mr. Babubhai.

Mrs. Loreana wished to buy a residential house on the outskirts of Gujarat. There was news of devastating floods in Kerala which would trash the state. There was also news that the economy of Kerala would go down as the effects of floods would have a far-reaching impact on all the sectors. Thus, Mr. Rajeev immediately called a real estate agent in Kerala and



asked him to sell the property in Kerala. He was ready to sell the property at less than the market price also. Mr. Rajeev sold the commercial property in Kerala for a value of ₹ 5 crores in the month of November 2018 to Mr. Ajay, a resident of India. Then, he got in touch with a relationship manager at HDFC Bank who assisted him in opening an NRO Account in HDFC Bank. He completed all the documental procedures and deposited the sale value of the property in the said NRO Account. Mr. Rajeev and Loreana left India on 3<sup>rd</sup> March 2019 for South Africa.

Mrs. Alka' son who stays in India visited South Africa on 6<sup>th</sup> March 2019 for 15 days trip to stay with his cousin Mr. Rajeev and his family. He had carried with him an International credit card to meet his expenses. Mrs. Alka's son shall inherit his mother's assets in South Africa after her death. She has the following assets in South Africa:

- ◆ Two bank accounts – one in Barclays Bank and another in Deutsche Bank
- ◆ \$15000 to be received from Google Inc., where Mrs. Alka used to work in South Africa.

### **I. Multiple Choice Questions**

1. Being an NRI, Mr. Rajeev can validly transfer the inherited agricultural land situated in India to
  - (a) A person resident in India
  - (b) A person resident outside India
  - (c) A non-resident who is a person of Indian Origin
  - (d) Can't sell to anyone
2. Examine in the light of the given facts whether Mr. Raju can transfer funds under Liberalised remittance Scheme to his grandson, brother's wife, and sister's husband for their maintenance abroad?
  - (a) Yes to all the three transferees
  - (b) Can't transfer to any of the aforesaid persons
  - (c) Transfer can be made to grandson only and not to brother's wife and sister's husband
  - (d) Transfer can be made to grandson, brother's wife and not to sister's husband.
3. What are the conditions subject to which Loreana can acquire a residential property in India?
  - I. Consideration for transfer should be made from inward remittance of funds received in India from any place outside India.
  - II. The marriage should have been registered

- III. The marriage should have subsisted for a continuous period of not less than two years immediately preceding the acquisition of property.
  - IV. The property should be bought jointly with Mr. Rajeev
  - (a) I and II
  - (b) I, II, and III
  - (c) I, II, III, and IV
  - (d) I and IV
4. Usage of International Credit Card by Mrs. Alka's son for meeting expenses while a visit to South Africa requires approval of;
- (a) Reserve Bank of India
  - (b) Government of India
  - (c) Doesn't require any approval
  - (d) Both Reserve Bank of India and Government of India
5. Can Mrs. Alka's son utilize the assets to be inherited by him abroad?
- (a) Mrs. Alka's son can only utilise the funds lying in Mrs. Alka's Bank accounts.
  - (b) Mrs. Alka's son can only utilise the funds to be received from Google Inc. abroad
  - (c) Mrs. Alka's son shall require approval of RBI to inherit the funds from her mother and after that, he can utilise them abroad.
  - (d) Mrs. Alka's son can inherit both the assets of her mother and can utilise the same abroad.

## II. Descriptive Questions

6. The Initiating Officer issued notice dated 01<sup>st</sup> April 2020 to Mr. Babubhai to show cause as to why the Gujarat house should not be considered a Benami property. However, a copy of the notice was not issued to Mr. Rajeev as his identity was not known to the officer. On 1<sup>st</sup> July 2020, the Initiating Officer passed an order provisionally attaching the property with the prior approval of the Approving Authority in writing. On receipt of a reference from the Initiating Officer on 14<sup>th</sup> July 2020, the Adjudicating Authority issued notice on 24<sup>th</sup> July 2020 to Mr. Babubhai to furnish the necessary papers of the agreement within 10 days from the date of this notice. After taking into account, all the materials furnished, Adjudicating Authority passed an order holding the property to be a Benami property. The Adjudicating Authority after giving Mr. Babubhai an opportunity of being heard made an order for confiscation of the Benami property.
- (i) Whether the steps followed by Initiating Officer are correct. If not, then provide

the correct steps which were required to be undertaken by him.

- (ii) Mr. Babubhai's contention was that the Adjudicating Authority provided such a short span of time to furnish the necessary papers. Is the act of Adjudicating Authority valid for providing such a short span of time to furnish the information?
  - (iii) Mr. Babubhai, after receiving the order for confiscating the property, sold the property to a villager for ₹ 10 lakhs who not having knowledge about the benami nature of the property. What rights such a villager possess regarding the property? Will it impact the rights/title of the government regarding confiscated property? Can villager claim compensation?
7. (i) What are the formalities Mr. Raju would have to follow for remitting the funds through Liberalised Remittance Scheme?
- (ii) Mr. Raju insisted the authorised dealer for making the remittance without furnishing the PAN as the amount of remittance was below USD 25,000. Advice Mr. Raju what provision Liberalised Remittance Scheme carries regarding furnishing of PAN?

## ANSWERS TO CASE STUDY 32

### I. Answers to Multiple Choice Questions

1. (a) A person resident in India

#### Reason

The Regulation 3(e) of the FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that an NRI or an OCI may transfer any immovable property other than agricultural land / farm house/ plantation property to an NRI or an OCI.

It means the NRI can transfer the inherited agricultural property to **any one except to an NRI or an OCI. Thus, he can transfer the inherited agricultural property to a person resident in India only and to no one else.**

2. (b) Can't transfer to any of the aforesaid persons

#### Reason

FAQ No.5 on LRS (updated as on 21.10.2021) released by the RBI provides that **Remittances under the facility can be consolidated in respect of close family members subject to the individual family members complying with the terms and conditions of the Scheme.**

The definition of relative is defined under section 2(77) of the companies Act, 2013 which states that “relative”, with reference to any person, means any one who is related to another, if—

- (i) they are members of a Hindu Undivided Family;
- (ii) they are husband and wife; or
- (iii) **one person is related to the other in such manner as may be prescribed.**

Under the sub-clause (iii) of section 2(77) the grandson, brother's wife and sister's husband do not come under the purview of close relatives.

Therefore, if light of the above provisions, Rajeev cannot transfer funds under LRS to his grandson, brother's wife, and sister's husband for their maintenance abroad.

3. (c) I, II, III, and IV

**Reason**

**The Regulation 6** of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 provides that a person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, **who is a spouse of a Non-Resident Indian** or an Overseas Citizen of India **may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse.**

**Provided that**

- (i) The consideration for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank;
- (ii) No payment for any transfer of immovable property shall be made either by traveller's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause;
- (iii) the marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property;
- (iv) that the non-resident spouse is not otherwise prohibited from such acquisition.

4. (c) Doesn't require any approval

**Reason**

Regulation 6 of the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 provides **that a person resident in India may make payment** for import of goods. In foreign exchange through an international card held by him/ in rupees from **international credit card/** debit card through the credit/ debit card servicing bank in India against the charge slip signed by the importer/ as prescribed by Reserve Bank from time to time.

Further FAQ No. 11 (Miscellaneous forex facilities) (Updated as on October 21, 2021) release by the RBI states that Banks authorised to deal in foreign exchange are permitted to issue International Debit Cards (IDCs) which can be used by a resident individual for drawing cash or making payment to a merchant establishment overseas during his visit abroad. IDCs can be used only for permissible current account transactions and the usage of IDCs shall be within the LRS limit.

5. (d) Mrs. Alka's son can inherit both the assets of her mother and can utilise the same abroad.

**Reason**

Regulation 5(1)(a) of the Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015 provides that a person resident in India may acquire immovable property outside India by way of gift or inheritance from a person referred to in section 6(4) of the FEMA or referred to in Regulation 4(b).

Section 6(4) of the FEMA provides that a person resident in India may hold, own, transfer or invest in foreign currency, foreign security **or any immovable property situated outside India** if such currency, security or property was acquired, held or owned by such person when he was resident outside India or **inherited from a person who was resident outside India.**

**II. Answers to Descriptive Questions**

6. (i) As per section 24 (1) of the Prohibition of Benami Property Transactions Act 1988 (PBPT), where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.

**Hence, Initiating Officer has rightly issued the notice to Mr. Babubhai to**

**show cause.**

Further, Section 24(2) of PBPT provides where a notice under sub-section (1) specifies any property as being held by a benamidar referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner **if his identity is known.**

Hence **Initiating Officer** is justified as the identity of Mr. Rajeev was not known to him.

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

So, in regard to provisional attachment, attachment can be done at any time but such provisional attachment shall be effective till ninety days from the last day of the month in which the notice under sub-section (1) is issued, so in a given case, such period ceases on 29<sup>th</sup> July 2020. In the given case, provisional attachment is also done with prior approval of the Approving Authority in writing; hence the course of action adopted by Initiating Officer is correct and within four corners of the law.

- (ii) The first proviso to Section 26 of the PBPT, provides that the Adjudicating Authority shall issue notice within a period of 30 days from the date on which a reference has been received.

The second provision to Section 26 further provides that the notice shall provide a period of not less than 30 days to the person to whom the notice is issued to furnish the information sought.

Hence, in view of the provisions mentioned above the contention of Mr. Babubhai that the Adjudicating Authority has provided a short span of time to furnish the necessary papers is not tenable, since the 30 days' time is sufficient to revert.

- (iii) Section 27 (1) of the PBPT deals with the matter relating to the confiscation and vesting of benami property. It reads as under-

- (1) Where an order is passed in respect of any property under section 26(3) holding such property to be a benami property, the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a benami property.

Provided that where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be made subject to the order passed by the Appellate Tribunal under section 46:

Provided further that the confiscation of the property shall be made in accordance with such procedure as may be prescribed.

- (2) Nothing in sub-section (1) shall apply to a property held or acquired by a person from the benamidar for adequate consideration, prior to the issue of notice under section 24(1) without his having knowledge of the benami transaction.
- (3) Where an order of confiscation has been made under sub-section (1), all the rights and title in such property shall vest absolutely in the Central Government free of all encumbrances and no compensation shall be payable in respect of such confiscation
- (4) Any right of any third person created in such property with a view to defeat the purposes of this Act shall be null and void.
- (5) Where no order of confiscations made upon the proceedings under this Act attaining finality, no claim shall lie against the Government.

Since in the given case property acquired by villager after the date of order of confiscation (which is obviously after the order under section 24 (1) and consideration were also inadequate **hence villager despite the fact not having the knowledge about the benami nature of the property, will not get the title.**

Villager **can't claim any compensation** from the Government, and said transaction between Babubhai and villager **will not impact right/title of government** in any manner because the said transaction is null and void on account of sub-section 4.

7. (i) Paras 14 to 16 of the Master Direction-Liberalised Remittance Scheme (LRS) dated 01.01.2016 (Updated as on 20.06.2018), deals with the documentation by the remitter, which reads as under:

**Para 14:** The individual will have to **designate a branch of an AD** through which all the remittances under the Scheme will be made. The resident individual seeking to make the remittance should **furnish Form A2** as at Annex for purchase of foreign exchange under LRS.

**Para 15:** It is **mandatory for the resident individual to provide his/her Permanent Account Number (PAN)** to make remittance under the Scheme.<sup>9</sup>

**Para 16:** Investor, who has remitted funds under LRS can retain, reinvest the income earned on the investments. At present, the resident individual is not required to repatriate the funds or income generated out of investments made under the Scheme. However, a resident individual who has made overseas direct investment in the equity shares; compulsorily convertible preference shares of a JV/WoS outside India, within the LRS limit, shall have to comply with the terms and conditions prescribed by the overseas investment guidelines under Notification No. FEMA 263/RB-2013 dated March 5, 2013.

Mr. Raju have to following the procedure mentioned in Paras 14 to 16 of the aforesaid Master direction. He will be required to designate a branch of an Authorised Dealer through which all the remittances under the Scheme will be made. Mr. Raju should furnish Form A2 for the purchase of foreign exchange under Liberalised Remittance Scheme. It is mandatory for Mr. Raju to provide his /her PAN to make remittance under the Scheme. Mr. Raju is required to sign a self-declaration provided by the Authorised Dealer which will satisfy the Authorise Dealer that the transaction will not involve and is not designed for the purpose of any contravention or evasion of the provisions of the FEMA or any rule, regulation, notification, direction or order issued there under.

Further, the Authorised Dealers shall obtain bank statement(s) for the previous year from the applicant to satisfy themselves regarding the source of funds. If such a bank statement is not available, copies of the latest Income Tax Assessment Order or Return filed by Mr. Raju shall be obtained.

- (ii) Furnishing of Permanent Account Number (PAN), is mandatory in terms of Para 15 of the Master Direction-Liberalised Remittance Scheme (LRS), for making all remittances.

While allowing the facility to resident individuals, Authorised Dealers are required to ensure that Know Your Customer guidelines have been implemented in respect of bank accounts. They should also comply with the Anti-Money Laundering Rules in force while allowing the facility.

Thus, Mr. Raju will have to provide PAN for remittance under LRS.



## CASE STUDY 33

Jayesh has 3 sons, Subhash, Girish, and Rajesh. The eldest son, Subhash, runs a Sugar Mill taken over from his father Jayesh, as a family business.

Rajesh, the third son of Jayesh, always feels ignored by his family, looking for some fast easy money, joins hands with Mohan, a real estate agent, who promises to pay Rajesh, a commission in cash, if he helps Mohan to buy 25 acres of land and hold the land in his name on behalf of one of his customers, Manu, in good trust and in good faith.

Rajesh agrees and a purchase agreement for 25 Acres of land was registered in the name of Rajesh and Madhav. Subsequently, Rajesh entered into several similar agreements in his name on behalf of others.

In due course of time, Rajesh also formed a company, Jeevan Jyothi Private Limited (JJPL), primarily in the hotel business, but the source of funding was secret drug dealings.

- (A) JJPL accepted illegal monies in cash as legitimate business transactions with fake income and receipts.
- (B) The monies were then deposited into the bank accounts of JJPL as clean money.
- (C) Rajesh also kept fraudulent records, which did not demonstrate the current state of his business.
- (D) Monies in the bank accounts of JJPL were also often transferred as legitimate business transactions, to the bank accounts of RD Private Limited (RDPL), which is also in a similar business like JJPL. Original source of money was, thus, disguised.
- (E) JJPL also mobilized funds from various investors but were never utilized for the purpose for which they were collected.
- (F) Rajesh also created a complex structure of group companies, subsidiaries, and associate companies, which were mainly paper /shell companies.
- (G) JJPL also took loans from various banks and financial institutions. The funds were diverted and transferred to bank accounts of group companies, from where they were systematically siphoned off and were used for the purchase of various properties in India and abroad.

Rajesh led a lavish lifestyle. He also utilized the illegal cash for lavish stays in various hotels and in nightclubs in India and abroad. Rajesh also held some properties in the name of his wife, Suguna, bought from his known legal sources i.e. from his share of income from the Sugar Mill.

Mahesh, a friend of Girish, is the Company Secretary of a listed public limited company, BBC Limited.

- (a) Mahesh gave ₹ 5 lakhs loan to Girish, who in turn gave the said amount to his other friend, Raghu, for investment in the shares of BBC Limited. Mr. Raghu traded in shares of BBC Limited on behalf of Mahesh.
- (b) Mahesh also ensured that some money is passed on to various legitimate companies to buy the shares of BBC Limited, in order to inflate the price of the shares. The intention is to show a higher valuation of shares before proposing to the investors or to discourage the shareholders from applying to the buyback scheme.

Raghav is the brother-in-law of Subhash, employed in UAE and a non-resident Indian.

- (a) Raghav purchased some properties in Mumbai in the name of his wife for ₹ 75 lakhs. He paid ₹ 40 lakhs through his NRE Account, ₹ 10 lakhs through direct transfer from his salaries account in UAE to the seller's account as advance through normal banking channels, complying with all the procedural requirements, but balance ₹ 25 lakhs payment was made through some unknown sources.
- (b) Raghav also invested in equity shares of various listed companies in India in the name of his wife Divya, who is a resident in India and himself, as joint holders, from an account that is not disclosed to tax authorities in India.
- (c) Raghav also purchased a flat in Mumbai in the name of Divya and himself, as joint holders, from his NRE Account.

Subhash has a married daughter, Mangala, who is a UK resident. Subhash invested ₹ 1.50 crores in a bank fixed deposit in the name of Mangala, without her knowledge. Later, during the course of inquiries by tax officials, Mangala denied ownership of the said bank fixed deposit to be made in her name.

The Enforcement Directorate (ED) conducted raid operations against Rajesh and his associates after his office obtained some inputs on the purported dubious financial transactions. ED seized incriminating documents, emails, and WhatsApp chats during the raid.

### **I. Multiple Choice Questions**

- 1. The purchase of properties by Raghav in the name of his wife in Mumbai for ₹ 75 lakhs;
  - (a) Can be considered as a valid transaction.
  - (b) Can be considered valid transaction to the extent of ₹ 40 lakhs.

- (c) Can be considered as an invalid transaction under the relevant law.
  - (d) Can be considered as an invalid transaction under the relevant law to the extent of ₹ 25 lakhs.
2. Which one of the following transactions undertaken by Rajesh can be considered valid and lawful?
- (a) Transaction in respect of a property, where the person providing the consideration to Rajesh is not traceable.
  - (b) An arrangement by Rajesh in respect of a property made in a fictitious name.
  - (c) Property held by Rajesh in the name of his spouse and consideration paid out of known legal sources.
  - (d) A transaction by Rajesh in respect of a property where the owner is unaware of or denies knowledge of the ownership.
3. Share Trading by Raghu on behalf of Mahesh;
- (a) Is a valid transaction, since he is not at all connected with BBC Limited.
  - (b) Can be considered as an unlawful transaction as trading is indirectly done in the stock market by Mahesh, the Company Secretary, who has insider price-sensitive information.
  - (c) Can't be considered as an unlawful or invalid transaction.
  - (d) Is a valid transaction, if Girish does share trading on behalf of Mahesh, out of the loan of ₹ 5 Lakhs given by Mahesh.
4. JJPL also took loans from various banks and financial institutions. The funds were diverted and transferred to bank accounts of group companies, from where they were systematically siphoned off and were used for the purchase of various properties in India and abroad. JJPL claimed such proceeds of crime to be untainted property. Which one among the following statements is correct?
- (a) Such offenses are non-cognizable
  - (b) Such offenses are always bailable
  - (c) Such offenses are cognizable and always non-bailable
  - (d) Such offenses are cognizable and non-bailable but a person can be bailed subject to certain conditions.

5. Monies in the bank accounts of JJPL were also often transferred as legitimate business transactions, to the bank accounts of RDPL, which is also in a similar business like JJPL. In respect of the transactions done by JJPL, the crime money injected into the formal financial system is layered, moved, or spread over various transactions in different accounts. This step under the relevant law is referred to as:
- (a) Smurfing
  - (b) Integration
  - (c) Layering
  - (d) Placement

## **II. Descriptive Questions**

6. Critically analyze the statement “the provisions of the Act need not necessarily apply only to persons, who try to hide their properties, but may also sometimes apply to genuine properties acquired out of disclosed funds”. Also, cite the relevant incidence/s in the aforesaid case and the name of the relevant applicable Act.
7. Rajesh formed a company, JJPL, primarily in the hotel business, but the source of funding was secret drug dealings.
- (i) Is secret drug dealings and then disguising the original source of money for business, a predicate offence? Is there any difference between a Scheduled Offence and a Predicate Offence?
  - (ii) Who investigates predicate offences?
  - (iii) What are the possible actions that can be taken against Rajesh or JJPL or other concerned persons in the above case, for the alleged offences?
8. The Enforcement Directorate (ED) conducted raid operations against Rajesh and his associates after it obtained some inputs on the purported dubious financial transactions.
- (i) What are the rights of Rajesh and his associates, being searched during the raid operations?
  - (ii) What are the rights of Rajesh during his arrest, in the case arrested?

**ANSWERS TO CASE STUDY 33****I. Answers to Multiple Choice Questions**

1. (d) Can be considered as an invalid transaction under the relevant law to the extent of ₹ 25 lakhs

**Reason**

Section 2(9)(A)(b)(iii) of the PBPT provides as under-

**“benami transaction” means,—**

(A) a transaction or an arrangement—

- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by—**

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

In the given case the purchase of property by Raghav in the name of his wife comes under the exempted category of benami transaction as per the provisions of section 2(9)(A)(b)(iii), provided the such property has been purchased out of the known sources of the Raghav. However, Raghav has made payment of ₹ 25 lakh from the undisclosed source of income, hence to that extent it is benami transaction.

2. (c) Property held by Rajesh in the name of his spouse and consideration paid out of known legal sources

**Reason**

Section 2(9)(A)(b)(iii) of the PBPT provides as under-

**“benami transaction” means,—**

(A) a transaction or an arrangement—

- (a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by—**

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

The options mentioned in the case (a), (b) and (d) are not valid and lawful since it comes within the meaning of the benami transaction under section 2(9) of the PBPT Act. As regards the option (c) is concerned, the property purchased by Rajesh in the name of his wife comes under the exempted category of section 2(9)(A)(b)(iii) of the PBPT Act provided the consideration is paid out of the known sources of the income

3. (b) Can be considered as an unlawful transaction as trading is indirectly done in the stock market by Mahesh, the Company Secretary, who has insider price-sensitive information.

**Reason**

As given in the case, Mahesh is the Company Secretary of BBC Ltd. He might be having certain price sensitive information from time to time, which is not known in the public domain. Mahesh being the KMP and insider, cannot directly do trading in the shares of BBC Ltd so indirectly routed the transactions through the friend of friend i.e. Raghu.

4. (d) Such offences are cognizable and non-bailable but a person can be bailed subject to certain conditions.

**Reason**

Section 45(1) of the PMLA provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence under this Act shall be released on bail or on his own bond unless—

- (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

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

5. (c) Layering

**Reason**

There are three stages to a transaction of money-laundering:

- ◆ **Placement:** It is the first stage is, where the criminals place the proceeds of the crime into normal financial system.
- ◆ **Layering:** It is the second stage, where money introduced into the normal financial system is layered or spread into various transactions within the financial system so that any link with the origin of the wealth is lost.
- ◆ **Integration:** It is the third stage, where the benefit or proceeds of crime are available with the criminals as untainted money.

In the given case, the transactions done by JJPL, are termed as layering, since the crime money is being injected into the formal financial system which is layered, moved, or spread over various transactions in different accounts.

**II. Answers to Descriptive Questions**

6. Prohibition of the Benami Property Transactions Act 1988 (PBPT Act) is the applicable Act here. The general belief is that the provisions of the PBPT Act apply only to persons, trying to hide their properties and not to genuine properties acquired out of disclosed funds. But that is not true. Even a property acquired using disclosed funds in a genuine transaction may sometimes be treated as Benami.

“Benami Property” under Section 2(8) means any property, which is the subject matter of a Benami transaction and also includes the proceeds from such property.

Benami Property means property without a name. Here the person, who pays for the property does not buy it under his own name. The person, who finances the deal, is the real owner of the property.

Section 2(10) defines the meaning of benamidar, which means a person or a fictitious person, as the case may be, in whose name the property is transferred or held and includes a person who lends his name.

As per the provisions of Section 2(9) of the Act-

Benami transaction means-

- (A) A transaction or arrangement
  - (a) where a property is transferred to, or held by, a person, and the consideration for such property has been provided, or paid by, another person; and
  - (b) the property is held for the immediate or future benefit, direct or indirect, of the person, who has provided or paid the consideration,  
**except when the property is held by-**
    - (i) a Karta, or a member of a HUF, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the HUF.
    - (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;
    - (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;
    - (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint- owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or
- (B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or
- (C) A transaction or an arrangement in respect of property where the owner of the property is not aware of, or, denies knowledge of such ownership;
- (D) A transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.



*Explanation.*— For the removal of doubts, it is hereby declared that *benami* transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,—

- (i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;
- (ii) stamp duty on such transaction or arrangement has been paid; and
- (iii) the contract has been registered.

Any transaction where possession of any immovable property is taken as a part performance of a contract is not a Benami transaction if the contract is registered and consideration, as well as stamp duty, has been paid.

The property would include assets of any kind, whether movable or immovable, tangible or intangible and includes rights or interest as well as proceeds from the property.

In the above case study, in one of the cases, Subhash invested ₹ 1.50 Crores in a bank fixed deposit in the name of his married daughter, Mangala, who is a UK Resident, without her knowledge. Later during the course of inquiries by Tax officials, Mangala denied ownership of the said bank fixed deposit. Here, the transaction is Benami, in terms of section 2(9)(C), though the FD is generated using disclosed funds in a genuine transaction.

7. (i) Money Laundering is not an independent crime in itself. It depends upon another crime, which is known as the “Predicate Offence”. Every Scheduled Offence is a Predicate Offence.

Offences under Narcotic Drugs and Psychotropic Substances is a Scheduled Offence and as such a Predicate Offence too. As such secret drug dealings and then disguising the original source of money by Rajesh and JJPL is a Predicate offence.

In terms of Section 2(1)(y) of the PML, The Scheduled Offence means –

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

The commission of any offence, as specified in Part A and Part C of the Schedule of the PMLA will attract the provisions of the PMLA. Some of the Acts and offences, which may attract the PMLA, are enumerated herein below;

**Part A enlists offences under 29 Acts. These are:**

The Indian Penal Code, The Narcotic Drugs and Psychotropic Substances Act, 1985, The Explosive Substances Act, 1908, The Unlawful Activities (Prevention) Act, 1967, The Arms Act, 1959, The Wild Life (Protection) Act, 1972, The Immoral Traffic (Prevention) Act, 1956, The Prevention of Corruption Act, 1988, The Explosives Act, 1884, The Antiquities and Arts Treasures Act, 1972, The Securities and Exchange Board of India Act, 1992, The Customs Act, 1962, The Bonded Labour System (Abolition) Act, 1976, The Child Labour (Prohibition and Regulation) Act, 1986, The Transplantation of Human Organs Act, 1994, The Juvenile Justice (Care and Protection of Children) Act, 2000, The Emigration Act, 1983, The Passports Act, 1967, The Foreigners Act, 1946, The Copyright Act, 1957, The Trade Marks Act, 1999, The Information Technology Act, 2000, The Biological Diversity Act, 2002, The Protection of Plant Varieties and Farmers Rights Act, 2001, The Environment Protection Act, 1986, The Water (Prevention and Control of Pollution) Act, 1974, The Air (Prevention and Control of Pollution) Act, 1981, The Suppression of Unlawful, Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 and The Companies Act, 2013.

**Part B** offences (offence under the Customs Act), provided the value of the property involved is more than one crore rupees or more;

**Part C:** An offence which is the offence of cross border implications and is specified in Part A; or the offences against property under XVII of the IPC. The offence of willful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

The Schedule Office is called Predicate Offence and the occurrence of the same is a pre-requisite for initiating an investigation into the offence of money laundering.

- (ii) Predicate offences are investigated by the agencies such as Police, Customs, SEBI, NCB, CBI, etc. under their respective Acts.
- (iii) Following actions can be taken against the persons involved in Money Laundering:-

- (a) Attachment of property under Section 5, seizure/ freezing of property, and records under Section 17 or Section 18. The property also includes property of any kind used in the commission of an offence under the PMLA or any of the scheduled offences.
- (b) Persons found guilty of an offence of Money Laundering are punishable with imprisonment for a term which shall not be less than three years but may extend up to seven years and shall also be liable to fine [Section 4].
- (c) When the scheduled offence committed is under the Narcotics and Psychotropic substances Act, 1985 the punishment shall be imprisonment for a term which shall not be less than three years but which may extend up to ten years and shall also be liable to fine.
- (d) As per Section 19(1), the Director may by passing an order, arrest such persons and shall inform them of the grounds for such arrest.

These are the possible actions that can be taken against Rajesh, JJPL, or other concerned persons in the above case for their offences.

8. (i) The following are the rights of Rajesh and his associates under section 18 of the Prevention of Money Laundering Act, 2002, being searched during the raid operations;
- (a) Where an authority is about to search any person, he shall, if such person so requires, take such person within twenty-four hours to the nearest Gazetted Officer, superior in rank to him, or a Magistrate. [Section 18(3)]
  - (b) If the requisition is made, the authority shall not detain the person for more than twenty-four hours prior to taking him before the Gazetted Officer, superior in rank to him, or the Magistrate referred to in that sub-section. [Section 18(4)]
  - (c) The Gazetted Officer or the Magistrate before whom any such person is brought shall if he sees no reasonable ground for search, forthwith discharge such person but otherwise shall direct that search be made. [Section 18(5)]
  - (d) Search shall be made in the presence of two or more persons. [(Section 18(6)]
  - (e) No female shall be searched by anyone except a female [(Section 19(8)]
- (ii) The following are the rights of Rajesh during his arrest under section 19 of the Prevention of Money Laundering Act, 2002, in the case arrested:

- (a) The Authorized Officer making an arrest shall, as soon as may be, inform the arrestee of the grounds for such arrest. [Section 19(1)]
- (b) Every person so arrested shall, within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction. **Provided that** the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the special court or magistrate's court. [Section 19(3)]

## CASE STUDY 34

Delight Business Solutions (DBS) was established by Mr. Madan Shukla, around 20 years back. DBS was constituted initially in form of a proprietorship concern and was later converted into a private limited company in which Mr. Shukla & Mrs. Mamta Shukla, wife of Mr. Madan Shukla, became its members. The company is famous for its high-performance desktop-based personnel computers, but as the Information Technology (IT) industry developed new techniques over the period; resultantly prices started declining and the big fat profits, which earlier, DBS used to earn, started eroding.

DBS was primarily dealing in computers, spares, and accessories thereto but due to change in situations, DBS entered into trading and repairs of laptops and started offering maintenance services to small and medium entities with respect to IT equipment and infrastructure, in form of Annual Maintenance Contract (AMC) at just ₹ 999 per equipment and per year with a plan called 'AMC@999'. 'AMC@999' made DBS famous among corporate houses. Since the price charged (₹ 999) was pretty much lesser than what others were charging and was even below the cost incurred by DBS. In a short span, DBS started getting contracts from larger clients and it became famous for its AMC deals. After few months, when DBS acquired significant market share, the price of AMC was raised from ₹ 999 to ₹ 1499 which was taken as an unfair move by the existing customers of DBS as it appeared that after acquiring such a significant position in the market, when the other players were wiped out, such a move was made by DBS.

In order to diversify, DBS, entered into two other sectors, one being information technologies enabled services (ITeS) in which it offered customized software, ranging from accounting packages to human resources solutions and business process outsource (BPO) services in form of a private company, 'DBS Consultancy Services Private Limited (DBSCS)'; and other being the development of real estate in form of the private company, 'DBS Realtors and Developers (DBSRD)'.

Ministry of Urban Local Bodies in one of its press conferences gave hint about Government's intention to remove prohibitions on Foreign Direct Investment (FDI) in the real estate sector. Various trade groups through trade associations reached to the government with their concerns relating to the adverse effect of such policy on domestic industry and competition and requested not to launch FDI policy in the real estate. Since elections were due in major states in a year or two to come, hence, Central Government, sent the matter for reference to Competition Commission to assess the validity of concerns shown by different trade groups and in order to give assurance to such trade groups that anything which is detrimental to their

interests will not be turned-up. Competition Commission gave its opinion to the government regarding the prospective effect on competition but Central Government did not consider such advice or opinion of Competition Commission and said such change in FDI policy was an essential part of government plan.

The BPO business of DBSCS was not doing well. Hence, Mr. Shukla decided to wind-up the BPO business, but was concerned about the realization of huge investment done in building and furniture. The building was structured in such a way that it could not be converted into residential property and was situated in an industrial area too. Mr. Shukla consulted his legal advisor for identifying DBSCSs' eligibility for moving an application for initiation of insolvency process of DBSCS, to the adjudicating authority.

The first real estate project of DBSRD was a big hit because the government had announced a list of 100 cities that were selected for mission 'smart city' and the city in which DBSRD started its first project was one amongst them. All the apartments were booked in the first week of opening of bookings, after the advertisement. The cost of each apartment was ₹ 70 lakhs. The advance of ₹ 10 lakhs was collected from each of the allottees and the allotment letters were issued in their names. Agreements for sale for few apartments were still pending to be entered, and in the case of some, were pending for registration.

Mr. & Mrs. Shukla went to New Zealand for the holidays. There they met, Mr. Binni, a cousin of Mrs. Shukla, who got settled in Christ church, since, 1990, although an Indian origin and is in the business of manufacturing and trading of food and beverages. Presently, the business of Mr. Binni is flourishing and he planned to open a branch office in India, for which he asked Mr. Shukla to help him in identifying suitable property. Mr. and Mrs. Shukla converted Indian rupees worth USD 500,000 through an authorised dealer for the foreign tour and they had spent an amount equal to USD 450,000.

Mr. Shukla told Mr. Binni about his building in the BPO business for which Mr. Binni agreed and the same building was sold to him, after making certain changes in the structure of the building, for ₹ 3 crores. ₹ 1 crore was repatriated into India and the sale proceeds were deposited into the personal account of Mrs. Shukla and her mother equally. The remaining ₹ 2 crores were not repatriated into India and the same was shown as loan/advance given in the books of accounts of DBS.

With, ₹ 1 crore, which was deposited into Mrs. Shukla's and her mothers' accounts, a plot was purchased and was registered in the name of Ms. Rinki (daughter of Mr. and Mrs. Shukla). Ms. Rinki received a notice from the office of the Deputy Commissioner of Income Tax (DCIT), to be present in his office and he himself initiated the inquiry. Based upon the re-presentation made by Ms. Rinki and documents furnished, she was held Benamidar, and a penalty was imposed on her. She wished to file an appeal against the said order from the office of DCIT.

**I. Multiple Choice Questions**

1. Is charging ₹ 999 for plan AMC@999, can be considered a predatory price?
  - (a) No, charging ₹ 999 for AMC can't be considered a predatory price.
  - (b) Yes, at the discretion of the competition commission.
  - (c) Yes, because the price charged is lesser than the other players in the market.
  - (d) Yes, because the price charged is less than its cost as well.
2. DBSRD is in contravention of the provisions of the Real Estate (Regulation and Development) Act, 2016, with respect to:-
  - I. Advance or booking fees collected was more the 10%.
  - II. Advance or booking fees was collected without entering into a written agreement for sale.
  - III. In the case of some, written agreements for sale (referred to in point 2 above) were pending for registration.
  - (a) I and II
  - (b) II and III
  - (c) I and III
  - (d) All the points
3. If DBSCS furnish an application for the initiation of insolvency resolution process, then adjudicating authority shall within a period of \_\_\_\_\_ days from the date of receipt of application; either accept the application or reject the same; but in case of rejection, a notice to rectify the defects in his application, within a period of \_\_\_\_\_ days from receipt of such notice shall be given.
  - (a) 7, 7
  - (b) 14, 7
  - (c) 7, 14
  - (d) 14, 14
4. Which of the following statements is true regarding the validity of inquiry against Ms. Rinki regarding benami transaction by the DCIT office?
  - (a) DCIT can conduct an inquiry himself, without any approval.

- (b) DCIT can conduct an inquiry after intimation to the Approving Authority.
  - (c) DCIT can conduct an inquiry with prior approval of the Approving Authority only.
  - (d) No, DCIT has no authority to conduct any an inquiry, despite permission.
5. Mr. and Mrs. Shukla shall surrender unused/unspent foreign exchange within a period of \_\_\_\_\_ days from the date of their return to India.
- (a) 60
  - (b) 90
  - (c) 120
  - (d) 180

## **II. Descriptive Questions**

6. The legal advisor, while explaining the process and eligibility of DBSCS for making an application to the adjudicating authority for the initiation of the insolvency process, also explained to the directors, certain cases, where the insolvency process can't be initiated. In that context, please explain:-
- (i) Person who can't move the application of insolvency
  - (ii) What shall be the information to be furnished along with the application by the corporate applicant?
7. (i) Can a person of Indian origin who is a resident outside India, buy immovable property in India?
- (ii) Proceeds from the sale of BPO business's building were not fully recovered and repatriated by Mr. Shukla, on behalf of DBSCS. Explain the legal duties of DBSCS under the Foreign Exchange Management Act, 1999.
8. (i) Whether the increase of price by DBS for AMC contract from ₹ 999 to ₹ 1499, can be constituted as abuse of dominance; Explain with reasons.
- (ii) Role of the Competition Commission is vital in order to ensure healthy competition in the market. In the present case, determine the legal validity of government action in terms of 'making reference to' & 'refusal to consider the opinion' furnished by the Competition Commission.



**ANSWERS TO CASE STUDY 34****I. Answers to Multiple Choice Questions**

1. (d) Yes, because the price charged is less than its cost as well.

**Reason**

According to explanation (b) attached to section 4(e) of the Competition Act, 2002, “predatory price” means the sale of goods or provision of services, at a price **which is below the cost**, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

In the given case, it is mentioned that the price charged (₹ 999) by the DBS was much lesser than what others were charging and was even below the cost incurred by DBS. Therefore, it is treated as predatory price.

2. (d) All the points

**Reason**

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

In the given case the DBSRD collected advance of ₹ 10 lakhs, while the cost of the flat was only ₹ 70 lakh, which is higher than 10%. Further it also accepted advance without written agreement for sale. Moreover, the agreements for sale for few apartments were still pending to be entered, and in the case of some, were pending for registration. Therefore, DBSRD has violated all points mentioned in the MCQ.

3. (b) 14, 7

**Reason**

**Acceptance of application:** Section 7(4) of the IBC provides that the Adjudicating Authority shall, **within fourteen days** of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

**Rectification of defect in the application:** The proviso to section 7(5) further states that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to **rectify the defect in his application within seven days** of receipt of such notice from the Adjudicating Authority.

4. (c) DCIT can conduct an inquiry with prior approval of the Approving Authority only.

**Reason**

Section 23(1) of the PBPT Act, **the Initiating Officer, after obtaining prior approval of the Approving Authority**, shall have power to conduct or cause to be conducted any **inquiry or investigation** in respect of any person, place, property, assets, documents, books of account or other documents, in respect of any other relevant matters under this Act.

5. (d) 180

**Reason**

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

## II. Answers to Descriptive Questions

6. (i) As per section 11 of the Insolvency and Bankruptcy Code, 2016, the following persons shall not be entitled to make an application to initiate the corporate insolvency resolution process, namely:
- (a) A corporate debtor undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process, or
  - (aa) A financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process, or
  - (b) A corporate debtor having completed corporate insolvency process twelve months preceding the date of making of the application, or

- (ba) A corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application, or
- (c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making an application, or
- (d) A corporate debtor in respect of whom a liquidation order has been made.

Explanation I: For purpose of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

Explanation II: For the purposes of this section, it is clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

- (ii) As per section 10(3) of the Insolvency and Bankruptcy Code, 2016, the corporate applicant shall, along with the application, furnish-
  - (a) The information relating to its books of account and such other documents for such period as may be specified;
  - (b) The information relating to the resolution proposed to be appointed as an interim resolution professional; and
  - (c) The special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving the filing of the application.

7. (i) As per regulation 3 of Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018,

An NRI or and OCI may -

- (a) acquire immovable property in India other than agricultural land/ farm house/ plantation property:

Provided that the consideration, if any, for transfer, shall be made out of –

- (i) funds received in India through banking channels by way of inward remittance from any place outside India or

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

Provided further that –

- ◆ no payment for any transfer of immovable property shall be made either by traveler's cheque or by foreign currency notes; or
  - ◆ by any other mode other than those specifically permitted under this clause.
- (b) acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;
- (c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;
- (d) transfer any immovable property in India to a person resident in India;
- (e) transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI.
- (ii) Section 8 of the Foreign Exchange Management Act, 1999, deals with realisation and repatriation of foreign exchange. It provides that, save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

RBI has specified the Foreign Exchange Management (Realisation, Repatriation, and Surrender of Foreign Exchange) Regulations, 2015, in this regard;

**Regulation 3: Duty of persons to realise foreign exchange due**

A person resident in India to whom any amount of foreign exchange is due or has accrued shall, save as otherwise provided under the provisions of the Act, or the rules and regulations made thereunder, or with the general or special permission of the Reserve Bank, take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from

doing anything, or take or refrain from taking any action, which has the effect of securing -

- (a) that the receipt by him of the whole or part of that foreign exchange is delayed; or
- (b) that the foreign exchange ceases in whole or in part to be receivable by him.

**Regulation 4. Manner of Repatriation:-**

- (1) On realisation of foreign exchange due, a person shall repatriate the same to India, namely bring into, or receive in, India and –
  - (a) sell it to an authorised person in India in exchange for rupees; or
  - (b) retain or hold it in account with an authorised dealer in India to the extent specified by the Reserve Bank; or
  - (c) use it for discharge of a debt or liability denominated in foreign exchange to the extent and in the manner specified by the Reserve Bank.
- (2) A person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer.

**Regulation 5. Period for surrender of realised foreign exchange:-**

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person under clause (a) of sub-regulation (1) of regulation 4, within the period specified below:-

- (1) foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;
- (2) in all other cases within a period of **ninety days** from the date of its receipt.

Hence, the DBSCS needs to realise, then repatriate, and then convert the foreign exchange, by making sale to authorised dealer within 90 days from the date of receipt.

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

Further, section 4(2)(a)(ii) says that there shall be an abuse of dominant position, if an enterprise or a group, directly or indirectly, imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or service.

Here, it is given in the case, that DBS acquired significant market share which appears that it was able to achieve a dominant position as aforesaid and the rise in price by DBS of AMC contracts from ₹ 999 to ₹ 1499 can be constituted as abuse of dominance as from the facts given in the case, it appears that DBS raised its prices after acquiring a dominant position in the relevant market, when the other players were wiped out from the market and where the customers were left with no choice but to opt for or continue taking the services of DBS.

- (ii) Chapter VII of the Competition Act, 2002, deals with provisions on Competition Advocacy. It comprises only one section, which section 49. It reads as under-

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

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

Hence, the Central Government is legally correct in both of the aforesaid aspects i.e. ‘making reference to’ & ‘refusal to consider the opinion’ as furnished by the Competition Commission.

## CASE STUDY 35

Mr. Naushad Ali is a managing director at Naushad Enterprises Private Limited (NEPL), registered under the Companies Act, 1956. NEPL was established around 60 years back in 1960, by the grandfather of Mr. Naushad Ali. Since then, 'Precision', is the most popular brand of NEPL. NEPL deals in different types of bearing balls exclusively. Precision is famous for conformance to specification and finishing. NEPL has made SOPs in all its domains, including procurement and supply of material; to ensure timely delivery of material and timely collection and payments of sale proceeds. NEPL has captured the maximum possible domestic market.

Apart from NEPL, there is another major player in the manufacturing of bearing balls, i.e. Aarti Steels Private Limited (ASPL). Since NEPL has been working profitably for many years; it has huge free realized reserves. NEPL with the use of such available reserves made a hostile takeover of ASPL, and resultantly became the largest manufacturer and supplier of bearing balls and gained a market share of approximately 80%. Gross assets situated in India of the combined entity, after such merger is ₹ 1800 crores and domestic turnover is ₹ 6500 crores.

Post-merger, the listed prices of bearing balls were increased by 40%. There is no major increase in prices of raw-material and labour charges. Sales dipped by 2-3%, but there are clear instructions from NEPL to all of its suppliers/stockists and even retailers that, they are not allowed to sell below such list price. If anyone in the distribution network is identified doing so, selling products at a price, below the list price, will be blacklisted.

In recent times, NEPL is on the drive to diversify its business. NEPL entered into the business of production & trading of designer wood items and also entered into the business of the real estate.

NEPL purchased two pieces of land, out of funds with the company and one of the plots was registered in the name of Mrs. Wahida, mother of Mr. Naushad Ali. On the plot which was registered in the name of NEPL, it developed a real estate project on it by constructing 40 flats of 120 square meters each. The sale price of each flat was fixed at 40 lakhs, whereas the estimated cost of each flat is 32 lakhs; which will result in a total project value of ₹ 16 crores and an estimated total project cost of ₹ 12.80 crores. Real Estate Regulatory Authority also estimated the same. NEPL failed to register the project with authority under the Real Estate (Regulation & Development) Act 2016 because it was discovered that the information provided/furnished was largely false. NEPL approached Satya Real Estate Advisors, a registered real estate agent, to deal in the NEPL housing project, but Satya Real Estate Advisors denied the offer stating that the project was not registered with the authority. The project remained in a low profile because NEPL failed to deliver the flats on the committed

date. Due to such experience, NEPL decided not to engage in the real estate business in the future.

Another piece of land, which was registered in the name of Mrs. Wahida was sold to Mr. Danish Akhtar for ₹ 2.25 crores (2 crores through cheque and balance in cash) and the proceeds of the same were deposited into the personnel account of Mrs. Wahida. Mrs. Wahida converted the entire proceeds (except for keeping ₹ 5 lakhs cash with her) into US\$ 300,000 without any intimation/approval and remitted the same to his grandson, Mr. Amin, as a gift on his 25<sup>th</sup> birthday, who is staying in the USA with his wife, Ms. Shazia, and 2 years older son, Azhar.

In the meantime, when demonetization was announced by the government, she deposited the said five lakhs equally into the personal savings accounts of her domestic helper, gardener, gate-keeper, and driver respectively, as their salary in advance for the upcoming 12 months, to which all the aforesaid persons happily agreed.

NEPL is dealing in a wide range of designer wood items for home decoration and personal use with brand-name 'Décor' and 'Wellness Mantra'. In order to ensure quality, NEPL used to import, teak wood logs, from Indonesia and Nigeria. Recently on 10<sup>th</sup> October 2019, 27,618 CBM of teak wood logs were imported against the letter of credit from Indonesia at a price of ₹ 68.75 per CBM, totaling to ₹ 24,23,448, on which following levies were charged and the same was duly paid.

Particulars	Amount (in ₹ )
Assessable Value	24,23,448.00
Add: Basic Custom Duty @ 5% (HSN code 44034910)	1,21,172.40
Add: Social Welfare Surcharge @10% of BCD	12,117.24
	25,56,737.64
Add: IGST @ 18%	4,60,212.78
	<b>30,16,950.42</b>

NEPL became the country-wide largest manufacturer of wooden muscle rollers (massager) and wooden wall clocks. NEPL captured a reasonable size of the domestic market in the business of wooden articles. NEPL is now looking to explore the global market. Recently, NEPL, shipped its first export order on 5<sup>th</sup> May 2020, of 9,800 muscle roller massagers (export duty was exempt on it) at ₹ 416.63 each, totaling to ₹ 40,82,974 to Australia.



**I. Multiple Choice Questions**

1. Whether a hostile takeover of ASPL by NEPL, will result in a combination as per the provisions of the Competition Act, 2002?
  - (a) For determining combination, there is no criteria of assets and turnover
  - (b) For determining combination, the assets should be more than ₹ 2000 crores
  - (c) For determining combination, the turnover should be more than ₹ 8000 crores
  - (d) For determining combination, the assets should be more than 1000 crores rupees and turnover should be more than ₹ 3000 crores
2. What shall be the maximum penalty that could be levied upon NEPL, for furnishing false information in an application to Real Estate Regulatory Authority?
  - (a) ₹ 80 Lakhs
  - (b) ₹ 64 Lakhs
  - (c) ₹ 160 Lakhs
  - (d) ₹ 128 Lakhs
3. Who will be considered as the beneficial owner under the Prevention of Money Laundering Act 2002 with respect to advance salary paid by Mrs. Wahida to her employees/caretakers?
  - (a) Mr. Naushad Ali
  - (b) Mrs. Wahida
  - (c) Domestic help, Gardener, Gate-keeper, and Driver
  - (d) Both (a) and (b) above
4. Who shall be considered as the benamidar in respect of property bought by NEPL out of the company's funds, but registered in name of Mrs. Wahida?
  - (a) Mr. Naushad Ali
  - (b) Mrs. Wahida
  - (c) Mr. Danish Akhtar
  - (d) NEPL
5. NEPL shall realize and repatriate, the full value of export within a period of:-
  - (a) 15 months from the date of export

- (b) 6 months from the date of receipt of material by an overseas importer
- (c) 9 months from the date of export
- (d) 9 months from the date of receipt of material by an overseas importer

## II. Descriptive Questions

6. (i) Identify the incidence of contravention of provisions of the Foreign Exchange Management Act, 1999 and regulations issued thereunder, from the given case study.  
 (ii) State the amount of penalty that could be levied in case of the contravention identified.  
 (iii) Whether the aforesaid contravention is compoundable in nature, if yes, please state the relevant provisions?
7. Whether any act conducted by NEPL, is prohibited under the provisions of the Competition Act, 2002? Please state the circumstances.
8. What shall be the quantum of monetary penalty that can be imposed on NEPL, for not getting its project registered with the Real Estate Regulatory Authority?

## ANSWERS TO CASE STUDY 35

### I. Answers to Multiple Choice Questions

1. (d) For determining combination, the assets should be more than 1000 crores rupees and turnover should be more than ₹ 3000 crores

#### Reason

Section 5 (c) of the Competition Act, 2002 provides that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if

#### any merger or amalgamation in which—

- (i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,—  
 (A) either in India, the assets of the value of more than rupees 1000 crores or turnover more than rupees 3000 crores.

In the given case, the gross assets situated in India of the combined entity, after such merger is ₹ 1800 crores and domestic turnover is ₹ 6500 crores.

2. (b) ₹ 64 Lakhs

**Reason**

Section 60 of the RERA provides that if any promoter provides false information or contravenes the provisions of section 4, he shall be liable to **a penalty which may extend up to five per cent. of the estimated cost** of the real estate project, as determined by the Authority.

In the given case, the estimated total project cost is ₹ 12.80 crores, so 5% of it comes to ₹ 64 lakhs.

3. (c) Domestic help, Gardener, Gate-keeper, and Driver

**Reason**

Section 2(1)(fa) of the PML provides that “beneficial owner” means an **individual who ultimately owns** or controls a client of a reporting entity or **the person on whose behalf a transaction is being conducted** and includes a person who exercises ultimate effective control over a juridical person.

In the given case, when demonetization was announced by the Government, Wahida, deposited 5 lakh rupees in the personal savings account of her domestic helpers. These helpers ultimately owns the money, transactions by Wahida has been done on behalf of these person, these persons shall be termed as beneficial owner.

4. (b) Mrs. Wahida

**Reason**

Section 2(10) of the PBPT Act, “benamidar” means a person or a fictitious person, as the case may be, **in whose name the benami property is transferred or held and includes a person who lends his name.**

In the given case, NEPL purchased two pieces of land, out of funds with the company and one of the plots was registered in the name of Mrs. Wahida, mother of Mr. Naushad Ali. Therefore, the name of Wahida is termed as benamidar since the property is transferred in her name or say she has lent her name for purchase of property in her name,

5. (a) 15 months from the date of export

**Reason**

As per para 9(1) of Foreign Exchange Management (export of goods and services) Regulation, 2015; the amount representing the full export value of goods exported shall be realized and repatriated to India within 9 (Nine) months from the date of export normally.

But vide RBI/2019-20/206 - A. P. (DIR Series) Circular No. 27 dated 1<sup>st</sup> April 2020, it has been decided, (in consultation with Government of India – in response to representations from Exporters Trade bodies to extend the period of realisation of export proceeds in view of the outbreak of pandemic COVID-19), to increase the present period of realization and repatriation to India of the amount representing the full export value of goods or software or services exported, from nine months to fifteen months from the date of export, for the exports made up to or on July 31, 2020.

**II. Answers to Descriptive Questions**

6. (i) As per rule 5 of Foreign Exchange Management (Current Account Transactions) Rules, 2000 read with liberalized remittance scheme; for purpose of transactions mentioned in Schedule III, resident individuals are permitted to remit overseas up to USD 250,000 per financial year. Such remittances are permitted to be used for conducting permissible current or capital account transactions and subsumes gift in foreign currency made to any NRI or Persons of Indian Origin ("PIO"). Any additional amount in excess of the said limit requires prior approval of RBI.
- Hence, Mrs. Wahida could remit a maximum of USD 250,000 as a gift to his grandson abroad. But Mrs. Wahida remitted USD 300,000 without any intimation/approval, which is in contravention to FEMA provisions.
- (ii) As per section 13 of Foreign Exchange Management Act 1999, if any person contravenes any provision of this act, or contravenes any rule, regulation, notification, direction, or order issued in exercise of the powers under this act, or contravenes any condition subject to which an authorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to **thrice the sum involved in such contravention where such amount is quantifiable**, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

With reference to schedule III of the Foreign Exchange Management (Current Account Transactions) Regulations 2000, in the present case, the amount involved in the contravention is USD 50,000 because the amount permissible by Schedule III read with LRS is USD 250,000. Hence, amount of penalty that could be levied will be an amount equal to USD 150,000 (i.e. 3 times of USD 50,000).

- (iii) Yes, contravention committed is compoundable in nature.

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

Sub-section (2) of section 15 states that where a contravention has been compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section, in respect of the contravention so compounded. [Section 15(2)].

7. There are three major acts conducted by NEPL, in relation to the Competition Act, 2002, let's study them one by one, as follows:-

**Entering into combination with ASPL** – As per section 6 of the Competition Act, 2002, no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

In the given case, NEPL after acquiring ASPL got a significant market share and increased the prices also, likely to cause an appreciable adverse effect on the competition in India within the relevant market, hence, such a combination can even be considered as void under the act.

**Increase in price without much/significant increase in raw material prices and labour charges** – Post hostile take-over of ASPL, since, NEPL got dominance over the market, hence, it increased the prices by 40%.

Section 4(1) of the Competition Act, 2002 provides that no enterprise or group shall abuse its dominant position. Its sub-section (2)(a) states that there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group, directly or indirectly, imposes unfair or discriminatory (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service.

Such increase in price by NEPL will be considered as abuse of dominance under sub-clause (ii) to clause (a) to sub-section 2 of section 4 of the Competition Act, 2002.

**Note** – Dominance is not prohibited, prohibition is on abuse of dominance.

**Resale Price Maintenance** – As per explanation(e) to section 3(4) - “resale price maintenance” includes any agreement to sell goods on the condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Further, as per section 3(4) read with section 3(1) of the Competition Act 2002, such resale price maintenance agreement is prohibited.

Hence, the act of NEPL of issuing clear instructions to all of its suppliers/ stockists and even retailers that, they are not allowed to sell below such list price is prohibited under the Competition Act, 2002.

**Note** – The clause, ‘who is selling product at price below the list price, will be black listed’ is of no importance.

8. Section 59 of The Real Estate (Regulation and Development) Act, 2016 deals with punishment for non-registration under section 3. It reads as under:

- (1) If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which **may extend up to ten percent of the estimated cost** of the real estate project as determined by the Authority.
- (2) If any promoter does not comply with the orders, decisions, or directions issued under sub-section (1) or continues to violate the provisions of section 3, he shall be punishable with imprisonment for a term which may extend up to three years or with fine which may extend up to a further ten percent of the estimated cost of the real estate project, or with both.

So, in the present case, in terms of section 59(1), the promoter shall be liable to a penalty which may extend upto 10% of the estimated cost i.e. ₹ 12.80 crores can be imposed on NEPL, which amounts to ₹ 1.28 crores.

Moreover, in terms of section 59(2), if the NEPL do not comply the provisions of section 3(1) it shall be punishable with imprisonment for a term which may extend up to 3 years OR with fine which may extend upto a further 10% of the estimated cost of the real estate project i.e. ₹ 1.28 crores, or with both.

## CASE STUDY 36

Mr. Amitabh Dutta was a professor who took voluntary retirement in the year 2008, from the College of Engineering, Nagpur. In his family, he has his wife, Rukmani, and three sons. His elder son's name is Dhruv who is a banker and an NRI residing in the Canada for last five years and his wife's name is Shreya. Mr. Amitabh's second son name is Arav who is an engineer by profession and well settled in Australia with his wife, Manju. Mr. Amitabh's youngest son's name is Asmith who recently got married and his wife's name is Saniya and he is living in India with Mr. Amitabh Dutta.

After voluntary retirement, Mr. Amitabh Dutta established a company called Krishna Industries Limited, in the year 2009. His son, Asmith, daughter in law, Saniya, and wife, Rukmani, became the directors of the company. The company had raised its capital by issuing shares in 2015. It had issued 10 million shares at the rate of ₹ 100 per share. An investor, Mr. John Tailor, who is an NRI, invested in the company's shares by purchasing 1,000 shares of the company.

Mr. Dhruv Dutta visited India, in the year 2018. He had heard about many upcoming real estate projects in Mumbai and wanted to invest in a newly launched township in Thane, Mumbai. After a few searches for properties in that area, he and his wife thought to invest in a project called, "Riveria Condename", which is proposed to be built in an area of around 2000 square metres. After seeing the model flat, they finally decided to buy a 3BHK flat at ₹ 3 crores. The builder demanded ₹ 50 Lakh as advance payment. But after negotiation, Mr. Dhruv paid ₹ 40 lakhs to the promoters, from his FCNR account, as advance prior to the agreement of sale. The date of completion of the project was June 2021. The remaining payment was to be made according to the completion of the slabs. After six months, the promoters were in shortage of funds. They decided to transfer their majority rights in the project to another company called, Z-One Construction Company. They held a meeting of 1/4<sup>th</sup> of the allottees and obtained written permission from the allottees present in the meeting for the said transfer.

Mr. Amitabh Dutta had a 3000 sq. feet plot in the posh area of Malabar Hills, Mumbai. The adjoining bungalow belonged to the U.A.E Embassy. Mr. Amitabh Dutta's plot was sea-facing, so the ambassador of U.A.E wanted to purchase that plot. After a few talks with Mr. Dutta, the deal was finalised at whooping ₹ 25 crores.

Krishna Industries Limited has generated huge profits since 2014. The company's shares are also performing well in the share market and generating huge profits for the company. So, in the general meeting held on 2<sup>nd</sup> September 2018, Mr. Amitabh Dutta declared a great amount

of dividend on the shares. Mr. Amitabh Dutta also decided to gift two of his self-acquired farm houses, to his sons, Mr. Dhruv and Mr. Arav. Both the sons were so happy to receive such a gift from their father. After sometime, Mr. Dhruv came to know that his cousin is selling a European style villa in Canada. Mr. Dhruv wanted to purchase that villa. Mr. Dhruv came to know from his cousin that after selling this villa, he will purchase some property in India. So, Mr. Dhruv told his cousin that he will gift him his farm house in India, and in return, he will pay the differential amount of the property to his cousin in Canada. Mr. Dhruv's cousin liked the offer and finally agreed to it.

Mr. Amitabh and his wife Mrs. Rukmani decided to go on a trip to a foreign destination. They consulted their travel agent. Their travel agent suggested many plans. After going through all the plans and trip details, Mr. Amitabh and Mrs. Rukmani decided to go on a European tour. They took USD 5,000 in cash along with them for their expenditure. They spent around USD 3,500, on their shopping, hotels bills, and dining. Out of the total cash carried by them, USD 1,500 was left unspent with them. They deposited this USD 1,500, in their FCNR account.

Arav Dutta who is an Engineer by profession wanted to start an industry of his own in India. He has a plan to build an industry for manufacturing switchgears near Gorakhpur. So, he visited India, on 21<sup>st</sup> March 2019 along with his wife and children and with one of his friends, Mr. Alex Johnson, who had heard a lot about India, from Mr. Arav and his wife. When they all visited India, Mr. Alex wanted to see the Taj Mahal and he got so much impressed by the beauty of the Taj Mahal and Mughal Architecture that he decided to extend his stay in India for 3-4 months in order to explore more about Indian culture and heritage. To support his stay in India, he required money, so he decided to open an NRO savings bank account with the Nationalised bank. He went back to his country on 27<sup>th</sup> September 2019. Mr. Arav, with his brother, Mr. Asmith, went to see some properties around Gorakhpur. After a few days, they finalised one property. The cost of the plot was ₹ 50 Lacs. Mr. Arav paid ₹ 5 lacs as earnest money through a cheque from his NRO account. After a few days, an agreement to sell was signed between both parties. The remaining amount, Mr. Arav paid through two cheques. On 12<sup>th</sup> May 2020, the property was finally registered in Mr. Arav's name. Now the next phase was of construction and buying and install plant and machinery. For this, Mr. Arav required a capital of ₹ 4 crores. So he decided to take the amount from his father, Mr. Amitabh, as he was short of ₹ 1 crore. He had a discussion with his father and took a loan of ₹ 1 crore from him. He decided to pay the entire loan amount to his father in the next two years. As planned, the construction of the industry started on time and finally, it got inaugurated on 19<sup>th</sup> September 2020.



**I. Multiple Choice Questions**

1. As per the provisions of the Foreign Exchange Management Act, 1999, Mr. Alex Johnson is a
  - (a) Person resident in India for both the financial years 2019-20 and 2020-21.
  - (b) Person resident in India for the financial year 2019-20 only.
  - (c) Person resident outside India for the financial year 2020-21.
  - (d) Person resident in India for the financial year 2020-21 only.
2. What shall be the maximum amount of advance as per provision of applicable laws that can be charged/paid in case of 3BHK flat booked Mr. Dhruv?
  - (a) Twenty lakhs rupees
  - (b) Thirty lakhs rupees
  - (c) Forty lakhs rupees
  - (d) Fifty lakhs rupees
3. The promoters of Riveria Condename transferred their majority rights to Z-one Construction Company. Has the company complied with the provisions of the relevant Act, before transferring its rights to another company? Choose the correct statement.
  - (a) The company has complied with the provisions, as written consent was taken from the allottees as required.
  - (b) The company is required to take prior written consent of two-third of allottees and approval from the authority also.
  - (c) Since the project is in the construction stage, the promoters can sell their rights to any other company as required.
  - (d) It depends totally on the sole discretion of the appropriate Government to grant permission to the promoters for transferring their rights to another company.
4. The U.A.E. Embassy bought the plot from Mr. Dutta at ₹ 25 crores. Whether a Foreign Embassy eligible under the provisions of FEMA to buy a property in India?
  - (a) After acquiring permission from the Reserve Bank of India, the Foreign Embassy can buy the property in India.
  - (b) After acquiring permission from the concerned State Government, the Foreign Embassy can buy the property in India.

- (c) After getting permission from the Ministry of External Affairs, the Foreign Embassy can buy the property in India.
  - (d) After getting permission from the Reserve Bank of India, the Foreign Embassy can only acquire the property on lease for a maximum of 10 years.
5. The loan is taken by Mr. Arav from his father, Mr. Amitabh, is credited to his NRO account. Is there any duration prescribed, within which the said loan is to be paid, and mode of its payment?
- (a) The loan should be paid within three years and it can be paid through inward remittance through normal banking channels or by debit through his NRO account.
  - (b) The loan should be paid within three years and it can be paid through inward remittance via normal banking channel or by debit through his NRE or NRO account.
  - (c) The loan should be paid within one year and can be paid through inward remittance via normal banking channel or by debit from NRE, NRO, or FCNR account.
  - (d) As it is not taken from any financial institutions, there is no time limit for payment of the loan and it can be paid through inward remittance via normal banking channel or by debit from NRE, NRO, or FCNR account.

## II. Descriptive Questions

6. (i) Mr. Amitabh Dutta gifted his self-acquired farm houses, to both his sons Mr. Dhruv and Mr. Arav, living abroad.
- (ii) Mr. Dhruv gifted the farm house which he received from his father to his cousin living in Canada and paid him the differential amount of the property situated in Canada.

Examine the legal status of both the above transactions as per the provisions of FEMA?

7. Mr. Amitabh Dutta's sons, Mr. Arav and Mr. Dhruv are living abroad. Can Mr. Amitabh Dutta make a remittance of ₹ 50 lacs each to both his NRI sons by way of crossed cheque/ electronic transfer for their maintenance abroad? Explain. (Presume 1 USD = ₹ 70)

**ANSWERS TO CASE STUDY 36****I. Answers to Multiple Choice Questions**

1. (c) Person resident outside India for the financial year 2020-21.

**Reason**

Section 2(v) of the FEMA provides the definition of 'Person resident in India', which reads as under:

**"person resident in India" means—**

(i) a person residing in India for more than 182 days during the course of the **preceding financial year but does not include—**

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

Section 2(w) "person resident outside India" means a person who is not resident in India.

**For 2019-20:** In the given Alex came in India on 21.3.2019. So, in the preceding financial year i.e. for the FY 2018-19 he stayed in India for 11 days. So, for the FY 2019-20, he is **Person resident outside India**

**For 2020-21:** Alex he left India on 27.9.2019 which means he remained in India in the preceding FY 2019-20 for 179 days only (from 01.04.2019 to 26.09.2019) for 179 days, which is less than 182 days. **Therefore for 2020-21, Alex is "Person resident outside India"**

2. (b) Thirty lakhs rupees

**Reason**

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

In the given case, since the cost of flat is 3 crores rupees, so the 10% advance comes to 30 lakh rupees only.

3. (b) The company is required to take prior written consent of two-third of allottees and approval from the authority also.

**Reason**

Section 15(1) of RERA provides that the promoter shall not transfer or assign his majority rights and liabilities in respect of a real estate project to a third party **without obtaining prior written consent from two-third allottees**, except the promoter, **and without the prior written approval of the Authority**.

4. (c) After getting permission from the Ministry of External Affairs, the Foreign Embassy can buy the property in India.

**Reason**

Regulation 5 of the FEM (Acquisition and Transfer of Immovable Property in India) Regulations, 2018. provides that a **Foreign Embassy/ Diplomat/ Consulate General** may purchase/ sell immovable property in India other than agricultural land/ plantation property/ farm house provided (i) **clearance from Government of India**, Ministry of External Affairs is obtained for such purchase/ sale, and (ii) the consideration for acquisition of immovable property in India is paid out of funds remitted from abroad through banking channels.

5. (c) The loan should be paid within one year and can be paid through inward remittance via normal banking channel or by debit from NRE, NRO, or FCNR account.

<b>II. Answers to Descriptive Questions</b>
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6. (i) As per regulation 3 (b) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 an NRI or an OCI may

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

Further regulation 3 (c) specifies the cases wherein through inheritance an NRI or an OCI can acquire the immovable property in India.

Mr. Dhruv and Mr. Arav are both NRIs. Hence, Mr. Amitabh Dutta cannot gift farm house to them, as it is prohibited under the provisions of FEMA.

- (ii) As per regulation 3 (b) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018

An NRI or an OCI may transfer any immovable property in India to a person resident in India;

An NRI or an OCI may transfer any immovable property other than agricultural land or plantation property or farm house to an NRI or an OCI. In case the transfer is by way of gift the transferee should be a relative as defined in section 2(77) of the Companies Act, 2013.

Firstly, as mentioned above, an NRI cannot transfer any agricultural land, farm house, or plantation property to another NRI or OCI. Secondly, an NRI, can by way of gift, transfer immovable property to his relative mentioned under section 2(77) of the Companies Act, 2013. According to the Companies Act, 2013, cousin is not covered under the definition of relative. Hence, the transfer of farm house by Mr. Dhruv to his cousin is invalid and prohibited under the provisions of FEMA, 1999.

7. A resident individual can remit to an NRI/PIO who is a close relative of the resident individual [relative' as defined in Section 2(77) of the Companies Act, 2013] by way of crossed cheque/electronic transfer. The amount should be credited to the Non-Resident (Ordinary) Rupee Account (NRO) a/c of the NRI / PIO and credit of such amount may be treated as an eligible credit to NRO a/c. The amount should be within the overall limit of USD 250,000 per financial year as permitted under the LRS for a resident individual. It would be the responsibility of the resident individual to ensure that the amount being remitted is under the LRS and all the remittances made by the said individual during the financial year including the amount remitted for maintenance have not exceeded the limit prescribed under the LRS.

Hence, remittance of ₹ 50 lacs each to both his NRI sons will be considered valid according to the provisions of FEMA if Mr. Amitabh Dutta has not remitted any amount

under LRS, in that particular financial year, then it is under the prescribed limit. If in any case, he has transferred any amount, then that amount will also be considered including this amount remitted. So, in the above-mentioned case, the amount to be remitted to both his sons is within the limit prescribed under LRS.

## CASE STUDY 37

Mr. Rajath and his two sons, Mr. Lokesh and Mr. Ramesh are the promoters of Rajath Beverages Limited (RBL). Rajath is the Chief Managing Director (CMD) of RBL. Lokesh looks after finance and marketing; while Ramesh takes care of production and human resources.

The production unit is located in Patna, Bihar. The business of RBL is manufacturing and selling mineral water. The company was formed with a small investment of Rs. 25 Lacs initially as a private limited company, however, later converted into an unlisted limited liability company. The promoters, through their hard work and business competence, ensured that RBL is profitable.

Lokesh is ambitious as well as a shrewd businessman. He always tried to beat the competition through flexibility in the pricing of his products. Sometimes he even sold some of the products at prices below the costs. He always looked for new avenues for business development, diversification, and expansion, for which Ramesh ably assisted him by providing him with the required feasibility reports, analysis, and technical information.

Years passed. The board of directors of RBL decided to go for public issue and listing of its equity shares, largely for expansion, initially with setting up a new large-scale mango juice preparation plant. The public offer was a great success and the required shares were duly allotted.

A new large-scale mango juice manufacturing plant was established in Patna, located next to the existing mineral water unit. The very initial year of operation was just breakeven. However unfortunately the second year of operation turned out to be negative for the Mango Juice unit due to bad monsoons and bad weather. There was a scarcity in the supply of mangoes, mango pulp, and some other basic raw materials required for the production of mango juice during the year 2017 in Bihar. Consequently, all the mango juice manufacturing units in Bihar, through their trade association, entered into an understanding for price-fixing with the sole purpose of defeating competition during the time of scarcity. However, the said understanding was not in writing and also not intended to be enforced by legal proceedings.

In due course of time, RBL entered into a joint venture agreement with Raman Pulp Private Limited (RPPL) of Punjab to ensure a continuous supply of mango pulp and some other raw materials to its mango juice manufacturing unit. With this JV and some other continuous supplies arrangements, RBL could gradually reach an advantageous position in Bihar for local sales of Mango Juice within the State. Production and sales of RBL increased by more than 10 times within a short period of time.

RBL also entered into various distribution agreements with different retail distributors within the state of Bihar to sell its products only in the area exclusively identified or allocated to each of them. Different agreements relating to prices, quantities, bids, and market sharing with the

competitors and other non-competing entities were also entered into by RBL.

RBL enhanced its production efficiency, introduced various cost-saving measures, and could substantially increase its market share in the sale of its products over a period of time. Many of the bankers, financial institutions, and potential investors approached and offer further financial assistance/investment. With all the productive measures, RBL could achieve the position of strength in the Bihar market to operate independently of competitive forces. RBL soon also diversified into other segments of businesses in beverages.

However, the continuing business competition also resulted in the Commission receiving formal information from one of the Trade Associations in Bihar that there is an abuse of dominance by RBL by contravening various provisions of the relevant law. The Commission initiated an inquiry and was of the opinion that there exists a prima facie case and directed the Director General (DG) to cause an investigation to be made into the matter and report the findings to the Commission.

After due investigation, the DG submitted his report to the Commission within the specified period. However, the allegations against RBL of the contravention of the law could not be substantiated during an investigation and were found to be mainly because of the business competition. The report of the DG recommended that, since there is no appreciable adverse effect on competition; hence there is no contravention.

The Commission forwarded copies of the report to both parties. After due consideration of the objections and suggestions, the Commission agreed with the recommendations of the DG, closed the matter, and passed the appropriate orders.

### **I. Multiple Choice Questions**

1. Board of Directors of RBL decided to go for public issue and listing of its equity shares, largely for business expansion, initially with setting up a new large-scale mango juice preparation plant. In the context of shares, which one of the following statements is correct under the Competition Act, 2002?
  - (a) Shares can't be considered as "goods" because nothing has to do with manufacturing, processing, or mining.
  - (b) Shares shall be considered as "goods" only if fully paid up.
  - (c) Shares shall be considered as "goods" after the application made for shares since application monies are paid for the acquisition of shares.
  - (d) Shares shall be considered as "goods" after allotment.
2. RBL also entered into a joint venture agreement with Raman Pulp Private Limited (RPPL) of Punjab to ensure the continuous supply of mango pulp and some other raw materials to its mango juice manufacturing unit. A Joint Venture agreement between RBL and RPPL is



- 
- (a) Anti-competitive, since resulted in an increased turnover for one company, as against others
  - (b) Not to be considered anti-competitive, since it enhanced the production efficiency of RBL
  - (c) Anti-competitive, since RBL could reach an advantageous position in Bihar because of this Agreement
  - (d) Void-ab-initio, since resulted in more sales to RBL as compared to other companies in Bihar.
3. The continuing business competition also resulted in the Commission receiving formal information from one of the Trade Associations in Bihar that there is an abuse of dominance by RBL by contravening various provisions of the relevant law. The composition of the said Commission (which received the formal information hereinabove), as per the relevant law shall be:
- (a) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the State Government.
  - (b) The Commission shall consist of a Commissioner and not less than two and not more than six other Members to be appointed by the Central Government.
  - (c) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.
  - (d) The Commission shall consist of a Chairperson and not less than two and not more than eight Members to be appointed by the Central Government.
4. All the mango juice manufacturing units in Bihar, through their trade association, entered into an understanding for price-fixing with the sole purpose of defeating competition during the time of scarcity. However, the said understanding was not in writing and also not intended to be enforced by legal proceedings. The oral understanding entered into by the trade association of Bihar in the aforesaid case is;
- (a) Not an agreement, because not intended to be enforced by legal proceedings.
  - (b) An arrangement but not an agreement
  - (c) A valid Agreement and shall be presumed to have an appreciable adverse effect on competition.
  - (d) A valid Agreement, but only if all the parties involved therein confirm it in writing.
5. Lokesh tried to beat the competition sometimes even by selling some of the products at prices lesser than costs. The sale of goods or provision of services, at a price below the cost, as may be determined by the regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors termed as:

- (a) Monopolistic price
- (b) Minimum Retail Price (MRP)
- (c) Eliminatory Price
- (d) Predatory Price

## II. Descriptive Questions

6. "An enterprise has the legal right to grow its business and achieve the position of strength to the maximum extent possible unless such position has been intentionally exploited to gain undue advantages".
- Analyze the above statement in the context of the given case (with all the productive measures, RBL could achieve the position of strength in the Bihar market to operate independently of competitive forces) with reference to the provisions of the relevant law in India, including the factors which the Commission shall consider in order to determine 'is there any dominance or abuse thereof'.
7. The Commission initiated an inquiry and was of the opinion that there exists a *prima facie* case and directed the Director-General to cause an investigation to be made into the matter and report the findings to the Commission.
- (i) Instead of any directions by the Commission, is there any possibility that Director-General *Suo-moto* initiates an investigation in the above case under any of the provisions of the relevant Indian law?
  - (ii) Imagine in the aforesaid case, the Commission passes an order directing the division of the enterprise, RBL. "*The Order of the Commission may provide for any or all the matters on a division of the enterprise enjoying the position of strength as stated under the law*". Explain the provisions of the relevant Law on what are the matters that may be provided for in the Order?
  - (iii) The Articles of Association of RBL provides that the Managing Director and the Directors are entitled to claim compensation (to the extent mentioned therein) in case they cease to hold their office(s) in consequence of the division of enterprise for any reasons. Is Ramesh, one of the directors of RBL, on cessation of his office entitled to claim compensation, because of the position stated in question (ii) above i.e. Commission passing an order for division of enterprise?
8. In the given case, RBL has entered into various types of agreements with various entities. "Any agreement at different stages or levels of the production chain in different markets for trade in goods or provision of services shall be void if it causes or is likely to cause an appreciable adverse effect on competition in India". State and explain five such agreements.

**ANSWERS TO CASE STUDY 37****I. Answers to Multiple Choice Questions**

1. (d) Shares shall be considered as “goods” after allotment.

**Reason**

As per Section 2(i)(B) of the Competition Act, 2002, “goods” means goods as defined in the Sale of Goods Act, 1930 and includes debentures, stocks and **shares after allotment.**

2. (b) Not to be considered anti-competitive, since it enhanced the production efficiency of RBL

**Reason**

The proviso to section 3(3) of the Competition Act, 2002 provides that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

3. (c) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

**Reason**

Section 8(1) of the Competition Act, 2002 provides that the Commission shall consist of **a Chairperson and not less than two and not more than six other Members** to be appointed by the Central Government.

4. (c) A valid Agreement

**Reason**

Section 3(3) of the Competition Act, 2002 provides that **any agreement entered into between enterprises or associations of enterprises** or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

- (a) directly or indirectly determines purchase or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way

of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

- (d) directly or indirectly results in bid rigging or collusive bidding

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

In the given case, some of the manufacturing units have entered into oral understanding with trade association for price fixing, which in terms of section 3(3)(a), shall be presumed to have an appreciable adverse effect on competition. It is immaterial, that it was an oral understanding. As per the contract laws, the contract can be in oral or written and both are valid, although the oral agreements are difficult to prove. Further the word 'understanding' shall be treated as oral agreements. So, it shall be treated as a valid agreement and such agreement **shall be presumed to have an appreciable adverse effect on competition.**

5. (d) Predatory Price

**Reason**

According to Explanation (b) to section 4(2)(e) of the Competition Act, 2002, "**predatory price**" means the **sale of goods or provision of services, at a price which is below the cost**, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

## II. Answers to Descriptive Questions

6. The statement "An enterprise has the legal right to grow its business and achieve the position of strength to the maximum extent possible unless such position has been exploited to gain undue advantages", simply signifies that 'Dominance is not prohibited, what prohibited is its' abuse'.

Sub-section (1) to section 4 of the Competition Act, 2002 (which is considered to be back-bone and principle component of competition law in India; (here-in-after referred to as the act) expressly says 'No enterprise or group shall abuse its dominant position'.

As per explanation (a) to section 4(2)(e) of the Act "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

Further as per sub-section 2 to section 4 of the Act, there shall be "abuse of dominant position" if an enterprise or group;

- (a) directly or indirectly, imposes unfair or discriminatory (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or services
- (b) limits or restricts (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
- (c) indulges in practice or practices resulting in denial of market access in any manner or
- (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage have no connection with the subject of such contracts; or
- (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market/s.

In the present case, mere achieving of the position of strength in the Bihar market by RBL to operate independently of competitive forces is not prohibited under the Act.

Abuse of a dominant position is prohibited because it impedes fair competition between firms, exploits consumers, and makes it difficult for the other players to compete with the dominant undertaking on merit. Hence the Commission, who is duty-bound under section 18 of the Act to eliminate practices having an adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India, can conduct the inquiry under section 19 of the act into any alleged contravention of the provisions contained in sub-section (1) of section 4 (regarding the prohibition on abuse of dominance) of the act.

For the purpose of determining whether an enterprise enjoys a dominant position or not under section 4, the Commission shall have due regard to all or any of the following factors enumerated by section 19 (4) of the act;

- (a) Market Share of the enterprise;
- (b) Size and Resource of the enterprise;
- (c) Size and importance of the competitors;
- (d) Economic power of the enterprise including commercial advantages over competitors;
- (e) Vertical integration of the enterprises or sale or service network of such enterprises;
- (f) Dependence of consumers on the enterprise;

- (g) Monopoly or dominant position whether acquired as a result of any statute or by the virtue of being a Government or a public sector undertaking or otherwise;
- (h) Entry barriers including barriers such as regulatory barriers, financial risk, high capital cost entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or services for consumers;
- (i) Countervailing buying power;
- (j) Market structure and size of the market;
- (k) Social obligations and social costs;
- (l) Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- (m) Any other factor, which the Commission may consider relevant for the inquiry.

Further, as sub-section 5 to section 19 of the Act, for determining as to what constitutes a “relevant market”, the Commission shall have due regard to the “relevant geographic market” and “relevant product market”. Factors shall be considered by the Commission for determination of “relevant geographic market” and “relevant product market” enumerated under sub-section 6 and 7 respectively of section 19 of the act.

7. (i) No, Director-General is not authorised to initiate investigation Suo-moto. As per sub-section 1 to section 41 of the Competition Act, 2002 (here-in-after referred as the Act), the Director General shall when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

The role of the Director-General is actually to assist the Competition Commission in the effective discharge of its duties. Section 16 (1) of the Act provides that the Central Government may, by notification, appoint a Director General for the purposes of assisting the Commission in conducting an inquiry into contravention of any of the provisions of this act and for performing such other functions as are, or may be, provided by or under the Act.

- (ii) Yes, as per sub-section 1 to section 28 of the Competition Act, 2002 (here-in-after referred to as the Act), the Commission may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise or group does not abuse its dominant position.

Further sub-section 2 to section 28 provides that in particular, and without prejudice to the generality of the foregoing powers, the order referred to in sub-section (1) may provide for all or any of the following matters;

- (a) The transfer or vesting of property, rights, liabilities, or obligations;
  - (b) The adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
  - (c) The creation, allotment, surrender, or cancellation of any shares, stocks, or securities;
  - (d) [Omitted]
  - (e) The formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
  - (f) The extent to which, and the circumstances in which, provisions of the Order affecting an enterprise may be altered by the enterprise and the registration thereof
  - (g) Any other matter, which may be necessary to give effect to the division of the enterprise or group.
- (iii) No, Ramesh is not entitled to claim any compensation. Sub-section 3 to section 28 of the Competition Act, 2002, states that notwithstanding anything contained in any other law for the time being in force or in any contract or in any memorandum or articles of association, an officer of a company, who ceases to hold office as such in consequence of the division of an enterprise, shall not be entitled to claim any compensation for such cesser.
8. As per sub-section 4 to section 3 of the Competition Act, 2002; any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade-in goods or provision of services, including –
- (a) tie-in arrangement;
  - (b) exclusive supply agreement;
  - (c) exclusive distribution agreement;
  - (d) refusal to deal;
  - (e) resale price maintenance,
- shall be an agreement in contravention of sub-section (1), if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.
- Further explanation (a) to (e) of sub-section 4 to section 3 of the Act explains the meaning of following phrases:

- (a) **Tie in arrangement:** includes any agreement, requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (b) **Exclusive supply agreement:** includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.
- (c) **Exclusive Distribution agreement:** includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.
- (d) **Refusal to deal:** includes any agreement, which restricts or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.
- (e) **Resale price maintenance:** includes any agreement to sell goods on the condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.



## CASE STUDY 38

Navjeevan Technology Private Limited (NTPL) is an electrical component manufacturing company. It was established in the year 1998. NTPL supplies some critical electronic components to Maharaja Elevators Private Limited (MEPL). MEPL is a manufacturer of Elevators and Escalators.

The two companies are successfully dealing with each other for the last fifteen years. Unfortunately, due to negative cash flow, MEPL failed to pay NTPL's total outstanding amount of ₹1.75 Crore. The amount remained unpaid for more than a year.

MEPL had been incurring losses for the last 6 years and it is expected that within the next 3 months, there might be a major financial crisis. The Company might not be able to pay its outstanding debts to many of its creditors. There is also a possibility that its financial position deteriorates further.

The Board of Directors of MEPL is confident and is of opinion that with certain financial decisions and concrete actions like the restructuring of some of the term loans MEPL had borrowed from banks, reduction in debtors' credit period for the faster realization to sort out liquidity issues, controlled inventory levels, certain other cost savings measurement, removal of some of the non-profitable items from the product mix, etc. might bring the Company into profitable position within next 6 to 8 months.

However, the operational creditors with long over dues were not convinced with the Board of Directors' suggestive measures. Demand Notice along with the photocopies of relevant invoices and outstanding statements as per the ledger officially sent to MEPL. MEPL in its turn tried to convince NTPL and other operational creditors about the future plans of the business. MEPL neither was able to clear their dues, nor were they able to make any future commitments.

After having meetings with the operational and financial creditors of MEPL, the Board of Directors of NTPL finally took a firm decision to file an application along with the required documents for initiation of the Corporate Insolvency Resolution Process (CIRP) against MEPL before the National Company Law Tribunal (NCLT) under Insolvency and Bankruptcy Code, 2016 (Here-in-after referred as IBC). NTPL proposed the name of Mr. Varadraj, as an Interim Resolution Professional (IRP). He is a Chartered Accountant and a leading Insolvency Professional.

NCLT admitted the application filed by financial creditors, operational creditors, and NTPL. The Corporate Insolvency Resolution Process commenced on the scheduled date, following the process under the provisions of the IBC. NCLT by an order issued a moratorium.

As an IRP, Mr. Varadraj started managing all the company affairs. The powers of the Board of Directors of MEPL got suspended. The officers and managers of MEPL started reporting to Mr. Varadraj. The banks and financial institutions of MEPL started acting on the instructions issued by Mr. Varadraj and provided him with all the necessary information and documents.

After receiving all the claims against MEPL and determining its financial position, Mr. Varadraj constituted a Committee of Creditors. In the first meeting of the Committee of Creditors, the committee approved the appointment of Mr. Varadraj as the Resolution Professional. Board approved the appointment of Mr. Varadraj. He took prior approval of the Committee of Creditors, whenever required.

Mr. Varadraj prepared the required Memorandum for the Resolution Plan. He invited prospective lenders, investors, and other persons to prepare Resolution Plans.

In consultation with various stakeholders, Mr. Varadraj prepared a Resolution Plan. MEPL and all the stakeholders agreed with the resolution plan submitted during the Meetings of the Committee of Creditors. Mr. Varadraj had a firm belief that liquidation of MEPL is not at all necessary. Finally, all the stakeholders agreed with MEPL revival possibilities.

Mr. Varadraj then submitted the Resolution Plan to the Committee of Creditors for approval. The Committee discuss it in detail and approved the Resolution Plan to revive MEPL with the required majority. The Revival Plan also approved the payments of debts due to NTPL and other Creditors. Mr. Varadraj submitted a Resolution Plan, approved by the Committee of Creditors to NCLT. NCLT made an Order by approving the Resolution Plan.

MEPL was back on track after the next 10 months and now it could repay, its overdue debts to all of its Creditors and NTPL Company and gradually could achieve a position to pay all the creditors on time.

### **I. Multiple Choice Questions**

1. Assuming that Mr. Varadraj suggested the merger of MEPL with some XYZ Company under the Resolution Plan. What will be your advice to Mr. Varadraj according to the provisions of this Code?
  - (a) Resolution plan may include restructuring, but only related to the sale of non-profitable assets or discontinuation of unprofitable product from existing product mix.
  - (b) Resolution plan may include restructuring of the corporate debtor, but not by way of merger and amalgamation.
  - (c) Resolution plan may include restructuring of the corporate debtor, including by way of merger, amalgamation, and demerger.
  - (d) Resolution plan shall include restructuring of the corporate debtor.

2. If in any case the resolution plan is approved by the Adjudicating Authority, but is breached by MEPL, then what remedy can be availed by the person whose interests are prejudicially affected?
  - (a) May file a complaint against MEPL to the Adjudicating Authority for some preventive measures to avoid such contravention in the future.
  - (b) May make an application to the Adjudicating Authority for a liquidation order
  - (c) The Committee of Creditors will take some preventive measures to avoid such contravention in the future.
  - (d) May file a complaint against MEPL to the Adjudicating Authority for imposing a fine on MEPL.
3. Assuming that instead of Mr. Varadraj, Mr. Ranjit is appointed as Resolution Professional, then till what period Mr. Varadraj can continue as Interim Resolution Professional?
  - (a) Shall not exceed 30 days from the date of his appointment
  - (b) Shall not exceed 60 days from the date of his appointment
  - (c) Shall not exceed 90 days from the date of his appointment
  - (d) Shall continue till the date of appointment of the resolution professional
4. Assuming Mr. Varadraj accepts a short-term loan of ₹20 Lakh (which is twice the limit fixed for such loan) as interim finance to meet the requirement and keep MEPL running as a going concern during CIRP. Choose the correct option out of the following:
  - (a) Mr. Varadraj as RP has all the power
  - (b) Mr. Varadraj needs prior approval from the Committee of Creditors.
  - (c) Mr. Varadraj can raise such a loan if it is incorporated under the Resolution Plan.
  - (d) Mr. Varadraj is empowered to take such a decision as the power of the board of MEPL now vests in him.
5. NCLT by an order issued a moratorium in the case of MEPL. Which of the following statements is true regarding the length of the moratorium under IBC?
  - (a) Moratorium shall cease to have effect from the cession date written in order, thorough which it is imposed by NCLT
  - (b) Moratorium shall automatically cease to have an effect on the 91<sup>st</sup> day from the day of its commencement

- (c) Moratorium shall have effect till the completion of the corporate insolvency resolution process in all cases
- (d) In case the Adjudicating Authority approves the resolution plan, the moratorium shall cease to have effect from the date of such approval order.

## II. Descriptive Questions

- 6. While itself undergoing CIRP, can MEPL file an application to NCLT to initiate CIRP against their debtors in the capacity of "Financial Creditor" or "Operational Creditor" to realise its overdue amount under IBC?
- 7. Read the three situations (course of action) given below:
  - i. MEPL signed a lease deed with Mr. X, for the warehouse a year back. MEPL is in possession of such warehouse property since then. But now Mr. X terminated the lease and recovered his property.
  - ii. MEPL sold its property worth ₹10 crores to XYZ company so that it can repay its creditors.
  - iii. Licence of MEPL with some sector regulator suspended, regarding which license fee is already paid by MEPL in advance.Analyse the legal validity of the actions under IBC, presuming MEPL is under moratorium?
- 8. NCLT admitted the application filed by financial creditors, operational creditors, and NTPL resultantly Corporate Insolvency Resolution Process commenced under the provisions of the IBC. NCLT by order declares a moratorium. Are there any agreements or arrangements which are in exception to the applicability of the moratorium?

## ANSWERS TO CASE STUDY 38

### I. Answers to Multiple Choice Questions

- 1. (c) Resolution plan may include restructuring of the corporate debtor, including by way of merger, amalgamation, and demerger.

#### Reason

Explanation to section 5(26) of the IBC states that for the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger.

2. (b) May make an application to the Adjudicating Authority for a liquidation order

**Reason**

Section 33(3) of the IBC provides that where the resolution plan approved by the Adjudicating Authority under section 31 or under sub-section (1) of section 54L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, **may make an application to the Adjudicating Authority for a liquidation order as whose interests are prejudicially affected by such contravention** referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

3. (d) Shall continue till the date of appointment of the resolution professional

**Reason**

Section 16(5) of the IBC provides that the term of the interim resolution professional **shall continue till the date of appointment of the resolution professional under section 22.**

4. (b) Mr. Varadraj needs prior approval from the Committee of Creditors.

**Reason**

Section 25 of the IBC lists out the duties of resolution professional. Its sub-section (2c) states that the **resolution professional shall raise interim finances subject to the approval of the committee of creditors** under section 28.

5. (d) In case the Adjudicating Authority approves the resolution plan, the moratorium shall cease to have effect from the date of such approval order.

**Reason**

The proviso to section 14(4) provides that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, **the moratorium shall cease to have effect from the date of such approval or liquidation order**, as the case may be.

## II. Answers to Descriptive Questions

6. Although as per Section 11 of IBC, the following persons shall not be entitled to make an application to initiate a corporate insolvency resolution process under Chapter II of IBC:

- (a) A corporate debtor undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process; or
- (aa) A financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or
- (b) A corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (ba) A corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or
- (c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- (d) A corporate debtor in respect of whom a liquidation order has been made.

Despite the intention of code was clear that restriction under section 11 is only in reference to an application made under section 10, still there was some ambiguity hovering around; which has also been removed through the insertion of explanation II to section 11 vide Act number 1 of 2020, with effect from 28.12.2019.

Explanation II reads as 'for the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor'.

Hence while itself undergoing CIRP, MEPL can file an application to NCLT to initiate CIRP against their debtors in the capacity of "Financial Creditor" or "Operational Creditor" to realise its overdue amount under IBC.

It is important here to note that under section 25 (1) of IBC , it shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

Further under clause (b) of sub-section (2) of section 25 itself, for the purposes of sub-section (1), the resolution professional shall represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings. Hence proceeding can be initiated through a resolution professional.

7. As per sub-section (1) to section 14 of IBC, subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare the moratorium for prohibiting all of the following, namely:

- (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree, or order in any court of law, tribunal, arbitration panel, or other authority:
- (b) Transferring, encumbering, alienating, or disposing-off by the corporate debtor any of its assets or any legal right or beneficial interest therein:
- (c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002):
- (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Further, explanation reads as for the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during the moratorium period.

- (i) Action of Mr. X to terminate the lease and recover his property is prohibited under clause (d) of sub-section (1) to section 14 stated above.
  - (ii) Action of MEPL to sell its property worth ₹10 crores to XYZ company so that it can repay its creditors is prohibited under clause (b) of sub-section (1) to section 14 stated above.
  - (iii) Action of the sectoral regulator to suspend the licence of MEPL despite the fact that license fee is already paid by MEPL is not legally valid due to explanation to sub-section (1) to section 14 stated above.
8. The sub-section (1) to section 14 of IBC explains the prohibitions due to the imposition of the moratorium. But further sub-section 3 specify exceptions to the application of the moratorium, which also includes notified agreements and arrangements too.

Clause (a) to sub-section (3) to section 14 of IBC reads as, the provisions of sub-section (1) of section 14 shall not apply to such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority.

It is important here to note that before the amendment made by Act No. 1 of 2020 (with effect from 28.12.2019), clause (a) stood as “such transaction as may be notified by the Central Government in consultation with any financial regulator”.

It is also pertinent to mention here that the provisions of section 14(1) shall not apply to a surety in a contract of guarantee to a corporate debtor, as stated in Section 14(3)(b).



## CASE STUDY 39

Mr. Gautam is the Karta of a Hindu Undivided Family (HUF) , consisting of his wife Mrs. Laxmi Devi and 3 sons, Mr. Subhash, Mr. Girish, and Mr. Rajesh. The eldest son Subhash runs a sugar mill, taken over from his father Gautam.

Rajesh, the youngest son of Gautam, looking for some fast and easy money; he joins hands with Mr. Mohanlal, who is a real estate agent. Mohanlal promises to pay a commission in cash to Rajesh, against the help in buying 25 acres of land and hold the land in his (Rajesh) name on behalf of Mr. Manoranjan (one of the clients of Mohanlal) in good trust and in good faith. Rajesh agrees and a purchase agreement for 25 acres of land was registered in the name of Rajesh and one Madhav Rao. Subsequently, Rajesh entered into several similar agreements in his name on behalf of others.

In due course of time, Rajesh also formed a Company XYZ Private Limited, primarily for a Hotel business, but the source of funding was secret drug dealings. The Company accepted illegal monies in cash as legitimate business transactions with fake income and receipts. The monies were then deposited into the Company's Bank accounts as clean money. XYZ Private Limited kept fraudulent records, which did not demonstrate the current state of its businesses. Monies in the Bank Accounts of XYZ Private Limited were also often transferred as legitimate business transactions, to the Bank Accounts of RDX Private Limited, which is also in similar businesses like XYZ Private Limited. Original source of money is thus disguised.

The Company XYZ Private Limited also mobilized funds from various investors but were never utilized for which they were collected. The Funds were transferred to bank accounts of some group companies, which were mainly paper companies, from where they were systematically siphoned off and were used for the purchase of various properties in India.

Rajesh has also held some properties purchased in the name of his wife Sugandha from his known income from legal sources.

Mr. Mahesh who is a Company Secretary of a listed Public Limited Company ABC Ltd. is also a friend of Girish. Mahesh gives a ₹ 5 lacs loan to Girish, who in his turn gives a loan of ₹ 5 Lacs to his friend Mr. Raghu for investment in the shares of ABC Ltd. Raghu trades in shares of ABC Ltd. on behalf of Mahesh.

Mahesh also ensures that some money is passed on to various legitimate Companies to buy the shares of ABC Ltd so that it results in an increase in the price of shares. The intention is to show a higher valuation of shares before proposing to the investors or to discourage the shareholders from applying to the buyback scheme.

Mr. Raghav is the brother-in-law of Subhash, employed in UAE, and a non-resident Indian. Raghav purchased the property in the Mumbai for ₹ 75 Lacs. He paid ₹ 40 Lacs through his NRE Account, ₹ 10 Lacs through direct transfer from his salaries account in UAE to the sellers' account as advance through normal banking channels, complying with all the procedural requirements, but balance ₹ 25 Lacs payment was made through some unknown sources.

Raghav also invested in equity shares of various listed companies in India, in the joint name along with his wife Mrs. Divya (who is a resident in India); out of an account not disclosed to tax authorities in India. Raghav also purchased another flat in Pune in the joint name of Divya and himself from his NRE Account.

Subhash has a married daughter Mangala, a resident of the UK. Subhash invested ₹ 1.50 Crores in a Bank Fixed deposit in the name of Mangala without her knowledge. Later during the course of inquiries by officials, Mangala denies ownership of Bank Fixed Deposit.

Since all of his children are well settled, due to the old age and deteriorating health conditions of Gautam and Laxmi Devi, the family decided to sell off the loss-making sugar mill. Later after much negotiations, the sugar mill was sold to a person well known to the real estate agent Mohanlal, but unknown to the Gautam's Family, at a very reasonable price.

### **I. Multiple Choice Questions**

1. The transaction of the purchase of properties in Mumbai by Raghav for ₹ 75 Lacs is;
  - (a) A valid transaction in full
  - (b) A valid transaction but only to the extent of ₹ 40 Lacs
  - (c) A benami transaction in full
  - (d) May be a benami transaction to the extent of ₹ 25 lacs
2. Which one of the following transactions is not Benami done by Rajesh?
  - (a) Transaction in respect of a property, where the person providing the consideration to Rajesh is not traceable.
  - (b) An arrangement by Rajesh in respect of a property made in a fictitious name
  - (c) Property held by Rajesh in the name of his spouse and consideration paid out of known legal sources
  - (d) A transaction by Rajesh in respect of a property where the owner is unaware of or denies knowledge of the ownership

3. Subhash has a married daughter Mangala, a resident of the UK. Subhash invested ₹ 1.50 Crores in a bank fixed deposit in the name of Mangala without her knowledge. Later during the course of inquiries by officials, Mangala denies ownership of the bank fixed deposit. Pick the correct statement out of the following
- (a) Transaction is not benami because Mangala is a child of Subhash.
  - (b) Transaction is benami transaction because Mangala is a Non-Resident Indian.
  - (c) Transaction is benami transaction because Mangala denies the ownership.
  - (d) Transaction is benami transaction because Mangala is his married daughter.
4. XYZ Private Limited company in the stated case, indulged in moving or spreading the injected proceed of crime over various transactions in different accounts to disguise the origin. This step in money laundering is referred to as
- (a) Smuggling
  - (b) Integration
  - (c) Layering
  - (d) Placement
5. What will be the quantum of the punishment under the Prevention of Money Laundering Act, 2002 for Rajesh to form a company XYZ Private Limited, primarily for a Hotel business, but the source of funding was secret drug dealings?
- (a) Fine upto five lakhs rupees and rigorous imprisonment upto 3 years
  - (b) Fine or rigorous imprisonment not lesser than 3 years and may extend up to 7 years
  - (c) Fine and rigorous imprisonment not lesser than 3 years and may extend up to 7 years
  - (d) Fine and rigorous imprisonment of not lesser than 3 years and may extend upto 10 years

## II. Descriptive Questions

6. In the context of various property dealings and transactions stated in the case study, critically analyse the statement “the provisions of the Prohibition of Benami Property Transactions Act, 1988 need not necessarily apply only to transaction where the source of fund is unknown or undisclosed and carries in a fictitious name, but may also sometimes apply to transaction wherein disclosed funds and real persons are involved” state at-least one transaction to support your analysis.

7. For the properties held by Rajesh as benamidar, if a penalty is to be imposed, then what will be the quantum, and how the amount of fine will be determined under the provisions of the Prohibition of Benami Property Transactions Act, 1988?
8. Can a property involved in money laundering be attached, if yes then state the provisions relating to the attachment of such property under the Prevention of Money Laundering Act, 2002?

### ANSWERS TO CASE STUDY 39

#### I. Answers to Multiple Choice Questions

1. (d) May be a benami transaction to the extent of ₹ 25 lacs

##### Reason

In the given case, Mr. Raghav while purchasing flat in Mumbai, paid ₹ 25 Lacs sources of which is unknowns. Therefore, to this extent the transaction shall be held as benami transaction.

2. (c) Property held by Rajesh in the name of his spouse and consideration paid out of known legal sources

##### Reason

The option (c) comes under the exempted category of benami transaction under section 2(9)(A)(b)(iii) of the PBPT Act.

3. (c) Transaction is benami transaction because Mangala denies the ownership

##### Reason

Section 2(9) (C) of the PBPT Act provides that benami transaction means a transaction or an arrangement in respect of a property **where the owner of the property is not aware of, or, denies knowledge of, such ownership.**

In the given case, Mangla has denied of having purchased any property, so it shall be a benami transaction.

4. (c) Layering

##### Reason

The layering is the second stage of money laundering in which the money launderer indulges in moving or spreading the injected proceeds of crime over various transactions in different accounts to disguise the origin.

5. (d) Fine and rigorous imprisonment of not lesser than 3 years and may extend upto 10 years

**Reason**

Proviso to section 4 of the PMLA provides that provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words “**which may extend to seven years**”, the words “**which may extend to ten years**” had been substituted.

Paragraph 2 of Part A of the Schedule deals with the offences under the Narcotic Drugs and Psychotropic Substances Act, 1985.

**II. Answers to Descriptive Questions**

6. The general belief is that the provisions of the Prohibition of Benami Property Transactions Act, 1988 (here-in-after referred to as the act) apply only to transactions and persons dealing with property out of unknown/undisclosed sources and through fictitious identity, where the primary intent is to hide the ownership of the property; but this is not true in all respects, even where the property is created out of known source can be the subject matter of benami transaction.

As per section 2(8) of the act, Benami Property means any property, which is the subject matter of a Benami transaction and also includes the proceeds from such property.

Further, as per section 2 (9), a Benami transaction means:

- (A) A transaction or arrangement
- (a) where a property is transferred to, or held by, a person and the consideration for such property has been provided, or paid by, another person; and
  - (b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

**except when the property is held by -**

- (i) A Karta, or member of a HUF, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the HUF;

- (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;
  - (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;
  - (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint- owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or
- (B) A transaction or an arrangement in respect of a property carried out or made in a fictitious name; or
- (C) A transaction or an arrangement, in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;
- (D) A transaction or an arrangement in respect of a property where the person, providing the consideration is not traceable or is fictitious.

Further as per section 2 (26) of the Act “property” means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

The exceptions have been provided in the Act which are narrated in clause (i) to (iv) of section 2(9)(A)(b). So if the transaction can be categorized under clauses (i) to (iv) it shall not be treated as benami transaction, provided the other conditions are fulfilled.

In the stated case study a transaction wherein, Subhash invested ₹ 1.50 Crores in a bank fixed deposit in the name of Mangala (his married daughter), who is a UK resident, without her knowledge. Later during the course of enquiries by officials, Mangala denies ownership of bank fixed deposit. Here, the transaction is Benami (due to section 2 (9) (C), despite the bank fixed deposit is generated using disclosed funds in a genuine name, which is not a fictitious transaction.

7. As per sub-section (2) of section 53 of the Prohibition of Benami Property Transactions Act 1988 (here-in-after referred to as the act), whoever is found guilty of the offence of

benami transaction shall be punishable with rigorous imprisonment for a term ranging from one year to seven years and shall also be liable to fine which may extend to twenty-five percent of the fair market value of the property.

Fair market value in relation to the property as per section 2(16) of the Act means the price that the property would ordinarily fetch on sale in the open market on the date of the transaction; and where such price is not ascertainable, then the price (fair market value) as may be determined in accordance with such manner as prescribed in Rule 3 of Prohibition of Benami Transactions Rules, 2016.

8. Section 5 of the Prevention of Money laundering Act 2002 (here-in-after referred to as the Act) deals with the attachment of property involved in money laundering. It reads as under-

- (1) Where the director or any other officer not below the rank of deputy director (authorized by the director for the purposes of this section) has reason to following believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that –
  - (a) any person is in possession of any proceeds of crime; and
  - (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed:

Provided that no such order of attachment shall be made unless in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person authorised to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country.

Provided further that, notwithstanding anything contained in first proviso, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this

Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted;

- (2) The director, or any other officer not below the rank of deputy director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.
- (3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under section 8 (3), whichever is earlier.
- (4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

*Explanation.*—For the purposes of this sub-section, “person interested”, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

- (5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.



## CASE STUDY 40

In coordinated raids, more than 100 income tax sleuths (apart from police personnel) swooped down on the total of 25 premises linked to the Yashraj family. The family runs the Vidyanand Group of Institutions (VGI), established by Late Shri Ramraj 4 decades ago. Ramraj is the grandfather of Yashraj, the present CMD of the group. Besides raiding the office, residence, and institutions belonging to Yashraj, the IT officials also searched the residences of his two brothers and some of their close aides.

The VGI is mainly into running educational and also coaching Institutes for different competitive examinations in various states. The VGI comprised three (3) private limited companies, four (4) partnership firms, and a trust, controlled by a close-knit group of individuals. The annual revenue of VGI was ₹ 105 Crores as per the latest available audited financial statements.

The raids at the premises belonging to Yashraj and others were in connection with a multi-crore tax evasion case. The search was undertaken on the basis of intelligence outputs that VGI was indulged in substantial tax evasion through the following mentioned three ways:

- (a) By the suppression of fee receipts received from students.
- (b) There was also an allegation of forgery/impersonation in a competitive examination and
- (c) Illegal payments- "cash for seat"- to secure seats in the educational institutions.

The modus operandi was as below:

- (a) To receive a part of the fees (40%) through bank transfers and balance (60%) in cash;
- (b) Such cash receipts were invariably not entered into a regular accounting system. Instead, the receipts were maintained in a separate set of manual accounts handled by a lone close associate of the Yashraj family;
- (c) Cash received from some of the students, education Institutions permitting illegal impersonation during competitive examinations;
- (d) Cash received from students to secure seats, though the Institution managed a network of brokers.

Incriminating evidence of such suppression of receipts was found during the search in the form of separate manual accounts, electronic storage devices, huge sums of unaccounted cash, and some other properties. It was found that:

- (a) Cash was kept in bank lockers in the names of some of the long-serving employees on behalf of the Yashraj family.
- (b) A significant amount of cash was also found in a secret safe inside an auditorium on the main premises of the educational institution.
- (c) Huge amount of cash was also found in the residences of the family members of Yashraj, their close aids.

The unaccounted cash receipts were deployed for

- (a) acquiring immovable properties as personal investments in different places in India and abroad,
- (b) The immovable properties were then leased for long terms to the Trust for expansion of business in other towns. The documents evidencing the acquisition of immovable properties were showing lesser values, but actual market prices were much higher.
- (c) Well qualified and highly-priced faculty were hired and employed in the educational and coaching institutes. They were paid outside the books.
- (d) Luxury vehicles, highly-priced jewellery, etc. were purchased for the promoters.
- (e) Shares, Debentures, Properties, Fixed Deposits, and Bank Accounts of the family members of Yashraj were held in the names of some of the long-serving employees and close aids.

Investigating Authorities found that there are highly sophisticated acts to cover up or camouflage the identity or origin of illegally obtained earnings so that they appear to have derived from lawful sources.

Based on the preliminary findings, the undisclosed income of the VGI was estimated at over ₹ 175 crores. Unaccounted cash of ₹ 30 crores, jewellery worth ₹ 12 Crores, and 2 new luxury cars value at ₹ 2 crores each were seized. During the search, even some of the students, who impersonated could be traced, who accepted their crimes, along with some of institution managed brokers. Two of the 3 private limited companies were found to have existed only on papers.

Some of the close aides, who held some of the shares and debentures of the Yashraj family tried to re-transfer them to the Yashraj family fearing actions by the investigating officials. Some of the employee's en-cashed fixed deposits held in their names and immediately tried to transfer the proceeds to the bank accounts of the Yashraj family.

**I. Multiple Choice Questions**

1. The unaccounted cash receipts were deployed for acquiring immovable properties as personal investments in different places in India and abroad. The immovable properties were then leased for long terms to the Trust for expansion of business in other towns. The documents evidencing the acquisition of immovable properties were showing lesser values, but actual market prices were much higher. In the context of an investigation of concealment of the proceeds of crime relating to the value of any property, value means:
  - (a) The Actual cost price at which the immovable properties were acquired by Yashraj Family as on the date of acquisition or possession;
  - (b) The Actual Value as per the Title Deeds, based on which the immovable properties were acquired by Yashraj Family;
  - (c) The Fair market value of the immovable properties acquired by Yashraj Family as on the date of acquisition or if the date cannot be determined, as on the date of possession;
  - (d) The Value as in the Title Deeds relating to the immovable properties acquired by Yashraj Family, suitably adjusting the Cost Inflation Index as on the date of acquisition or possession.
2. Shares, Debentures, Properties, Fixed Deposits and Bank Accounts of Yashraj Family were held in the names of some of the long-serving employees and their close aides. In this context, which of the following statements is not correct?
  - (a) A transaction in respect of a property, where the person providing the consideration is unknown at the time of sale but can be traced is not valid.
  - (b) A transaction in respect of a property carried out or made in a fictitious name is not valid.
  - (c) A transaction in respect of a property, where the person providing the consideration is fictitious is not valid.
  - (d) A transaction or arrangement in respect of a property, where the owner of the property is not aware of such ownership is not valid.
3. Some of the close aides, who held some of the shares and debentures of the Yashraj family, tried to re-transfer them to Yashraj family fearing actions.
  - (a) Such retransfer is a valid transaction

- (b) Such transactions are voidable at the option of the Adjudicating Authority
  - (c) Such transaction and retransfer shall be deemed to be null and void.
  - (d) Such transaction and re-transfer shall be valid in case transferred to any other person, acting on behalf of Yashraj Family.
4. Some of the employees encashed the fixed deposits held in their names on behalf of the Yashraj family and immediately after raids tried to transfer the proceeds to the bank accounts of the Yashraj family. In this context;
- (a) Once transferred, such property becomes the property of the real owner Yashraj family and the said employees are relieved from liability.
  - (b) The proceeds from the properties are also illegal and consequently, such employees of the Yashraj family are also liable
  - (c) Fixed deposits of the Yashraj family, if not transferred, becomes the property of such employees and they are not liable.
  - (d) Transactions in fixed deposits in the above case held in other names are valid transactions.
5. Cash receipts were invariably not entered into the regular accounting system. Instead, the receipts were maintained in a separate set of manual accounts by a lone close associate of the Yashraj family. Pick the correct statement regarding records, out of the following statements;
- (a) Only accounts made through a regular accounting system shall be considered as a record.
  - (b) Separate manual accounts may be considered as a record for the purpose of investigation at the will of investigating officers.
  - (c) Separate manual accounts shall also include apart from accounts made through regular accounting system considered as a record for the purpose of investigation.
  - (d) Separate manual accounts may be considered as records only if maintained directly by one of the family members of Yashraj for the purpose of investigation.

<b>II. Descriptive Questions</b>
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6. Prima facie various offences have been committed by the Yashraj family and VGI. There are highly sophisticated acts to cover up or camouflage the identity or origin of illegally obtained earnings so that they appear to have derived from lawful sources. Answer the following:

- (A) What should be established by the Government to bring a successful prosecution of the Yashraj family and their close aides?
- (B) Illegal payments such as cash for the seat to secure seats in the educational institutions; education institutions permitting illegal impersonation during competitive examinations; the unaccounted cash receipts were deployed for acquiring immovable properties. What is the punishment for such types of offences under the Indian Laws when the crime involves disguising financial assets so that they can be used without detection of the illegal activity that produced them?
7. It was found that Cash was kept in bank lockers in the names of some of the long-serving employees. "All cases of transactions or arrangements may not be illegal or unlawful, where the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration". Elucidate.
8. The unaccounted receipts were deployed for acquiring immovable properties as personal investments in different states. Based on the preliminary findings, the undisclosed income of the group was estimated at over ₹ 175 Crores, while unaccounted cash of ₹ 30 Crores, Jewellery valued ₹ 12 Crores, 2 Luxury Cars value ₹ 2 Crores each was seized.

What are the wide powers to the concerned authorities to attach such properties suspected to be involved in covering up the origin of illegally obtained earnings?

## ANSWERS TO CASE STUDY 40

### I. Answers to Multiple Choice Questions

1. (c) The Fair market value of the immovable properties acquired by Yashraj family as on the date of acquisition or if the date cannot be determined, as on the date of possession.
- Reason**
- In terms of section 2(1)(zb) of the PMLA "**value**" means the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person.
2. (a) A transaction in respect of a property, where the person providing the consideration is unknown at the time of sale but can be traced is not valid.

**Reason**

Examining each of the options given in the MCQ-

- ◆ **Option (b):** It is correct in light of the provisions contained in section 2(9)(B) of the PBPT Act. *Section 2(9)(B):* benami transaction means, a transaction or an arrangement in respect of a property carried out or made in a fictitious name.
- ◆ **Option ©:** It is correct in light of the provisions contained in section 2(9)(D) of the PBPT Act. *Section 2(9)(D):* benami transaction means, a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious.
- ◆ **Option (d):** It is correct in light of the provisions contained in section 2(9)(C) of the PBPT Act. *Section 2(9)(C):* benami transaction means, a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership.

Therefore, only option (a) is not correct.

3. (c) Such transaction and retransfer shall be deemed to be null and void.

**Reason**

Section 6 of the PBPT Act provides that –

- (1) No person, being a *benamidar* shall re-transfer the *benami* property held by him to the beneficial owner or any other person acting on his behalf.
- (2) Where any property is re-transferred in contravention of the provisions of sub-section (1), the transaction of such property shall be deemed to be null and void.

4. (b) The proceeds from the properties are also illegal and consequently, such employees of the Yashraj family are also liable.

**Reason**

In light of the provision contained in section 6 of the PBPT Act it is null and void.

5. (c) Separate manual accounts shall also include apart from accounts made through regular accounting system considered as a record for the purpose of investigation.

**Reason**

Yes, the separate accounts maintained manually shall also be the part of the investigation, since all the cash receipts are entered in it.

**II. Answers to Descriptive Questions**

- 6 (A) Government has to establish that there is an offence of money laundering as per section 3 of the Prevention of Money-Laundering Act, 2002 (here-in-after referred to as the Act) to bring a successful prosecution of the concerned in Yashraj family and their close aids under the PMLA.

As per section 2 (p) of the Act, money-laundering has the meaning assigned to it in section 3. Further section 3 provides that whoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeding of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of the offence of money laundering.

*Explanation.*—For the removal of doubts, it is hereby clarified that,—

- (i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—
  - (a) concealment; or
  - (b) possession; or
  - (c) acquisition; or
  - (d) use; or
  - (e) projecting as untainted property; or
  - (f) claiming as untainted property,in any manner whatsoever;
- (ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

- (B) Prima facie, various offences of Money Laundering appear to have been committed in the given case.

As per section 4 of the Prevention of Money Laundering Act, 2002, whoever commits the offence of money-laundering shall be punishable with **rigorous imprisonment for a term which shall not be less than three years** but which may extend to seven years and shall also be liable to fine.

Further provided that where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 (Offences under The Narcotic Drugs and Psychotropic Substances Act, 1985) of Part A of the Schedule, then the maximum imprisonment may extend to ten years.

7. In the given case, it was found that cash was kept in bank lockers in the names of some of the long-serving employees as benami.

A transaction or arrangement where the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration is a benami transaction under Section 2(9)(A)(b) of the Prohibition of Benami Property Transactions Act, 1988.

However, there are certain exceptions to this when the transaction or arrangement shall not be considered benami. The exceptions are when the property is held by;

- (i) a Karta or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family.
- (ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose.
- (iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual.
- (iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.



8. The unaccounted receipts were deployed for acquiring immovable properties as personal investments in different states. Based on the preliminary findings, the undisclosed income of the VGI was estimated at over ₹ 175 crores. Unaccounted cash of ₹ 30 crores, jewellery worth ₹ 12 Crores, and 2 new luxury cars value ₹ 2 crores each were seized.

As per section 2 (d) of the Prevention of Money laundering Act 2002 (here-in-after referred to as the Act), the attachment means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III of the Act.

Section 5 of the Act gives extremely wide powers to the authorities to attach properties suspected to be involved in Money Laundering, which reads as under-

- (1) Where the director or any other officer not below the rank of deputy director authorized by the Director for the purposes of this section has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that-
- (a) Any person is in possession of any proceeds of crime; and
  - (b) Such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter.

he may by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

‘That any person is in possession of any proceeds of crime and such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to the confiscation of such proceeds of crime’.

Provided that no such order of attachment shall be made unless (with exception of cases where the absence of immediate attachment leads to frustrate any proceeding under this Act), in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973, or a complaint has been filed by a person authorized to investigate the offence mentioned in that Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be, or a similar report or complaint has been made or filed under the corresponding law of any other country.

Provided further that, notwithstanding anything contained in 1[first proviso], any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

Provided also that for the purposes of computing the period of one hundred and eighty days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding thirty days from the date of order of vacation of such stay order shall be counted.

- (2) The director, or any other officer not below the rank of deputy director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.
- (3) Every order of attachment made under sub-section (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under section 8 (3) (Adjudication), whichever is earlier.
- (4) Nothing in this section shall prevent the person interested (includes all persons claiming or entitled to claim any interest in the property) in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

*Explanation.*—For the purposes of this sub-section, “person interested”, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

- (5) The Director or any other officer who provisionally attaches any property under sub-section (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

## CASE STUDY 41

Little Star Private Limited (LSPL) is a fully integrated setup from taking a 3D model as input to the design and manufacturing of tools to the manufacturing of finished products. The Company is also into Engineering Services with headquarters in Mumbai, India managed and run mainly by the promoters Mr. Sharad (Managing Director), Mr. Sanjeev (Director), and Mr. Javed (Director). All three are Indian residents.

LSPL has a marketing office with warehouse facility Little Star Trading Spolka Z.O.O (LTS) in Poland, fully owned and controlled by it, to cater to the demands of European customers. LTS has been established with the permission of the Reserve Bank of India, duly complying with the required statutory formalities.

On 1st January 2017, LSPL shipped some engineering products with a CIF value of EUR 265,000 to LTS, the cost of the products is EUR 250,000, Insurance EUR 3,000, and Freight EUR 12,000. Also, some of the products worth CIF GBP 126,000 were shipped to one of the customers in the UK on the same date. The total value of Exports of LSPL during the calendar year 2017 from various customers from different countries was USD 12 Million.

LSPL during the normal course of business also entered into a Supply (Export) Agreement with one of its customers Drakes Group (DG) in the UK for the supply of two machines, a total export value estimated to be CIF(Cyrpto Improvement Fund)GBP 4 Million. As per the terms of supply:

- a. Two Machines, as specified, worth about CIF GBP 2 Million each are to be exported by LSPL to DG.
- b. Exact value of each of the Machinery can be ascertained only after the export to the UK since some more processes are involved during installation and commissioning.
- c. An advance of GBP 1 Million is to be remitted to India by DG to LSPL for the purchase or import of critical components required for the manufacture of the said machines.
- d. Interest shall be payable on Advance payment by LSPL to DG up to the date of bill of lading of the first shipment.
- e. The first Machinery is to be supplied within 15 months from the date of receipt of advance payment in India, and the second one within a period not exceeding 27 months.

Accordingly, as per the terms of supply, a sum of GBP 1 Million was received by LSPL from DG on 1st July 2018 as an advance towards exports through the State Bank of India. The First machinery was supplied on time and the relevant export declaration was furnished to the specified authority in a specified manner. Other export formalities were duly complied with.

LSPL also established a marketing office in Dubai, UAE - Little Star Emirates LLC (LSEL) for conducting normal business activities of the Indian entity, to cater to the requirements of customers from the Middle East. For promoting business in the Middle East Region, LSPL sponsored a T20 Cricket match in Dubai International Cricket stadium and approached State Bank of India for remittance of USD 250,000 towards sponsorship Fees.

LSPL is holding certain properties in the form of some residential flats in UAE ready for sale. Prestige Real Estate LLC (PREL) is a well-reputed real estate agent in UAE and has experience in marketing, advertising, and selling real estate property. While on travel to Dubai, Sharad and Sanjeev, on behalf of LSPL entered into an Agency Agreement PREL for the sale of properties in UAE. As per the Agreement

- a. LSPL grants PREL the exclusive rights to sell all the residential flats in UAE.
- b. Any and all offers and negotiations in regards to the said properties shall be conducted by PREL
- c. PREL shall do everything possible to entertain and vet offers made. It is the Agent's sole purpose to sell the properties and as so shall be permitted to employ additional Brokers to assist in the selling and advertising process.
- d. Any offers considered valid should be reported to the Seller within 2 days and it shall be at the discretion of LSPL to accept or decline.
- e. LSPL agreed to remit PREL a flat commission of a certain percentage of the final sale price, on a case-to-case basis.

PREL also authorized to sell one of the commercial plots owned by LSPL in India on similar terms as stated above. For one of the plots owned by LSPL in Pune, PREL finds a buyer from UAE. Because of the efforts of PREL, such a plot could be sold at USD 400,000. PREL transferred USD 400,000 to India, as sale proceeds. As per the Agreement, USD 22,000 is to be transferred as Commission to PREL.

Javed wants to remit USD 250,000 under the Liberalized Remittance Scheme (LRS) to buy lottery tickets abroad making use of his business connections.

### **I. Multiple Choice Questions**

1. For one of the plots owned by LSPL in Pune, PREL find a buyer from UAE. Because of the efforts of PREL, such a plot could be sold at USD 400,000. PREL transferred USD 400,000 to India, as sale proceeds. As per the Agreement, USD 22,000 is to be transferred as Commission to PREL. In the context of commission which of the following statements is correct:
  - (a) Without any pre-approval from the Reserve Bank of India upto USD 100,000 or 5% of the amount remitted, whichever is higher, can be transferred as a commission by LSPL to PREL

- (b) Without any pre-approval from the Reserve Bank of India any amount upto USD 25,000 or 5% of the amount remitted, whichever is higher can be transferred as a commission by LSPL to PREL
  - (c) Without any pre-approval from the Reserve Bank of India only USD 20,000 can be transferred as a commission by LSPL to PREL in the given case.
  - (d) Without any pre-approval from the Reserve Bank of India upto USD 50,000 or 5% of the amount remitted, whichever is lesser, can be transferred as a commission by LSPL to PREL.
2. The First machinery was supplied on time and the relevant Export Declaration was furnished to the specified authority in a specified manner. In the context of the Export Declaration, which one of the following statements is **not** correct?
- (a) Export of goods can be made without furnishing the specified Declaration when goods are imported free of cost on a re-export basis;
  - (b) Export of goods can be made without furnishing the specified Declaration when goods are sent outside India for testing subject to re-import into India.
  - (c) Export of goods can be made without furnishing the specified Declaration when defective goods are sent outside India for repairs at an agreed price with the supplier outside, subject to re-import into India.
  - (d) Export of goods can be made without furnishing the specified Declaration in case of unaccompanied personal effects of travelers.
3. LTS (Little Star Trading Spolka Z.O.O) in Poland in the stated case shall be treated as:
- (a) Person resident outside India
  - (b) Person resident in India
  - (c) Person not ordinary resident in India
  - (d) No relevance to LTS of residential status with reference to Indian laws
4. For promoting business in the Middle East Region, LSPL sponsored a T20 cricket match in Dubai International Cricket stadium and approached the State Bank of India for remittance of USD 250,000 towards sponsorship Fees.
- (a) State Bank of India can remit USD 250,000 towards cricket sponsorship without any limits and any pre-approval.
  - (b) State Bank of India can remit USD 250,000 with the approval from Reserve Bank of India.
  - (c) State Bank of India can remit USD 250,000 with prior approval from the appropriate ministry of the Government of India.

- (d) Remittance by State Bank of India of USD 250,000 towards T20 cricket sponsorship in Dubai is a transaction for which remittance of foreign exchange is prohibited.
- 5. Javed wants to remit USD 250,000 under the Liberalized Remittance Scheme (LRS) to buy lottery tickets abroad making use of his business connections.
  - (a) Remittance to buy lottery tickets abroad is a prohibited item under LRS
  - (b) Remittance of more than USD 100,000 for buy lottery tickets abroad is prohibited under LRS
  - (c) Remittance upto USD 250,000 per financial year is permitted to buy lottery tickets abroad under LRS
  - (d) Remittance only upto USD 150,000 per financial year is permitted to buy lottery tickets abroad under LRS

## **II. Descriptive Questions**

- 6. On 1st January 2017, LSPL shipped some engineering products with a CIF value of EUR 265,000 to LTS, the cost of the products is EUR 250,000, Insurance is EUR 3,000, and Freight is EUR 12000. In this regard answer the following;
  - A. What is the period within which the export value of goods shipped to LTS to be realized and repatriated to India, and does it make any difference, if only the cost price is realized but not Insurance and Freight within the period specified?
  - B. Will your answer change to part A above, in the case of the transaction wherein goods worth GBP 126,000 shipped/exported to one of the customers in the UK and not to LTS?
  - C. Will your answer change to part A above, in case LSPL has an Export Oriented Unit in Mumbai and goods/software/services are shipped therefrom? Explain.
- 7. As per the terms of supply, a sum of GBP 1 Million was received by LSPL from DG on 1<sup>st</sup> July 2018 as an advance towards exports. In this context, as per the legal system prevailing in India answer the following:
  - A. What are the obligations of LSPL with references to the rate of interest payable to DG and the submission of documents?
  - B. Within how much period the shipment shall be made by LSPL, is there any exception to this?
  - C. Is it possible for LSPL to refund the advance received in case of its inability to make the shipment as per the supply terms?

8. LSPL is holding certain properties in the form of some residential flats in the UAE. What are the possible ways by which these properties might have been legally acquired by LSPL in the UAE?

## ANSWERS TO CASE STUDY 41

### I. Answers to Multiple Choice Questions

1. (b) Without any pre-approval from the Reserve Bank of India any amount upto USD 25,000 or 5% of the amount remitted, whichever is higher can be transferred as a commission by LSPL to PREL.

**Reason:** Regulation 2(ii) of Schedule III of the the Foreign Exchange Management (Current Account Transactions) Rules, 2000 provides the commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25000 or 5% of the inward remittance, whichever is more, requires prior approval of the RBI. Therefore, the payment of commission which is below the above ceiling, do not require prior approval of RBI.

2. (c) Export of goods can be made without furnishing the specified Declaration when defective goods are sent outside India for repairs at an agreed price with the supplier outside, subject to re-import into India.

**Reason:** Regulation 4 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015, states that notwithstanding anything contained in Regulation 3, export of goods/ software may be made without furnishing the declaration in case of –

- (i) goods sent outside India for testing subject to re-import into India.
- (j) defective goods sent outside India for repair and re-import provided the goods are accompanied by a certificate from an authorised dealer in India that the export is for repair and re-import and that the export does not involve any transaction in foreign exchange.

3. (b) Person resident in India

**Reason:** Section 2(v) of the FEMA provides that “**person resident in India**” means—

- (i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—

- (A) a person who has gone out of India or who stays outside India, in either case—
  - (a) for or on taking up employment outside India, or
  - (b) for carrying on outside India a business or vocation outside India, or
  - (c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
- (B) a person who has come to or stays in India, in either case, otherwise than—
  - (a) for or on taking up employment in India, or
  - (b) for carrying on in India a business or vocation in India, or
  - (c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period.
- (ii) any person or body corporate registered or incorporated in India,
- (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
- (iv) an office, branch or agency outside India owned or controlled by a person resident in India.**

In the given case, the LSPL has a marketing office with warehouse facility Little Star Trading Spolka Z.O.O (LTS) in Poland, **fully owned and controlled by it**, to cater to the demands of European customers. LTS has been established with the permission of the Reserve Bank of India, duly complying with the required statutory formalities. **Thus, LTS shall be treated as 'Person Resident in India' in terms of section 2(v)(iv) of the FEMA.**

4. (c) State Bank of India can remit USD 250,000 with prior approval from the appropriate ministry of Government of India.

Reason: Rule 4 read with Schedule II of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 narrates the transactions which requires prior approval of the Central Government. The para 9 of the schedule II states that remittance of prize money /sponsorship of sports activity abroad by a person other than International/ National / State Level sports bodies, if the amount involved exceeds USD 1,00,000, requires the approval of Ministry of



HRD (Dept of Youth Affairs and Sports). In the given case, since the amount of remittance required is USD 2,50,000 hence it requires the prior approval of Ministry of HRD (Dept. of Youth Affairs and Sports).

5. (a) Remittance to buy lottery tickets abroad is a prohibited item under LRS

**Reason:** Rule 3 read with Schedule I of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 narrates the transactions which are prohibited. Among the list of various transactions, at S. No. 3 "Remittance for purchase of lottery tickets, banned / proscribed magazines, football pools, sweepstakes etc.", which is also a prohibited transaction.

## II. Answers to Descriptive Questions

6. (A) Regulation 9 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 deals with the period within which the export value of goods is to be realized. It reads as under-

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

(a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorized dealer as soon as it is realized and in any case within fifteen months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of shipment of goods.

(b) further provided that RBI, or subject to the directions issued by that bank on this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.

Since in the given case, LTS is a warehouse facility of LSPL established with the permission of RBI in Poland and the goods were shipped and/or exported on 1st January 2017, EUR 265,000 is expected to be realized within the next 15 months i.e. by March 31st, 2018, unless the period is further extended as above. It is the full value of export i.e. CIF value (EUR 265,000) is to be realized within the period stipulated in Regulation 9.

- (B) Regulation 9 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 deals with the period within which export value of

goods to be realized. As per sub-regulation 9(1), the amount representing the full export value of goods / software/ services exported shall be realized and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of export,

It is further provided that the Reserve Bank, or subject to the directions issued by that Bank on this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the said period.

Since in the given case, the goods were shipped and/or exported on 1st January 2017, GBP 126,000 is expected to be realized within the next 9 months i.e. by September 30th, 2017, unless the period is further extended as above. It is the full value of export i.e. GBP 126,000 is to be realized within the period stipulated.

- (C) Regulation 9 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 deals with the period within which export value of goods to be realized. As per Regulation 9(2)(a), where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realized and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time from the date of export.

It is further provided that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the said period.

Since in the given case, the goods were shipped and/or exported on 1st January 2017, EUR 265,000 is expected to be realized within the next 9 months i.e. by September 30th, 2017, unless the period is further extended as above. It is the full value of export i.e. CIF value (EUR 265,000 is to be realized within the period stipulated.

**Note** - “or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time” and, “said period” Inserted vide Notification No. FEMA 23(R)/(3)/2020-RB dated March 31, 2020 published in the Official Gazette of India, Extra Ordinary, Part III, Section 4 dated March 31, 2020.

It is pertinent to mention here that on 1<sup>st</sup> April 2020, through RBI/2019-20/206 A. P. (DIR Series) Circular No. 27, It has been decided, in consultation with the Government of India (after considering the representations from Exporters Trade bodies to extend the period of realisation of export proceeds in view of the outbreak of pandemic COVID- 19), to increase the present period of realization and repatriation to India of the amount representing the full export value of goods or software or services exported, from nine months to fifteen months from the date of export, for the exports made up to or on 31<sup>st</sup> July 2020.

7. (A) As per regulation 15 (1) of the Foreign Exchange Management (Export of Goods and Services) Regulation 2015 where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that;

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

Hence the rate of interest shall not be more than LIBOR+1% and the documents covering the shipment are also routed through the State Bank of India.

- (B) As per regulation 15 (1) of the Foreign Exchange Management (Export of Goods and Services) Regulation, 2015 where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that the shipment of goods is made within one year from the date of receipt of advance payment;

As such, since advance payment is received by LSPL on 1<sup>st</sup> July 2018, under the normal circumstances, LSPL should have ensured shipment within one year i.e. within 1<sup>st</sup> July 2019.

But further regulation 15 (2) Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment. Since the Export Agreement between LSPL and DG provides that the first Machinery is to be supplied within 15 months from the date of receipt of advance payment in

India and the second one within a period not exceeding 27 months. LSPL shall be bound by this Export Agreement and may accordingly ship the machines.

- (C) As per proviso to regulation 15 (1) of the Foreign Exchange Management (Export of Goods and Services) Regulation 2015 read as “Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of an unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank”.

In view of the proviso, LSPL is in a position to refund the advance received in case of its inability to make the shipment as per the supply terms only after the prior approval of the Reserve Bank of India. A period of one year may be substituted with the period stated under the Export Agreement considering the sub-clause (2) of Regulation 15.

8. According to section 6 (4) of the Foreign Exchange Management Act, 1999 (here-in-after referred to as the Act) read with regulation 5 of Foreign Exchange Management (Acquisition and transfer of immovable property outside India) Regulations, 2015,

- (1) A person resident in India may acquire immovable property outside India;
- (a) By way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the Act, or referred to in clause (b) of regulation 4;
  - (b) By way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (foreign currency accounts by a person resident in India) Regulations, 2015;
  - (c) Jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India;
- (2) A person resident in India may acquire immovable property outside India, by way of inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provisions in force at the time of such acquisition.
- (3) A company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

These are the possible ways by which these properties might have been legally acquired by LSPL in UAE.

## CASE STUDY 42

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

Their construction business was flourishing day-by-day. KBCPL was now a brand that could attract persons from all walks of life i.e. professors, advocates, engineers, professionals, businessmen, government employees holding responsible positions, etc. Expanding business required Keshav and Tanishk to appoint Radhika and her husband Ratnesh, both architects by profession, as directors in the company. Radhika was the younger sister of Tanishk.

Time was passing on. It was in the month of July 2015, that the KBCPL launched yet another project in Greater Noida whose completion date was given as June 2018. This project involved the construction of residential units, office spaces, and a mall. The modus operandi was to invest around ₹ 1200 Crores for developing the township at Greater Noida under the 'committed returns plan'.

The 'committed returns plan' required the home-buyers to pay 80% percent of the total sale consideration up-front at the time of execution of the MOU and the promoters of KBCPL would undertake to pay 12% of the 'advance money' so received each month to the investors as 'committed returns' from the date of execution of the MOU till the time actual physical possession of residential units/office space, etc., was to be handed over to the buyer. The home-buyers also had the option to choose the construction-linked payment plan and possession-linked payment plan.

In comparison to the construction and possession linked payment plan, the 'committed returns plan' proved to be an attractive one for the home-buyers belonging to different strata of society. Like many others, Aayush, by profession a computer engineer and working for a reputed MNC engaged in developing customized software, was also interested in this plan and applied for a residential unit as well as an office space. Aayush, who always wanted to be a self-employed person, in the long run, kept some future plans in mind while applying for the office space.

Under the 'committed returns plan', Aayush was required to make a payment of ₹ 80.00 lacs (i.e. 80% of the cost of ₹ 1.00 crore for a 4BHK apartment and an office space in the mall). He discussed the matter with his father Rama Shankar who arranged ₹ 65.00 lacs by raising a loan against his fixed deposits. The remaining ₹ 15.00 lacs were arranged by Aayush as a

gold loan by pledging the jewellery of his wife Meera. According to the MOU entered by Aayush with the company, he would be paid ₹ 80,000 per month through NEFT from October 2015 onwards till the handing over of the fully constructed property. The difference of ₹ 20.00 lakh (i.e. ₹ 1.00 crore minus ₹ 80.00 lakh) would be paid by Aayush when he will be having possession of the apartment as well as office space.

Everything seemed to be fine in the first year of launching the project as the KBCPL paid the 'committed returns' to the home-buyers without any default but stopped the same thereafter without assigning any reason. Similar to the others, Aayush also noticed the default but comforted himself by assuming that the 'committed returns' would start soon after some time.

There was, however, no ray of hope and the default continued unhindered. Further, Aayush learned from certain other home-buyers that no construction activities were in sight at the earmarked plot. He made up his mind to visit the site personally and found the unthinkable revelations true. Aayush got extremely worried at the changed scenario. He contacted the officials of the company but received no reply. At a later date, when Aayush confronted the company officials, he was informed that the possession would be given within the next two years; but the time passed without anything concrete to happen.

Sensing dark clouds looming large over his head, he discussed the worrying matter with his uncle's lawyer Vansh Agarwal. Vansh informed him that due to some significant amendments in the Insolvency and Bankruptcy Code, 2016, home-buyers were also the financial creditors of the builders and developers. The premise of this amendment was based on an important fact that the home-buyers were also a reckoning force as other financial creditors, but they were being left high and dry when it came to playing a role in the decision-making process relating to the initiation of the insolvency resolution process against the defaulting builder/developer. Accordingly, he could also be referred to as a financial creditor and could initiate insolvency proceedings against the company as it had failed to pay back monthly 'committed returns' to him including non-delivery of apartment and office space at the stipulated time. The other investors could also sail in the same boat as they had a similar fate.

Vansh further clarified that 'debt' in this case was disbursed against the consideration for 'time value of money' which is the main ingredient that is required to be satisfied in order for an arrangement to qualify as financial debt and for the lender to qualify as a financial creditor under the scheme of the Insolvency and Bankruptcy Code, 2016. This acted as a silver lining for Aayush.

In the meantime, Aayush came across a public announcement through which claims from 'Financial Creditors' as well as other creditors of KBCPL were invited. On further inquiry, he gathered that the company had defaulted in repayment of a term loan of ₹ 100 crore which were obtained from the National Bank of India. Accordingly, the Hon'ble National Company

Law Tribunal (NCLT), Delhi, on the application of the National Bank of India, had ordered the commencement of the Corporate Insolvency Resolution Process (CIRP) against KBCPL. As mentioned in the public announcement, Aayush submitted his claim along with proof thereof in 'Form C' through the specified e-mail.

### **I. Multiple Choice Questions**

1. In the given case study National Bank of India filed an application for corporate insolvency resolution process (CIRP) with the National Company Law Tribunal, Delhi against KBCPL for default in repayment of term loan. If everything was in perfect order, from which date the corporate insolvency resolution process would have commenced?
  - (a) From the date of admission of the application.
  - (b) From the date of submission of the application.
  - (c) From the date of ascertaining the existence of default by the NCLT.
  - (d) From the date of appointment of Insolvency Resolution Professional (IRP).
2. Suppose Radhika had given a loan of ₹ 15 lakh to KBCPL which remained outstanding when Corporate Insolvency Resolution Process was ordered. As a financial creditor whether she could be a part of the Committee of Creditors (CoC) after she submitted her claim in 'Form C'.
  - (a) Yes, she could be a part of the Committee of Creditors (CoC) as she had given a loan to KBCC which was more than ₹ 5 lakh.
  - (b) No, she is a director of KBCC, could not be a part of the Committee of Creditors (CoC).
  - (c) Yes, she could be a part of the Committee of Creditors (CoC), if Interim Resolution Professional (IRP) permitted her despite the fact that she was a director of KBCC.
  - (d) Yes, she could be a part of the Committee of Creditors (CoC), if Interim Resolution Professional (IRP) sought permission of a minimum of 66% of the shareholders of the company carrying voting rights.
3. In the case study, Ketan Builders and Constructions Private Limited had demanded advance payment of 80% of the project cost from the intending home-buyers. After coming into force of Real Estate (Regulation and Development), Act, 2016 (RERA), maximum how much advance money can be demanded by a builder.
  - (a) Not more than 25%
  - (b) Not more than 20%

- (c) Not more than 10%
  - (d) Not more than 5%
4. Suppose the application for Corporate Insolvency Resolution Process against KBCPL filed by National Bank of India with the National Company Law Tribunal, Delhi is adjudged as incomplete in respect of certain matters. Within how much time the defects must be rectified from the receipt of notice by the National Bank of India from the National Company Law Tribunal, Delhi.
- (a) 7 days
  - (b) 10 days
  - (c) 14 days
  - (d) 15 days
5. In the given case study, Aayush, as a 'financial creditor', could also move an application for corporate insolvency resolution process because non-payment of debt by KBCPL was much more than the minimum amount stipulated for triggering a default against the company. Indicate that minimum amount by choosing the correct option (Assuming the current calendar date is 31<sup>st</sup> July 2021)
- (a) ₹ 50,000
  - (b) ₹ 1,00,000
  - (c) ₹ 10,00,000
  - (d) ₹ 1,00,00,000

## II. Descriptive Questions

6. In this case study Aayush, who is a home-buyer, has been categorized as a 'financial creditor'. You are required to answer why the advance payment against allotment by allottees can be regarded as 'financial lending'? How advance given by homebuyers against the allotment is distinct from the debt of the operation creditor?
7. Can a person (say Mr. Aayush) also be an operational creditor apart from being a financial creditor?
8. In the given case study, suppose Aayush having developed a customized software for KBCPL. Despite repeated reminders, KBCPL did not settle his invoice of ₹ 5,00,000 raised in this respect. Ultimately, Aayush proceeded to file an application for initiating the Corporate Insolvency Resolution Process (CIRP) against KBCPL with the National Company Law Tribunal (NCLT), Delhi. What could have been the documents which Aayush might have furnished along with the application filed for initiating the Corporate Insolvency Resolution Process (CIRP)?



**ANSWERS TO CASE STUDY 42****I. Answers to Multiple Choice Questions**

1. (a) From the date of admission of the application.

**Reason:** Section 7(6) of the IBC states that the corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) by the Adjudicating Authority.

2. (b) No, she is a director of KBCC, could not be a part of Committee of Creditors (CoC).

**Reason:** Section 21 of the IBC provides as under:

- (1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.
- (2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Further, section 5(24)(a) states that 'related party' in relation to a corporate debtor means, a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor. Since in the given case, Radhika being a director in the company will be termed as related party, hence cannot be the part of the CoC.

3. (c) Not more than 10%

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

4. (a) 7 days

**Reason:** The proviso to section 7(5) of the IBC provides that Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

5. (d) ₹ 1,00,00,000

**Reason:** Section 4(1) of the IBC provides that Part II shall apply to matters relating to the insolvency and liquidation of corporate debtors **where the minimum amount of the default is one crore rupees.**

## II. Answers to Descriptive Questions

6. According to section 5 (8) (f) of the Insolvency and Bankruptcy Code, 2016 states that financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing.

Further, as per the explanation inserted to this sub-clause,

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).

Hence advance payment against allotment by allottees shall be regarded as ‘financial lending’. Further, the payment made by Aayush to KBCPL for purchasing an apartment and office space is, therefore, a ‘financial debt’, and accordingly, Aayush is a ‘financial creditor’.

Further, Hon'ble Supreme Court, while disposing civil writ petition no. 43 of 2019, in the matter of *Pioneer Urban Land and Infrastructure Ltd and Anr vs. Union of India*, highlight the following three major difference between operational debts

Point of difference	Operational Creditor	Advance by the allottee
Role of supplier	In operational debts, a person who supplies the goods and	In the case of real estate developers, the developer

<sup>1</sup> Subs. by Notification No. S.O. 1205(E), for “one lakh rupees” (w.e.f. 24-3-2020).

	services becomes a creditor.	who is the supplier of the flat/apartment is the debtor.
Time value of money	Payments made in advance for goods and services are not made to fund the manufacturer of such goods or provision of such services.	Advance by allottees against allotment is to fund the developer to construct the apartment and flats.
The stake of interest of fund provider in the business of the other party	The operational creditor has no interest in or stake in the corporate debtor's business	Allottee of a real estate project is vitally concerned with the financial health of the corporate debtor

Hence, the advance given by homebuyers against the allotment is distinct from the debt of the operation creditor.

7. Yes, a person may also be an operational creditor apart from being a financial creditor.

According to Section 5 (20) of the Insolvency and Bankruptcy Code, 2016, the term 'operational creditor' means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

Further, according to Section 5 (21), the term 'operational debt' means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

In order to categorise Aayush as an 'operational creditor' also, in addition to a 'financial creditor', he should have made provision of goods, for example, the supply of construction material to KBCPL and the payment for which remains unpaid. Or else, he should have made provision of certain services but the company, till date, has not honoured the invoice raised by him. Another limb of operational debt is 'employment dues' *i.e.* Aayush was/is in the employment of the company but his employment dues are still pending.

Section 21(4) of the IBC states that where any person is a financial creditor as well as an operational creditor,—

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

8. As per sub-section (3) to section 9 (application for initiation of corporate insolvency resolution process by an operational creditor) of the Insolvency and Bankruptcy Code, 2016, Mr. Aayush as an 'operational creditor' shall furnish the following documents, along with the application for corporate insolvency resolution process of KBCPL:
- (a) A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor.
  - (b) An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt.
  - (c) A copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available.
  - (d) A copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
  - (e) Any other proof confirming that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

## CASE STUDY 43

Way back in November 2011, Mr. Hariharan Reddy, a senior professor of Biology at the University of Hyderabad, booked a 3BHK apartment in Royal Golf Burg - an impressive and integrated housing project proposed to be developed by a reputed builder popularly known as Raj Group. The project was large enough to accommodate 1200 fully-furnished apartments of different sizes spread out in 15 towers; each tower having 80 apartments. In addition, a golf course and a mall were also to be developed. This project was to come up near Shankarpally Road, Hyderabad, a non-polluting and posh area having all the facilities in close vicinity including ultra-modern cinema halls, markets, schools, colleges, hospitals, etc.

As mentioned above, the Raj Group which undertook to develop Royal-Golf-Burg consisted of Dhanraj and his younger brother Yuvraj, a well-known figure of Hyderabad. Both the brothers were the directors of Eklavya Estates Private Limited (EEPL) which had a registered office at Gachibowli, Hyderabad. EEPL owned the plot of land where the proposed housing project including the mall was to be developed.

The gated residency with a nice and peaceful environment as provided by Royal Golf Burg was meant for golf lovers who wanted to live a sleek and sporty lifestyle by making golf playing a routine. The glamour which attracted Mr. Reddy the most was that every apartment owner after occupation would feel the ownership of the golf course due to its strategic location vis-à-vis each apartment.

The management team of EEPL comprised seasoned architects and professionals who had, in the past, made luxurious homes possible for every home-buyer and the team was considered to be a dedicated one having will and honesty as its strong pillars that could build integrated properties with excellent infrastructure and services. The builders had completed several giant opulent projects in Guwahati, Mumbai, and Bhopal earlier. In the case of Royal Golf Burg, the company was to give delivery of fully furnished apartments by December 2017. Construction cost including the cost of the land was valued at around ₹800 crores.

The current project, however, missed the deadline of December 2017 and on the date of delivery, it was noticed that only six towers were completed; but the apartments in those towers were yet to be furnished. The other three towers had been constructed with a skeletal structure. In the other six towers, only the foundation and negligible wall work had been completed. In other words, the construction work was just at the initial stage and nothing more than that. However, the construction of the mall was almost complete. This angered the home-buyers including Mr. Reddy a lot but their repeated visits to the office of promoters did not evoke any positive response. Six months

passed without any significant happening. Nothing was done to furnish the already constructed apartments or to develop the other nine towers. Disappointed, Mr. Reddy and others approached Telangana State RERA authorities for redressal of their grievances including the filing of complaints regarding non-delivery of apartments.

Telangana State RERA, after a detailed inquiry, found that there were several financial irregularities together with diversion and siphoning of funds. More than two hundred shell companies were floated in the names of peons and drivers to divert money. Further, unaccounted money worth crores of rupees was invested in various other housing projects floated by the Raj Group which sold these flats at throw-away prices on paper but received black money in cash which was laundered through various shell companies operated by the Raj Group. This attracted the provisions of the Prevention of Money Laundering Act, 2002.

In the case of 250 apartments built in the six towers, the double allotment was also detected where the apartments were allotted to the persons more than their entitlement at a very nominal amount. It included the person himself, the spouse or dependent children, and almost in all cases, such persons were found to be connected with the promoters. The double allotment deprived the genuine home-buyers who had parted with their hard-earned money from getting even the deserving allotment of apartments despite paying around 80% of the cost. The double allotment was considered to be a form of unfair practice in which the promoters were involved. Inquiry by the RERA Authority also revealed that ten gardeners and drivers of Raj Group who had no means of paying the price of ten apartments were allotted the flats though consideration came from the Raj Group itself.

A show-cause notice was issued by Telangana State RERA authorities to the developers asking them to provide a satisfactory response within a period of 30 days from the date of the notice as to why the project should not be de-registered. The response was given by the directors, however, was dismal, lacked substance, and was not at all satisfactory.

However, de-registration of a building project is not an ideal choice for the authorities keeping in view the larger interests of the stakeholders as well as the nation as a whole and it is resorted to only when all the possible avenues of reaching a comfortable and plausible solution are shut. Therefore, as a last attempt before going for de-registration, RERA authorities in the interest of the allottees, permitted the developer EEPL to continue with the project and complete it in the next one year at the most subject, however, to the payment of a fine equivalent to 10% of ₹800 crores within next thirty days.

However, the developers seemed to be not serious at all so far as the completion of the housing project was concerned. They did not make use of this golden opportunity; thus, letting the project slip out of their hands. Citing insufficiency of the funds, they

did not cough out the required fine of ₹80 crores within the next thirty days and therefore, the Telangana State RERA authorities were forced to de-register the project, and an order to this effect was passed. Thereafter, finally, the project was taken over by RERA Authorities.

After take-over, RERA authorities with the concurrence of the State Government imposed various restrictions and controls on the project and the developer. These included:

- ◆ Freezing of various bank accounts due to which the developer was not allowed to make any payment or withdraw from these accounts without the authority's approval.
- ◆ Debarring the developer EEPL from accessing the website of RERA in relation to the project.
- ◆ RERA offices in other States and Union Territories were given information about such a revocation.
- ◆ As a part of name and shame, the name of the EEPL was mentioned in the list of the defaulters along with the photographs of Dhanraj and Yuvraj, and also relevant information about the case was displayed.

The officials of Telangana State RERA opined that after de-registration, there were several options before them to solve the issue in favour of home-buyers. The authority could give the first right of completion of the project to the home-buyers. In case the buyers were not in a position to do so by pooling their resources together and required RERA to supervise the development work which could be undertaken by another trust-worthy developer, then the RERA Authority could take steps to develop a mechanism to supervise the project.

In case there was not enough money left in the project fund, the Authority could also start proceedings to recover the diverted funds from the EEPL and it could also explore other possibilities to complete the project if the home-buyers so wished.

The response from the Home-buyers' Association of Royal Golf Burg was positive and therefore, a conciliatory committee was formed. President and Secretary of the Home-buyers' Association were nominated to the committee and RERA then appointed Mr. Yudhister Pal, a retired IAS Officer as a conciliator to supervise the operations of the committee. Another developer Uttam Constructions Private Limited was given the charge to complete the project within one year under the supervision of the RERA Authority represented by Mr. Yudhister Pal.

RERA ordered that all money realised from the sale of Mall as well as remaining dues to be given by the home-buyers would flow into an 'Escrow Account' opened solely for the construction of the project and Mr. Yudhister would release the funds only with the

consent of the President and Secretary of Home-buyers' Association. Proceedings to recover the diverted funds from the EEPL were also started. It was hoped that the project would be completed as per the new schedule.

### **I. Multiple Choice Questions**

1. Before revocation of registration, the RERA authorities are required to give written notice to the promoter stating the grounds on which it is proposed to revoke the registration. Such notice should be of how many days within which the promoter needs to reply?
  - (a) Not less than 30 days
  - (b) Not less than 45 days
  - (c) Not less than 60 days
  - (d) Not less than 120 days
2. RERA Authority passed the order of de-registration of Royal Golf Burg Project against its promoter EEPL. Within how many days of receipt of the order of de-registration, EEPL, as an aggrieved party, can file an appeal with the concerned Real Estate Appellate Tribunal?
  - (a) 30 days
  - (b) 45 days
  - (c) 60 days
  - (d) 120 days
3. The promoter EEPL did not complete the Royal Golf Burg Project within the projected time-frame as shared through declaration with RERA Authorities while seeking registration under Section 4. For such contravention, how much penalty the EEPL is liable to pay?
  - (a) Penalty may extend up to 2% of the estimated project cost
  - (b) Penalty may extend up to 5% of the estimated project cost
  - (c) Penalty may extend up to 10% of the estimated project cost
  - (d) None of the above
4. In the case of the Royal Golf Burg project, it is seen that it was de-registered by the RERA Authorities due to various irregularities. Choose from the given options as to who shall have the first right of refusal for carrying out the remaining development works in case of such revocation of registration.
  - (a) Home-buyers' Association of Royal Burg Golf



- (b) EEPL
  - (c) Mr. Yudhister Pal, Head of Conciliatory Committee
  - (d) RERA Authority
5. In case the Real Estate Appellate Tribunal admits the appeal of EEPL against de-registration of the Project, then maximum within how much time such appeal must be disposed of?
- (a) Within 30 days from the receipt of the appeal
  - (b) Within 45 days from the receipt of the appeal
  - (c) Within 60 days from the receipt of the appeal
  - (d) Within 120 days from the receipt of the appeal

## II. Descriptive Questions

6. According to the above case study, the Royal Golf Burg promoted by the Raj Group was de-registered by the Telangana State RERA authorities because the promoters were found to be involved in certain unfair and fraudulent practices. You are required to state the various reasons due to which registration granted to a project under RERA can be revoked and the project stands de-registered.
7. In the given case study, the Telangana State RERA authorities resorted to de-registration of the Royal Golf Burg Project due to unfair and fraudulent practices and irregularities followed by its promoters while developing the project, and the development was carried out at such a slow pace that ultimately the home-buyers could not get the possession of fully furnished apartments well within the promised time. What are the obligations of the RERA Authority and other matters associated with it if it recourses to de-registration of a project?
8. The circumstances stated in the above case study require the RERA Authority to revoke the registration of the Royal Golf Burg Project instead of its extension. State the provisions under which the RERA Authority may be required to extend the registration instead of revoking it.

## ANSWERS TO CASE STUDY 43

### I. Answers to Multiple Choice Questions

1. (a) Not less than 30 days
- Reason:** Section 7(2) of the RERA provides that the registration granted to the

promoter under section 5 shall not be revoked unless the Authority has given to the promoter not less than thirty days notice, in writing, stating the grounds on which it is proposed to revoke the registration, and has considered any cause shown by the promoter within the period of that notice against the proposed revocation.

2. (c) 60 days

**Reason:** Section 44(2) of the RERA provides that every appeal made under sub-section (1) shall be preferred within a period of sixty days from the date on which a copy of the direction or order or decision made by the Authority or the adjudicating officer is received by the appropriate Government or the competent authority or the aggrieved person and it shall be in such form and accompanied by such fee, as may be prescribed.

3. (b) Penalty may extend up to 5% of the estimated project cost

**Reason:** Section 61 of the RERA provides that if any promoter contravenes any other provisions of this Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to five per cent. of the estimated cost of the real estate project as determined by the Authority.

4. (a) Home-buyers' Association of Royal Burg Golf

**Reason:** The proviso to section 8 of the RERA states that in case of revocation of registration of a project under this Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.

5. (c) Within 60 days from the receipt of the appeal

**Reason:** Section 44(5) of the RERA provides that the appeal preferred under sub-section (1), shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within a period of sixty days from the date of receipt of appeal.

## II. Answers to the Descriptive Questions

6. Section 7 of the Real Estate (Regulation and Development) Act, 2016, lists out various grounds of revocation of registration granted to a real estate project under section 5, after being satisfied that -

- a. **Making of default** -The promoter makes default in doing anything, which is required by or under the Act or the rules or the regulations made thereunder.

- b. **Violation of terms or conditions of approval** -The promoter violates any of the terms or conditions of the approval given by the competent authority. From the case study it shall be noticed that broadly the following terms or conditions of the approval were violated by the promoters of the Royal Golf Burg;
- i. Non-construction of all the apartments in fifteen towers till the due date.
  - ii. Non-furnishing of apartments though the deadline to handover the furnished apartments passed.
- c. **Involvement in unfair practice or irregularities** – If the promoter is involved in any kind of unfair practice or irregularities. The term “unfair practice” here means a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely-
- (A) The practice of making any statement, whether in writing or by visible representation which,
    - (i) Falsely represents that the services are of a particular standard or grade;
    - (ii) represents that the promoter has approval or affiliation which such promoter does not have;
    - (iii) makes a false or misleading representation concerning the services;
  - (B) The promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;
- d. **Fraudulent practices** - The promoter indulges in any fraudulent practices.
- From the case study it shall be noticed that the fraudulent practices were undertaken by the promoters of the Royal Golf Burg included;
- i. Resorting to double allotment due to which the genuine home-buyers were not allotted the apartments which they very much deserved.
  - ii. Diversion of funds meant for constructing the apartments to shell companies.
  - iii. Allotment of apartments in the name of the peons and drivers though such allotments were actually meant for the use of the promoters since the consideration flowed from them.

**Note** - De-registration of a building project is not an ideal choice for the authorities keeping in view the larger interests of the stakeholders as well as the nation as a whole and it is resorted to only when all the possible avenues of reaching a comfortable and plausible solution are shut.

7. Section 8 of the Real Estate (Regulation and Development) Act, 2016 deals with the obligation of Authority consequent upon the lapse of or on the revocation of registration.

Upon lapse of the registration or on revocation of the registration under this Act, the Authority, may consult the Appropriate Government to take such action as it may deem fit including the carrying out of the remaining development works by competent authority or by the association of allottees or in any other manner, as may be determined by the Authority:

Provided that no direction, decision or order of the Authority under this section shall take effect until the expiry of the period of appeal provided under the provisions of this Act:

Provided further that in case of revocation of registration of a project under this Act, the association of allottees shall have the first right of refusal for carrying out of the remaining development works.

8. Section 6 of the Real Estate (Regulation and Development) Act, 2016 deals with the extension of registration.

The registration granted under section 5 may be extended by the Authority on an application made by the promoter, due to force majeure, in such form and on payment of such fee as may be prescribed:

Provided that the Authority may in reasonable circumstances, without default on the part of the promoter, based on the facts of each case, and for reasons to be recorded in writing, extend the registration granted to a project for such time as it considers necessary, which shall, in aggregate, not exceed a period of one year:

Provided further that no application for extension of registration shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

*Explanation.*— For the purpose of this section, the expression “**force majeure**” shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project.

According to Section 7 (3) of the RERA Act also, the Authority may, instead of revoking the registration under sub-section (1) of Section 7, permit the registration to remain in force subject to such further terms and conditions as it thinks fit to impose in the interest of the allottees, and any such terms and conditions so imposed shall be binding upon the promoter.

## CASE STUDY 44

The production of sugarcane is reasonably good in Uttar Pradesh from the point of view of both quality and quantity. The cause of worry, however, is the non-receipt of timely payments by the sugarcane-growers from the sugar mills. A common platform, therefore, is an essential requirement to provide a solution to this impending problem. Keeping this prerequisite in view, the sugarcane cultivators came together and formed a co-operative society known as Northwest Agro Produce Cooperative Society (NWAPCS) under the U.P. Co-operative Societies Act, 1965. The main objective of forming the society was to ensure the timely collection of sale proceeds from the domineering sugar mills. However, the Cooperative Society also developed a Charter, in the form of a memorandum for its members, to regulate and control the supply, price, terms of sale of sugarcane, collection of sale proceeds, and also recovery, if required. This Charter was binding on all the members of the Society.

In order to extend its support to the sugarcane-growers, the NWAPCS asked them to sell their entire farm produce of sugarcane to the Society at a mutually agreed price. The selling of entire farm produce to the Society was rather a pre-condition, because the farmers who wanted to avail the services of NWAPCS were under an obligation not to sell any portion of their farm produce in the open market. The Society, in turn, would sell the sugarcane so procured from the farmers to the sugar mills.

In order to trade with the sugar mills and to deal with the regulatory authorities, financial institutions, etc., NWAPCS, in accordance with its memorandum, promoting a company called Northwest Agro Limited. Over a period of time, Northwest Agro Limited transformed itself into a significant company, playing its role as an intermediary to augment the process of the sale of sugarcane.

The extracts from the latest audited financial statements of Northwest Agro Limited are as follows:

S. No.	Particulars	Amount (₹ in crore)
1.	Authorised Share Capital	500
2.	Paid-up Share Capital	489
3.	Sale proceeds (net of taxes) from the sale of sugarcane	4200
4.	Operating Assets	728
5.	Net Profit	96

Mr. Vijendra Narang, CEO of Northwest Agro Limited, had heard about forward integration as a strategy of expansion and growth. Based on his research work in this direction, he prepared a proposal to takeover Sun Sugar Limited having registered office at Lucknow, which was duly approved by the Board of Directors and thereafter, by the members of the company at an extraordinary general meeting. The strategy adopted by Northwest Agro Limited was to acquire a controlling stake in Sun Sugar Limited from the open market. To recount, Sun Sugar Limited is running a number of sugar mills, with a global presence.

Around 60% of the total sales made by Sun Sugar Limited constitutes the export of raw sugar; the majority of which is exported to Iran. It may be noted that in order to settle the trade balance, Iran had started buying sugar from India because it has been blocked from the global financial system (including using USD) to transact its oil business.

During the last FY, the turnover of Sun Sugar Limited has recorded as ₹ 2200 crores while the operating assets were to the tune of ₹ 470 crores. The paid-up share capital stood as ₹ 126 crores against the Authorised share capital of ₹ 150 crores. It is noteworthy that even after the acquisition, Northwest Agro Limited and Sun Sugar Limited were not merged but maintained respective identities.

Sun Sugar Limited has a strong domestic network with retail shops and stores through which the company sells its sugar under the brand name 'Meetha'. The domestic sale constitutes around 40% of the total turnover. The retail shops and stores which sell 'Meetha' are given instructions by Sun Sugar Limited not to charge a price that is more than what is suggested by it though a lower price may be charged.

Mr. Abhishek Nair, head of the marketing department at Northwest Agro Limited was also given the responsibility to look after the marketing department of Sun Sugar Limited and to suggest ways to acquire substantial market share. After his thorough research, Mr. Nair concluded that the substantial market share in terms of new customers could be captured only if Sun Sugar Limited sold its 'Meetha' brand sugar at a price lower than the cost. Accordingly, a new pricing policy for 'Meetha' was implemented and the retail price was brought down from ₹ 40 per kilogram to ₹ 35 per kilogram. However, in order to restrict loss on account of selling sugar at a price lower than the cost incurred in its production, Sun Sugar Limited asked all the shopkeepers and stores who sold 'Meetha' brand of sugar, not to bill at a time more than 2 kilograms of 'Meetha' per purchaser.

With a view to expanding the business, the directors of Northwest Agro Limited are contemplating adding another segment in the form of 'development and production of seeds' for a variety of crops. For the purpose of financing the current project, the company, in addition to availing of funds from the domestic market, is also hopeful of borrowing foreign currency funds in US dollars from a commercial bank situated in Chicago (USA).

NWAPCS undertook to promote another company called Southwest Agro Limited, whose object clause, *inter-alia*, included -

- ◆ To conduct weather research and provide forecast reports;
- ◆ To provide necessary technical knowledge/guidance to the members of NWAPCS;
- ◆ To conduct market research for Northwest Agro Limited and Sun Sugar Limited.

According to the detailed market research conducted by Southwest Agro Limited, it was found that Moon Sugar Limited held a major stake in the retailing of packaged sugar under the brand name 'Aur' and covered around 30% market across the whole country at a retail price of ₹ 40 per kilogram. This was a worrying factor as Moon Sugar Limited posed stiff competition among the players who sold packaged sugar in the retail sector. Keeping in view that the acquisition of Sun Sugar Limited by Northwest Agro Limited proved largely a successful event, a bear-hug letter was sent to the senior management of Moon Sugar Limited for its acquisition. For the immediately previous FY, the turnover of Moon Sugar Limited was recorded at ₹ 2800 crores whereas operating assets were to the tune of ₹ 568 crores. Its Authorised capital was ₹ 400 crores and its paid-up share capital stood at ₹ 364 crores.

Undeniably, Moon Sugar Limited was already an undisputed market leader, and therefore, it refused the bear-hug offer. However, Northwest Agro Limited along with Southwest Agro Limited performed hostile acquisitions and each of the companies acquired a 25.5% stake in the voting rights respectively by 'tender notice' over the stock exchange. The governing body of Moon Sugar Limited was restructured completely. Post-acquisition, Northwest Agro Limited got dominance over the market.

In order to obtain the benefit of 'dominance', a new pricing policy was introduced by Northwest Agro Limited. Accordingly, the new price was fixed at ₹ 45 per kilogram and the packaged sugar was renamed as 'Aur Meetha'. To support the price rise, Northwest Agro Limited started restricting the supply to the market.

Northwest Agro Limited also entered into a Memorandum of Understanding (MOU) with Star Ethanol Limited, which is a USD 30 million company considering the value of its assets, for the transfer of technology by the latter.

### **I. Multiple Choice Questions**

1. When the merger of Sun Sugar Limited with Northwest Agro Limited, can be considered as a 'combination':
  - (a) When the value of assets of the enterprise created after the merger is more than ₹ 1000 crores or the turnover after the merger is more than ₹ 3000 crores.

- (b) When the value of assets of the enterprise created after the merger is more than ₹ 1000 crores and the turnover after the merger is more than ₹ 3000 crores.
  - (c) When the value of assets of the enterprise created after the merger is more than ₹ 2000 crores or the turnover after the merger is more than ₹ 6000 crores.
  - (d) When the value of assets of the enterprise created after the merger is more than ₹ 2000 crores and the turnover after the merger is more than ₹ 6000 crores.
2. When a notice has been given to the Commission in respect of a 'combination' but the Commission has not passed any order in this respect, such 'combination' shall come into effect after the passing of how many days from the day of giving the notice to the Commission?
- (a) 90 days
  - (b) 180 days
  - (c) 210 days
  - (d) 270 days
3. With a view to adding another segment in the form of 'development and production of seeds' for a variety of crops, Northwest Agro Limited is contemplating financing the project partly by borrowing foreign currency funds in US dollars from a commercial bank situated in Chicago (USA). Any such foreign currency borrowing availed by the company shall be:
- (a) A current account transaction
  - (b) A capital account transaction
  - (c) Neither a current account transaction nor a capital account transaction
  - (d) Either a current account transaction, if the funds to be borrowed are less than USD 1 million, or a capital account transaction if more than USD 1 million
4. In terms of the decision of Northwest Agro Limited, Sun Sugar Limited, through some agreement, asked all the shopkeepers and stores, who sold the 'Meetha' brand of sugar, not to sell more than 2 kilograms of sugar per purchaser. Such agreement can be categorised as:
- (a) Exclusive supply agreement
  - (b) Exclusive distribution agreement
  - (c) Refusal to deal



- (d) None of the above
5. The Commission is empowered to direct that the 'combination' shall not take effect if it is of the opinion that the 'combination' has, or is likely to have a certain kind of 'effect' on the competition. By choosing the correct option, name that 'effect'
- (a) A severe adverse effect on competition
- (b) An appreciable adverse effect on competition
- (c) A significant adverse effect on competition
- (d) A considerable adverse effect on competition

## II. Descriptive Questions

6. From the given case study, is it justifiable to consider Northwest Agro Produce Cooperative Society (NWAPCS) as a 'cartel'?
7. Does Northwest Agro Limited hold dominance over the market? If yes, mention the instances under which it abuses its dominant position.
8. In the context of Northwest Agro Limited, explain briefly the regulatory aspects of 'combination' as mentioned in the Competition Act, 2002. (Presuming South-west Agro Limited has a relevant turnover of ₹ 500 crores and assets of ₹ 200 crores) Also, explain how the 'combination' is regulated.

## ANSWERS TO CASE STUDY 44

### I. Answers to Multiple Choice Questions

1. (c) When the value of assets of the enterprise created after the merger is more than ₹ 2000 crores or the turnover after the merger is more than ₹ 6000 crores.

**Reason:** Section 5(c)(i)(A) of the Competition Act, 2002 provides that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if any merger or amalgamation in which the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have, either in India, the assets of the value of more than rupees 1000 crores or turnover more than rupees 3000 crores.

**However, the original thresholds set out in the Competition Act have been revised twice in 2011 and in 2016.**

<sup>1</sup>The current thresholds are as follows:

Combines Assets			Combined Turnover	
	In India	Worldwide	In India	Worldwide
Parties to combination	> ₹ 2000 crores	>USD 1 billion (including at least INR 1000 crore in India)	>₹ 6000 crores	>USD 3 billion (including at least INR 3000 crore in India)
Group of the parties to a combination	>₹ 8000 crore	>USD 4 billion (including at least INR 1000 crore in India)	>₹ 24000 crore	>USD 12 Billion (Including at least INR 3000 crore in India)

2. (c) 210 days

**Reason:** Section 6(2A) of the Competition Act, 2002 provides that no combination shall come into effect **until 210 days have passed** from the day on which the notice has been given to the Commission under sub-section (2) **or the Commission has passed orders under section 31, whichever is earlier.**

3. (b) A capital account transaction

**Reason:** Section 2(e) of FEMA provides that “capital account transaction” means a transaction **which alters the assets or liabilities**, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6.

In the given case after borrowing in foreign currency the balance sheet will be altered. The liability side will be increase with borrowing and assets will also increase by Cash (FC) / Assets created out of such borrowing.

4. (b) Exclusive distribution agreement

**Reason:** Before answering to this, one has to understand the meaning of ‘exclusive supply agreement’, ‘exclusive distribution agreement’, and ‘refusal to deal’ as provided under the Competition Act, 2002.

“Exclusive supply agreement” includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in

<sup>1</sup> [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/CompetitionLawModule.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/CompetitionLawModule.pdf)

any goods other than those of the seller or any other person. [Explanation (b) to Section 3(4)]

**“Exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods. [Explanation (c) to Section 3(4)]**

“Refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought. [Explanation (d) to Section 3(4)]

Thus, as per above, the limiting the quantity of ‘Meetha’ comes under the ‘Exclusive distribution agreement’.

5. (b) An appreciable adverse effect on competition

**Reason:** Section 3(1) of the Competition Act, 2002 provides that No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause **an appreciable adverse effect on competition within India.**

## II. Answers to Descriptive Questions

6. As per Section 2 (c) of the Competition Act 2002, the term “cartel” includes an association of producers, sellers, distributors, traders, or service providers who, by agreement amongst themselves, limit, control, or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

In the given case it has been mentioned that NWAPCS has asked the sugarcane growers **to sell their entire farm produce of sugarcane to the Society at a mutually agreed price.** The **selling of entire farm produce to the Society was rather a pre-condition**, because the farmers who wanted to avail the services of NWAPCS were under an obligation **not to sell any portion of their farm produce in the open market.** The Society, in turn, would sell the sugarcanes so procured from the farmers to the sugar mills.

From the above, it may be noted that the term ‘cartel’ has been given inclusive meaning. Although Northwest Agro Produce Cooperative Society was formed to ensure the timely collection of sale proceeds from sugar mills, it also developed a charter, in the form of a memorandum for its members, to regulate and control the supply, price, term of sale of sugarcanes (though only on behalf sugarcane-growers), collection of

sale proceeds and also recovery, if required. This charter, in the form of a memorandum, was binding on all the members of the Society. Hence, Northwest Agro Produce Cooperative Society is a 'Cartel' within the meaning of Section 2 (c) of the Competition Act, 2002.

7. Yes, North West Agro Limited holds dominance over the market because as per *Explanation (a)* to Section 4(2) of the Competition Act, 2002, "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to-
  - (i) operate independently of competitive forces prevailing in the relevant market; or
  - (ii) affect its competitors or consumers or the relevant market in its favour.

#### **Instances of abuse of dominance**

- (i) **Predatory Pricing after the acquisition of Sun Sugar Limited** - Northwest Agro Limited acquired a substantial network of retailers after the takeover of Sun Sugar Limited and due to such takeover, it tried to penetrate the market using predatory pricing [refer Section 4(2)(a)(ii) of the Competition Act, 2002]. Northwest Agro Limited reduced the price of the brand 'Meetha' from ₹ 40 to ₹ 35 per kilogram **which was lower than the cost incurred**, whereas other players in the market like Moon Sugar Limited were selling sugar at ₹ 40 per kilogram.

As per *Explanation (b)* to Section 4(2) of the Competition Act, 2002, the term "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

- (ii) **Increasing the price after the acquisition of Moon Sugar Limited** – After the hostile acquisition of Moon Sugar Limited by Northwest Agro Limited with the help of another group company Southwest Agro Limited, Northwest Agro Limited raised the price of its branded sugar 'Aur Meetha' from ₹ 35 to ₹ 45 per kilogram, even though Moon Sugar Limited was originally selling its sugar 'Aur' at ₹ 40 per kilogram. According to Section 4 (2)(b)(i) of the Competition Act, 2002, there shall be an abuse of dominant position under Section 4(1), if an enterprise or a group limits or restricts the production of goods or market therefore through unfair or discriminatory price.
8. In the context of Northwest Agro Limited, the regulatory aspects of 'combination' as mentioned in Section 5 of the Competition Act, 2002, are given as under:

Sr. No	Nature of Combination	Facts of the case	Criteria for considering 'Combination'	Whether 'Combination' or not
1	Acquisition by single acquirer but different goods [Section 5 (a) (i) (A)]	Northwest Agro Limited acquired Sun Sugar Limited.	Joint Asset over ₹ 2,000 crores <b>or</b> Turnover over ₹ 6,000 crores	<b>Yes. It is a combination.</b> <i>Hint:</i> Although joint assets base of INRs 1198 crores (728+470) which is less than INRs 2,000 crores but joint turnover is ₹ 6,400 crores (4,200+2,200) which is more than ₹ 6,000 crores.
2	Acquisition by a group with similar goods [Section 5 (b) (ii) (A)]	Northwest Agro Limited acquired Moon Sugar Limited with the help of another group company Southwest Agro Limited.	Group assets over ₹ 8,000 crores <b>or</b> turnover over ₹ 24,000 crores	<b>No. It is not a combination.</b> <i>Hint:</i> Joint asset base of the 'group' is only ₹ 1,966 crores (1198+200+568) and aggregate turnover is also only ₹ 9,700 crores. (6400+500+2800)
3	MOU for transfer of technology	Northwest Agro Limited enters into an MOU with Star Ethanol Limited for transfer of technology.	No criterion is prescribed for considering the transfer of technology as a 'combination'.	<b>Not Applicable.</b>

**Note** – Limits are quoted in section 5 of the Competition Act 2002 and further modified through notification number S.O. 675(E) dated 4th March 2016

### Regulation of Combinations

According to Section 6 (1) of the act, no person or enterprise shall enter into a combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Further section 6 (2) of the act says, any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission in the specified form

along with a requisite fee, disclosing the details of the proposed combination, within thirty days of:

- (a) Approval of the proposal relating to merger or amalgamation by the Board of Directors of the enterprises concerned with such merger or amalgamation;
- (b) Execution of any agreement or other document for acquisition or acquiring of control.

Further section 6 (2A) of the act provides, no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission or the Commission has passed orders under Section 31, whichever is earlier.

## CASE STUDY 45

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

SN	Name	Relation to Mr. Rattan Mal Gulati	Status
1	Mr. Rattan Gulati	Self	Managing Trustee
2	Mrs. Shashi Kala	Wife	Member Secretary
3	Mr. M R Gulati	Elder Son	Member Trustee
4	Mr. O P Gulati	Younger Son	Member Trustee
5	Mrs. Rita Gulati	Daughter-in-law (wife of Mr. M R Gulati)	Member Trustee
6	Mrs. Radha Gulati	Daughter-in-law (wife of Mr. O P Gulati)	Member Trustee
7	Mr. Alok	Grand-Son (Son of Mrs. Rita & Mr. M R Gulati)	Member Trustee

Easy Key Educational Trust runs a group of agriculture colleges. Rita and Radha is a cousin from the Mohanty family with a political background, which supports the businesses of the Gulati Family, where ever possible.

Post to the death of Mr. Rattan Mal Gulati last year, Ms. Alka was admitted as member trustee to Easy Key Education Trust and Mr. M R Gulati took charge as managing trustee. Ms. Alka is the daughter of Mrs. Radha & Mr. O P Gulati; she is studying Agriculture Economics and Business Administration in one of the dual degree programs of Kansas State University, Manhattan, United States. Mr. M R Gulati during the current fiscal year remitted the USD 260,000 (USD 160,000 for tuition fee and USD 100,000 personal expenditure) to Ms. Alka through authorised person without prior permission of RBI under a liberalised remittance scheme.

On the 21st birthday of Ms. Alka, both the parents Mrs. Radha & Mr. O P Gulati, decided to visit Ms. Alka in States, to congratulate her and on the same day there is the 25th Wedding Anniversary of Mrs. Radha & Mr. O P Gulati. While passing by streets in Manhattan Mrs. Radha, find a Jewelry showroom that offers the latest design and exciting offers. Mr. O P Gulati also agrees to buy gold for Mrs. Radha, being fond of jewelry from an investment perspective. The price offered by Goldsmith is USD 45 per gram, which is cheaper than the prevailing prices of gold in India. Therefore, Mr. O P Gulati apart from the purchase of 70 grams of gold ornaments (jewelry) and 100 grams of gold in form of gold coins (these are in

excess of what is allowed as per baggage rule); also purchased the latest gizmo device, which is not yet launched in India. On arrival in India, both Mrs. Radha & Mr. O P Gulati, pass through the green channel; without making any disclosure/declaration to custom authority.

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

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

Advance equal to 25% of estimated (due to escalation clause) price collected from the customer who booked the flats at the time of entering an agreement to sell, and 20% of these advance amounts used to complete one of an existing ongoing project by Mr. M R Gulati and the remaining amount kept in a separate bank account. Project Paradise is not registered with the Real Estate Regulatory Authority yet. Looking into the high demands among buyers, Mr. M R Gulati decided to enlarge the project by 4 flats, resultantly there is increase the floors from 3 to 5. Installments are also collected as and when become due, and duly accounted for in books of accounts, and acknowledgment is also provided to allottees. Mr. Rahman, who is a friend to the family of Mr. M R Gulati, is also a qualified lawyer by qualification but hotelier by profession, told Mr. M R Gulati about registration requirements of the project under the Real Estate (Regulation and Development) Act, 2016; and Mr. M R Gulati applied for same. In meantime, Mr. M R Gulati using his influence took permission from the Municipal Corporation of the city for an increase of the floor.

Mr. Alok is a fickle-minded young star who graduated from a top-notch B-School willing to start his business of solar panels hence he asked his father to help him with funds in establishing the business. Mr. M R Gulati helped the son to establish the business in form of a private company with the name 'Power Sun Private Limited' by allowing him to use the Vikas-Khand land, in order to avail tax benefit. Mr. Alok raised a loan from a financial institution at a relatively high-interest rate. Due to his capricious nature, no experience in the business of solar panels, and stiff economic conditions; the business went into losses. The situation of the debt trap arises in the second year of operation. The liquidity and solvency position of the



business of Mr. Alok is this bad that he is unable to pay-off trade creditors, despite multiple month-long reminders from vendors. One of the unpaid operational creditors sent the demand notice under IBC 2016 to Power Sun Private Limited on 15<sup>th</sup> November 2019.

Ms. Alka came back to India after completing her academic program; she joined the governing body of a group of agriculture colleges operated by Easy Key Educational Trust. She planned for a strategic restructuring of the business. She decided to attain dominance in the market and beat the competition by the acquisition of the only other agriculture college operational in the state. New programs are also launched which are research-based and featuring industry immersion as a unique selling point. She ensured that all the group agriculture colleges of the group must be accredited by ICAR. Down the line having aspirations, that these affiliated colleges must either emerge as autonomous colleges or become research-based universities. Due to the monopoly in agriculture courses, all fees apart from tuitions fee doubled from the upcoming academic year.

### **I. Multiple Choice Questions**

1. What will be the maximum amount of penalty, in regard to remittances in US\$ to Ms. Alka (in the United States) done by Mr. M R Gulati:
  - (a) USD 260,000
  - (b) USD 200,000
  - (c) USD 60,000
  - (d) USD 30,000
2. If the price of each flat is INRs 50 lakhs, then how much will be the maximum amount of advance to book flat
  - (a) ₹ 1,50,000
  - (b) ₹ 5,00,000
  - (c) ₹ 6,00,000
  - (d) ₹ 6,50,000
3. Out of the following acts of Mr. M R Gulati, which can be held as offence under the Real Estate (Regulation and Development) Act, 2016
  - (i) Not applied for registration of the project at an earlier stage (prior to the extension of floors)
  - (ii) Receive the advance and installments against an agreement to sell, without/prior registration of the project.
  - (iii) Use 20% of the fund for completion of another on-going existing project

- (a) Both i and ii
  - (b) Both ii and iii
  - (c) Both i and iii
  - (d) All (i, ii, and iii) of these
4. By which date does 'Power Sun Private Limited' need to respond to demand notice of operational creditor served on 15<sup>th</sup> November 2019
- (a) Latest by 22<sup>nd</sup> November 2019
  - (b) Latest by 25<sup>th</sup> November 2019
  - (c) Latest by 30<sup>th</sup> November 2019
  - (d) Latest by 15<sup>th</sup> December 2019
5. Can Mr. Alok be held as Benamidar under the Prohibition of Benami Property Transaction Act 1988?
- (a) Yes, because consideration paid by Mr. M R Gulati, but property registered in his name
  - (b) Yes, because he is a party to the transaction
  - (c) No, because he is the son of Mr. M R Gulati, who paid the consideration
  - (d) No, because he didn't participate in the negotiation of price and payment thereof.

## **II. Descriptive Questions**

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

**ANSWERS TO CASE STUDY 45****I. Answers to Multiple Choice Questions**

1. (d) USD 30,000

**Reason:** In terms of Para 1 of Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 individuals can avail of foreign exchange facility for the studies abroad and maintenance of close relatives up to USD 250,000 without the prior approval of RBI. In this case, remittance has been of USD 260,000 ( i.e. 160,000+100,000), thus USD 10,000 in excess which requires prior approval of RBI. Thus, penalty of three times of the default amount USD 30,000 (USD10,000\*3) will be levied as penalty.

2. (b) ₹ 5,00,000

**Reason:** Section 13(1) of RERA states that a promoter shall **not accept a sum more than ten per cent. of the cost of the apartment**, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force. Therefore, 10% of 50 lakh rupees, comes to 5 lakh rupees.

3. (a) Both i and ii

**Reason:** Registration real estate project is compulsory in terms of section 4(1) of RERA. Advance not exceeding 10% of the cost of flat without first entering into the agreement for sale, as per section 13(1) of RERA.

4. (b) Latest by 25<sup>th</sup> November 2019

**Reason:** The time given under section 8(2) of the IBC is within a period of 10 days of the receipt of demand to respond. Therefore the respond by the corporate debtor should be made latest by 25<sup>th</sup> November, 2019.

5. (c) No, because he is the son of Mr. M R Gulati, who paid the consideration.

**Reason:** Since, Alok is the son of M.R. Gulati, the hence any purchase of property in name of son is exempted vide section 2(9)(A)(b)(iii) of PBPT Act.

**II. Answers to Descriptive Questions**

6. As per section 3 of the Prevention of Money Laundering Act, 2002, whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is

actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property, shall be guilty of offence of money-laundering.

Further, as per section 2(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

**The Schedule attached to the PMLA describes the following offences:**

**Part A:** Paragraph 12: Offences under the Customs Act, 1962

Section 135: Evasion of duty or prohibitions

**Part B: Offence under the Customs Act, 1962**

Section 132: false declaration, false documents etc.

Since baggage items are also subject to duty beyond a certain limit. Gold/jewelry purchased by Mrs. Radha & Mr. O P Gulati is in excess of what is allowed as per baggage rules under the custom laws, hence passing through the green channel and not filling declaration to the custom officer on arrival at an airport leads to evasion of duty under custom laws.

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

7. As per section 6 of the Insolvency and Bankruptcy Code, 2016, where any corporate debtor commits a default, a financial creditor, an operational creditor, or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided. Hence, yes 'Power Sun Private Limited' can initiate insolvency resolution process.

**Initiation of corporate insolvency resolution process 'Power Sun Private Limited'**

Section 10 of the IBC deals with the matter relating to the initiation of CIRP by corporate applicant. The relevant provision reads as under:

- (1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.
- (2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner with such fee as may be prescribed.

- (3) the Corporate applicant shall, along-with application, furnish-
- (a) the information relating to its books of account and such other documents relating to such period as may be specified;
  - (b) the resolution professional proposed to be appointed as an interim resolution professional; and
  - (c) special resolution passed by shareholder of the corporate debtor, approving the filing of the application.
- (4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by order –
- (a) admit the application, if it is complete and no disciplinary proceeding is pending against the proposed resolution professional; or
  - (b) reject the application, if it is incomplete, or any disciplinary proceeding is pending against the proposed resolution professional.

Provided that the Adjudicating Authority shall, before rejecting an application, give notice to the applicant to rectify the defects in his application within 7 days from the date of receipt of such notice from the Adjudicating Authority.

- (5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

**Student must note** – Due to effect of COVID-19 pandemic, vide newly inserted section 10A, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed under sections 7, 9, and 10, for any default arising on or after 25th March 2020 up-till 24<sup>th</sup> March 2021.

But as per provision of section 11, in the following circumstances 'Power Sun Private Limited' shall not be entitled to make an application to initiate the corporate insolvency resolution process:

- (a) a corporate debtor undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process; or
- (aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or
- (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or

- (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- (d) a corporate debtor in respect of whom a liquidation order has been made.

*Explanation I.*—For the purposes of this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor.

*Explanation II.*—For the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

**Note** – The above scenarios are not applicable to Power Sun Private Limited, as per the fact stated in the case study.

8. As per sub-section 1 to section 4 of the Competition Act, 2002, no enterprise or group shall abuse its dominant position.

Further as per explanation (a) to section 4(2) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to

- (i) operate independently of competitive forces prevailing in the relevant market; or
- (ii) affect its competitors or consumers or the relevant market in its favour.

Further, as per section 4 (2) (a) (ii), there shall be an abuse of dominant position if an enterprise or a group, directly or indirectly, imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or service.

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

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

Acquiring dominance is not an offence, but abuse of dominance is an offence.

## CASE STUDY 46

Mr. Mohit Agarwal is an engineering graduate from one of the IITs in the civil stream. He has a high dream about his career and started his own business in the form of a private limited company named 'Sweet Homes Private Limited' in association with one of his classmates and best buddy Mr. Rohit. Both Mr. Mohit and Mr. Rohit were the directors of said company.

Mr. Rohit was responsible for the administration of the company and for raising the finance. On behalf of Sweet Homes Private Limited, he met various Angel Investors and Venture Capitalists to raise a requisite amount for funding initial projects. Sweet Homes Private Limited was formed to offer affordable housing for the lower-income group through its initial project 'Hamara Ghar'. The elevator pitch by Mr. Rohit convinced Mr. Kapil Shangi to fund a seed capital of ₹ 1.5 crore in Sweet Homes Private Limited.

Project 'Hamara Ghar', although is located in the outskirts of the city, but surrounded by greenery and an approach from the national highway is pretty well. The railway station is just 1.5 kilometers away. It comprises 18 apartments in a total area of 500 Square Meters in form of 6 legs of 3 floors each (including the ground floor).

Land for the project 'Hamara Ghar' was purchased from Mr. Verma (A renowned and influential industrialist who invests in the real estate sector as well) on 3rd October 2019 for ₹ 90 lakhs. Mr. Verma through his influence tried to take Mr. Mohit under pressure to make half of the payment in cash and the remaining half in form of an account payee cheque, in order to reduce his capital gain liability, to which Mr. Mohit not agreed at all and mentioned that payment will be made entirely through account payee cheque only.

Mr. Mohit also did not wish to lose the deal from his hand, hence agreed at the second request from Mr. Verma, to make payment of ₹ 90 lakhs entirely by account payee cheque in favour of Verma Spun Private Limited (One Person Company) instead of Mr. Verma. After a few days, Mr. Verma received the show-cause notice from the office of the Assistant Commissioner of income tax, to show-cause why should the provision of the Prohibition of Benami Property Transaction Act, 1988 not applied to him.

'Hamara Ghar' is an innovative project of its own type. Under this project, affordable housing will be made and architected in such a manner that there will be fresh air ventilation and rooms will remain largely unaffected by external weather, especially in summers, and will also be in accordance with Vaastu requirements. For expertise in space management, 'Perfect

Square Consultancy' an Italy-based architect firm was hired. Perfect Square Consultancy raised a bill of US \$ 4000 on Sweet Homes Private Limited.

Each apartment is the comprising of a gross area of 70 Square Meters, including internal partition walls (which amounts to 3% of the gross area of the apartment); and also including an exclusive balcony of 2 Square Meters. Since said apartments are part of an affordable housing scheme, hence sale price of each apartment will be kept at ₹ 30,000 per Square Meter of the super built-up area, which is relatively much lower than prevailing market prices of ₹ 45,000-50,000 per Square Meter. The estimated cost as of now of the entire project will be about ₹ 3 crores.

Soil testing, legal aspects in reference to Municipal Corporation of the city, agreement with fund provider, maintaining escrow account and selection of vendors, etc. had been done in the meantime, in order to meet expected project delivery date 12th May, 2020.

'Home Advisor' is a famous property advisor of the city who has been hired for the Project 'Hamara Ghar'. Hence, Home Advisor was appointed as an authorized real estate agent for project Hamara Ghar, on 11th November, 2019. Home Advisor is registered with the Real Estate Regulatory Authority of the state in which it's having a registered office situated.

Home Advisor started advising their clients about the affordable houses from Sweet Homes Private Limited and within the first five days identified 4 clients, who offered advance to book the apartments under Project 'Hamara Ghar'. Advance collected was deposited into the current account of Sweet Homes Private Limited.

Application for project approval was moved to Real Estate Regulatory Authority on 15th November 2019 along with necessary details and prescribed fees, by Sweet Homes Private Limited. Project 'Hamara Ghar' got the nod from Real Estate Regulatory Authority on 2<sup>nd</sup> December 2019.

Sweet Homes Private Limited, began the construction on 20th December, 2019. By the 25th of December, all the apartments booking reaches to 100%. All 18 allottees/buyers were provided with the estimated layout and other specification which was earlier provided to the Real Estate Regulatory Authority. But on 20th January, 2020, Sweet Homes Private Limited made certain changes in specification on the advice of a site engineer. Such changes are not alterations to major layouts, but significant in nature. The majority of the allottees didn't wish to accept the proposed changes. Allottees were making the argument that they took the decision of purchase based upon initially specified promises, after which changing specification was ethically incorrect.



**I. Multiple Choice Questions**

1. Carpet Area for each apartment offered under project 'Hamara Ghar' as per applicable provisions of RERA is:
  - (a) 70 Square Meters
  - (b) 67.9 Square Meters
  - (c) 68 Square Meters
  - (d) 69.9 Square Meters
2. Out of the following, who can be initiating officer apart from Assistant Commissioner for attachment of the property?
  - i. Income Tax Officer
  - ii. Deputy Commissioner
  - iii. Joint Commissioner
  - (a) Only i above
  - (b) Only ii above
  - (c) Both i and ii above
  - (d) Both ii and iii above
3. Changes proposed by Sweet Homes Private Limited need to be approved through written consent by:
  - (a) All 18 allottees
  - (b) At least 14 allottees
  - (c) At least 12 allottees
  - (d) At least 10 allottees
4. How much can be the maximum amount of consultancy charges which can be remitted by Sweet Homes Private Limited without RBI approval, presuming it is an infrastructure project:
  - (a) USD 1,000

- (b) USD 10,000
  - (c) USD 100,000
  - (d) USD 10,000,000
5. Real Estate Regulatory Authority (RERA) must approve or reject the application for registration of Sweet Homes Private Limited maximum by:
- (a) 30<sup>th</sup> November 2019
  - (b) 15<sup>th</sup> December 2019
  - (c) 30<sup>th</sup> December 2019
  - (d) 14<sup>th</sup> January 2020

## **II. Descriptive Questions**

6. Can the act of offering apartments at prices lower than prices prevailing in the market by Sweet Homes Private Limited in the stated case, concluded as predatory bidding under the Competition Act, 2002?
7. In response to the notice issued from the Assistant Commissioner of Income Tax (ACIT), Mr. Verma appeared in the office of ACIT. ACIT compelled Mr. Verma to produce books of accounts and record evidence on affidavits, which Mr. Verma tried to avoid by stating, the same could not come within the powers of ACIT. Explain powers of authorities and state whether ACIT is justified or not.
8. Sweet Homes Private Limited offered the apartment at a price of ₹ 30,000 per Square Meter of the super built-up area. Is this the correct method of pricing under the Real Estate (Regulation and Development) Act, 2016? What can be the price of the apartment and how much should be advance or booking money?
9. The Real Estate (Regulation and Development) Act, 2016 imposes certain responsibilities/functions on registered Real Estate Agents. Explain the legal position of 'Home Advisor' and is there any act of 'Home Advisor' that constitutes an offence.

**ANSWERS TO CASE STUDY 46****I. Answers to Multiple Choice Questions**

1. (c) 68 Square Meters

**Reason:** According to Section 2(k) of RERA “carpet area” means the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes the area covered by the internal partition walls of the apartment. In the given case, the cost of the project is ₹ 3 crores and the total price will be ₹ 3.672 crores (18 apartments x 68 square meters x ₹ 30000 per square meter). The carpet in this case is 68 sq meter.

2. (b) Only ii above

**Reason:** According to Section 2(19) of the PBPT Act, “Initiating Officer” means an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961.

Therefore, the Deputy Commissioner can also be an initiating officer apart from the Assistant Commissioner.

3. (c) At least 12 allottees

**Reason:** Section 14(2)(ii) of the RERA provides that any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written **consent of at least two-thirds of the allottees**, other than the promoter, who have agreed to take apartments in such building. In the given case the total number of allottees are 18, so the two-third of 18 comes to 12.

4. (d) US \$ 10,000,000

**Reason:** Para 2(iii) of Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 provides that the remittances by persons other than individual, **exceeding USD 10,000,000 per project** for any consultancy services in respect of infrastructure project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India shall require prior approval of RBI.

5. (b) 15<sup>th</sup> December 2019

**Reason:** Section 5(1) of RERA provides that on receipt of the application under sub-section (1) of section 4, the Authority shall **within a period of thirty days**. In the given case, the application for registration was made on 15.11.2019 so 30 days period will end on 15.12.2019.

## II. Answers to Descriptive Questions

6. As per section 4(2)(a)(ii) of the Competition Act, 2002 there shall be an abuse of dominant position, if an enterprise or a group, directly or indirectly, imposes an unfair or discriminatory condition or price (including predatory price) in purchase or sale of goods or services.

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

In the given case, the price is less than the comparative market price but not less than the cost. The cost of the project is ₹ 3 crores and the total price will be ₹ 3.672 crores (18 apartments x 68 square meters x ₹ 30000 per square meter). Hence, the act of Sweet Homes Private Limited, offering apartments at prices lower than the price prevailing in the market shall not be considered as predatory bidding under the Competition Act, 2002.

7. Section 19(1) of the Prohibition of Benami Property Transaction Act, 1988, prescribed the powers of authorities.

Further, as per section 18 of the Act, authorities for purpose of this Act includes Initiating Officer. Further as per section 2(19) of the Act, Initiating Officer means an Assistant Commissioner or a Deputy Commissioner as defined in clauses (9A) and (19A) respectively of section 2 of the Income-tax Act, 1961 (43 of 1961).

Hence ACIT for the purposes of this act shall have power specified under 19 (1) as same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely;

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining him on oath;

- (c) compelling the production of books of account and other documents;
- (d) issuing commissions;
- (e) receiving evidence on affidavits; and
- (f) any other matter which may be prescribed.

In the given case, the notices issued by Assistant Commissioner of Income Tax (ACIT) is justified because rights are vested with him u/s 19 (1) (c) of Prohibition of Benami Property Transaction Act, 1988 to compel Mr. Verma to produce books of accounts and record evidence on affidavits.

8. Pricing for the sale of the property shall be based upon the carpet area. Hence the method of pricing (based upon super built-up area) adopted by Sweet Homes Private limited is not in line with the intentions of the Real Estate (Regulation and Development) Act, 2016 (based upon reasonable construction).

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

In the given case, the built-up area is 70 square meters but the carpet area is 68 square meters i.e. 70-2. Hence, the price should not be per square meter of 70 square meters, it should be for 68 square meters.

If we presume that price remains ₹ 30,000 per Square Meter then the price for each apartment will be ₹ 20.40 lakhs (i.e. ₹ 30,000 x 68 square meters).

As per section 13(1) of the Real Estate (Regulation and Development) Act, 2016, a promoter shall not accept a sum more than ten percent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force. Hence, the maximum of advance money that can be taken from the customer is ₹ 2.04 lakhs (i.e. 10% of ₹ 20.40 lakhs)

9. As per section 10(a) of the Real Estate (Regulation and Development) Act, 2016, every real estate agent registered under section 9 (in given case 'Home Advisor') shall not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority.

'Home Advisor' was appointed as authorized real estate agent for project Hamara Ghar, on 11<sup>th</sup> November 2019. Home Advisor started advising their clients about the affordable house from Sweet Homes Private Limited and within the first five days means till 15<sup>th</sup> November 2019, identifies 4 clients, who offered advance to book the apartment.

Whereas application for project approval was moved to the Real Estate Regulatory Authority on 15<sup>th</sup> November 2019 by Sweet Homes Private Limited and Project Hamara Ghar got the nod from the Real Estate Regulatory Authority on 2<sup>nd</sup> December, 2019.

Hence, 'Home Advisor' is guilty of facilitating the sale of apartments under project Hamara Ghar, prior to its registration with Real Estate Regulatory Authority.

## CASE STUDY 47

Vashi Food Industries Limited (VFIL) was established around 3 decades ago by Mr. Kalyan along with his two friends Mr. Rajeev and Mr. Adil as a private company that later became public and its securities also got listed. VFIL performed really well till a decade ago and was among the market leaders.

In expansion and diversification drive VFIL relies upon the un-organic mean of growth, it makes numerous mergers and acquisitions largely cash mergers and financed by debt. The major component of debt, which VFIL owes is in form of a syndicated loan or from a consortium of financial institutions. VFIL defaulted in serving the financial debt. Financial creditors moved the application under section 7 of the Insolvency and Bankruptcy Code (IBC) wherein the name of Mr. Syal was suggested as interim resolution professional (IRP). The application was admitted by the Mumbai Bench of National Company Law Tribunal (Adjudicating Authority) and appoint Mr. Syal as Interim Resolution Professional on 19th July, 2019. On the same date, the moratorium is also declared.

Mr. Syal constitutes a Committee of the Creditor on 18<sup>th</sup>, August 2009 and the first meeting of the Committee of Creditors took place on 3<sup>rd</sup> September 2019. In the first meeting of the Committee of Creditors, Mr. Syal is appointed as a resolution professional (RP) with an exact 66% of the voting share.

The CoC with 87% of voting power approved the resolution plan submitted by Britannia Holmes Limited (BHL). This resolution plan quoted an upfront payment at an amount lesser than the liquidation value of the corporate debtor. When the matter was placed before the Adjudicating Authority, the authority pointed out the following objections;

- The CoC should sell the plot of land immediately at Lower Parel in Mumbai as it would fetch an exceptionally high value of ₹ 100 crores as there is a boom in the property market at Lower Parel due to corporate houses, malls, and exquisite restaurants being set up.
- All financial creditors having a claim amount of over ₹ 100 crores would be entitled to 65% of their admitted claim. It also states that 62% of the admitted claim to certain operational creditors having claims of more than ₹ 1 crore.
- Financial Creditors in whose favour guarantees were executed, as their total claim stands satisfied to the extent of the guarantee, cannot re-agitate such claims as against the principal borrower

The CoC conveyed their point to the Adjudicating Authority that they did not wish to give more time in executing the sale of the property as they wanted to arrive at a Resolution Plan immediately. Still, the Adjudicating Authority was objecting to the decision taken by the CoC. The CoC stated that they have taken the decision on the basis of their commercial wisdom and the resolution plan is in accordance with section 30 (2).

VFIL has acquired a substantial stake in Rico Limited, whose headquarter is based in Mumbai, and engaged in the export of rice and other foodstuffs to middle-east and European countries. Rico Limited has a stake of 26% in a Dubai-based company named Dibschi LLC. Rico Limited has an overseas office in Dubai but at the third-party location and Mr. Raj, senior project manager at Rico Limited manages Dubai's operations of Rico Limited. Currently, Mr. Raj used to work from his own location as Rico Limited doesn't have any office premises in Dubai. The Rico Limited is now approaching various real estate brokers to find a suitable space for opening an office in Dubai.

Mr. Sridhar left India on 26th May 2006 for employment with the subsidiary of Rico Limited based in Germany. Mr. Sridhar was born and brought in India and holds an Indian passport with non-resident status. Mr. Sridhar acquired a commercial property in Pune in May 2018 for which he paid out of funds held in any non-resident account. He while being a non-resident had also inherited an ancestral house situation in Mumbai from his deceased father, who was resident in India.

Mr. Sridhar who is also the nominee for the purpose of the bank account of his deceased father in India approached the branch manager of the bank for the closure of the account and withdrawal of the balance amount. Considering Mr. Sridhar is a beneficial owner, the bank asked him to verify his identity by showing the Aadhaar Card. Since Mr. Sridhar doesn't have the Aadhaar Card, he showed the other proof of his identity and relation with his father apart from the death certificate of his deceased father. The banker has shown sympathy with him but denied him to transact in absence of furnishing the Aadhaar Card as proof of identity.

Mr. Sridhar took her mother to Germany along with him as he is the only son and decided to permanently settle there. In order to acquire bigger property there, he decided to sell both the property he owns in India; hence start looking for buyers. Through his brother-in-law, who is a real estate broker (but not charged any commission from Mr. Sridhar); he was able to found two genuine buyers. The inherited property got sold for ₹ 2.5 crores and the property at Pune got sold for ₹ 4.5 crores. Since Mr. Sridhar holds NRI status for purpose of Indian income tax laws purposes hence buyers deduct tax of ₹ 52 lakhs and ₹ 93.6 lakhs respectively at the source. Mr. Sridhar wishes to repatriate the realised funds to his German account.



**I. Multiple Choice Questions**

1. Regarding the committee of creditors and its meeting, which of the following statements is/are incorrect;
  - i. The committee of creditors shall conduct its first meeting by 2<sup>nd</sup> September 2019.
  - ii. The committee of creditors shall comprise both operational and financial creditors
  - iii. In the case of consortium all the participant banks shall be part of the committee of creditors that too with equal voting share.
  - (a) i and ii only
  - (b) i and iii only
  - (c) ii and iii only
  - (d) i, ii, and iii
2. With reference to property acquired by Mr. Sridhar in Pune in May 2018, choose the correct statement out of the following considering the legal validity in the context of provisions of the Foreign Exchange Management Act, 1999 and regulations made there under;
  - (a) Mr. Sridhar shall not acquire any immovable property in India
  - (b) Mr. Sridhar may acquire immovable property other than plantation property.
  - (c) Mr. Sridhar may acquire the immovable property in India, but only in joint ownership with anyone who is resident in India
  - (d) Mr. Sridhar may acquire only one immovable property, but not from the fund held in a non-resident account
3. Regarding the appointment of Mr. Syal as the resolution profession, choose the correct statement/s out of the following:
  - i. Appointment of Mr. Syal is legally invalid because his appointment is approved by a voting share of not more than 66%.
  - ii. Appointment of Mr. Syal is legally valid because his appointment is approved by voting share which is not less than 66%.
  - iii. Written consent of Mr. Syal is required.

- (a) i only
  - (b) ii only
  - (c) i and iii only
  - (d) ii and iii only
4. Regarding the duration of moratorium identify incorrect statement/s out of the following:
- i. The order of moratorium shall have effect from the date of admission from application filled under sections 7, 9, and 10 of the IBC.
  - ii. The order of moratorium shall have effect till the completion of the corporate insolvency resolution process.
  - iii. If Adjudicating Authority approves the resolution plan under sub-section (1) of section 31, then the order of moratorium shall have effect till the date of such approval order.
- (a) i only
  - (b) i and ii both
  - (b) i and iii both
  - (b) ii and iii both
5. Rico Limited is now approaching various real estate brokers to find a suitable space for opening an office in Dubai. Can Rico Limited buy office premises (immovable property) in Dubai?
- (a) Rico Limited, being an Indian company cannot buy office premises outside India.
  - (b) Only Dibschi LLC can buy office premises in Dubai for Rico Limited.
  - (c) Rico Limited can buy office premises in Dubai.
  - (d) Dibschi LLC and Rico Limited can buy office premises jointly only.

## **II. Descriptive Questions**

6. In the given case, the CoC with 87% of voting power approved the resolution plan which quoted an upfront payment at an amount lesser than the liquidation value of the corporate debtor. Is NCLT (Adjudicating Authority) justified in challenging the commercial wisdom of the committee of creditors on the ground that the resolution plan offers something less than liquidation value? Can Adjudicating Authority send back the resolution plan to CoC?

7. Whether the bank is legally correct while denying Mr. Sridhar to transact in the absence of furnishing the Aadhaar Card as proof of identity? Can Mr. Nishankh use his passport as proof of his identity, for purpose of verification by the bank?
8. Since Mr. Sridhar is not aware of the local laws of the country, hence looking for your assistance to know can he repatriate funds back to his German account; if yes then how much amount of the sale proceeds can be repatriated? Advice.

### ANSWERS TO CASE STUDY 47

#### I. Answers to Multiple Choice Questions

1. (d) i, ii, and iii

**Reason:** Examining each of the options gives in the MCQ:

**Option (i):** The committee of creditors shall conduct its first meeting by 2<sup>nd</sup> September 2019.

**Answer:** Section 22(1) of the IBC provides that the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors. In the given case the CoC was constituted on 18.08.2019, so it should be held latest by 24.08.2019. Since the meeting was held on 02.09.2019, **so this option is wrong.**

**Option(ii):** The committee of creditors shall comprise both operational and financial creditors.

**Answer:** Section 21(2) states that the committee of creditors shall comprise all financial creditors of the corporate debtor. So the option (ii) is wrong.

**Option (iii):** In the case of consortium all the participant banks shall be part of the committee of creditors that too with equal voting share.

**Answer:** Section 21(3) of the IBC provides that Subject to sub-sections (6) and (6A), where] the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them. In the given option, the equal voting right is mentioned, which is wrong.

After analysing each of the options, all the other options (a),(b) and (c) are wrong.

2. (b) Mr. Sridhar may acquire immovable property other than plantation property.

**Reason:** Regulation 3(a) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 state that an NRI or an OCI may acquire immovable property in India other than agricultural land/ farm house/ plantation property.

3. (d) ii and iii only

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

Further section 22(3)(a) provides that where the committee of creditors resolves under sub-section (2) (a) to continue the interim resolution professional as resolution professional, subject to a written consent from the interim resolution professional in the specified form it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority.

In the given case, it is mentioned that Mr. Syal is appointed as a resolution professional with an exact 66% of the voting share, which fulfills the requirement of section 22(2). It means the vote in favour of appointment of IRP should not be less than 66%. If exact 66% vote is in favour, Syal can be appointed as RP.

4. (a) i only

**Reason:** Section 13(1)(a) of the IBC provides that the Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order declare a moratorium for the purposes referred to in section 14.

Further options (ii) and (iii) are not correct.

5. (c) Rico Limited can buy office premises in Dubai.

**Reason:** Regulation 5(3) of the FEM (Acquisition and transfer of immovable property outside India) Regulations, 2015 states that a company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

**II. Answers to Descriptive Questions**

6. The facts given in the case are more or less similar to *Maharashtra Seamless Limited vs. Padmanabhan Venkatesh & Ors* (SC, Civil Appeal No. 4242 of 2019 dated 22.01.2020).

In this case, the Supreme Court held that it was completely within the CoC's commercial wisdom to approve the resolution plan of Maharashtra Seamless, which proposed an upfront payment of ₹ 477 crores, an amount which was ₹ 120.54 crores lower than the liquidation value of the corporate debtor. Court further held that the object behind prescribing valuation process is to assist the CoC to take a decision on a resolution plan properly, hence resolution need to match liquidation value as no provision of Code warrant so. The also Court held that it is not up to the Adjudicating Authority to look into the merits (commercial wisdom) of the decision of the CoC.

Court further held that CoC should make sure that the corporate debtor needs to keep going as a going concern because the rationale being that during resolution, the corporate debtor remains a going concern, whereby the financial creditors will have the opportunity to lend further money, the operational creditor's will have a continued business and the workmen and employees will have job opportunities; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors have been taken care of during the insolvency resolution process.

If the Adjudicating Authority finds the abovementioned parameters have not been taken care of, it may send a resolution plan back to the CoC. If the adjudicating authority has been satisfied that the CoC has taken care of the parameters mentioned then only it has to pass the resolution plan. Further, the reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority.

Court further held, once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of section 30 thereof.

Hence NCLT (Adjudicating Authority) is not justified in challenging the commercial wisdom of the committee of creditors on the ground that the resolution plan offers something less than liquidation value.

Yes, NCLT (Adjudicating Authority) can send back the resolution plan to CoC; if it finds the parameters of going concern have not been taken care of.

**Notes for students**

No doubt, the CoC's commercial wisdom can't be challenged and it is always presumed that CoC has rational commercial wisdom but the same is not boundless

While interpreting the preamble of the IBC in *Swiss Ribbons Pvt. Ltd. v. Union of India*, the Supreme Court observed that the IBC was enacted with the primary objective of reviving and keeping a corporate debtor as a going concern by maximisation of the value of assets and balancing the interests of all the stakeholders. The Court thus observed that the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests.

7. Section 11A(3) of PMLA provides that the use of modes of identification under sub-section (1) shall be a voluntary choice of every client or beneficial owner who is sought to be identified and no client or beneficial owner shall be denied services for not having an Aadhaar number.

Thus, as per sub-section 3 to section 11A of the Prevention of Money Laundering Act, 2002, the use of modes of the identification under sub-section (1) shall be a voluntary choice of every client or beneficial owner who is sought to be identified and no client or the beneficial owner shall be denied services for not having an Aadhaar number. Hence, the bank is legally incorrect while denied Mr. Sridhar to transact in the absence of furnishing an Aadhaar Card as proof of identity.

As per sub-section 1 to section 11A of the prevention of Money Laundering Act, 2002, every reporting entity shall verify the identity of its clients and the beneficial owner, by—

- ◆ Authentication under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 if the reporting entity is a banking company; or
- ◆ Offline verification under the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016; or
- ◆ Use of a passport issued under section 4 of the Passports Act, 1967; or
- ◆ Use of any other officially valid document or modes of identification as may be notified by the Central Government on this behalf.

Further sub-section 3 becomes relevant here because it says the use of the modes of identification under sub-section (1) shall be a voluntary choice of every client or beneficial owner who is sought to be identified.

Mr. Sridhar has an Indian passport, which is issued under section 4 of The Passport Act 1967. Hence, Mr. Sridhar can use his passport as proof of his identity, for purpose verification by the bank.

**Note for students**

Students must note, section 4 of the Passports Act, 1967 explains the classes of passports and travel documents. Sub-section 1 following classes of passports may be issued under this Act, namely ordinary passport or official passport or diplomatic passport.

8. As per Regulation 8 (a) of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, a person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section

Here it is worth noting that section 6(5) in the Foreign Exchange Management Act, 1999 read as a person resident outside India may hold, own, transfer or invest in Indian currency, security, or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India'.

Further regulation 8 (b) provides, in the event of sale of immovable property other than agricultural land/ farm house/ plantation property in India by an NRI or an OCI, the authorised dealer **may allow repatriation of the sale proceeds outside India, provided** the following conditions are satisfied, namely:

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

Thus, Mr. Sridhar can repatriate of sale proceed of both the immovable properties.

Mr. Sridhar can repatriate ₹ 1.98 crores (₹ 2.5 crores - ₹ 52 lakhs), the net proceed from the sale of an inherited ancestral house; under regulation 8 (a) with permission from RBI, whereas authorised dealer may allow repatriation of ₹ 3.564 crores (₹ 4.5 crores - ₹ 93.6 lakhs) the net proceed from sale of commercial property under regulation 8 (b).



## CASE STUDY 48

Mr. XYZ worked with the BANK-I for over 30 years before his retirement in 2018 and thereafter he is drawing pension from BANK-I. Post his retirement, Mr. XYZ cleared the Limited Insolvency Examination and registered with the Insolvency and Bankruptcy Board of India (IBBI) as an Insolvency Professional and later got himself empanelled with BANK-I.

ABC Steels Limited (ASL) is a steel company having its manufacturing facilities in the State of Maharashtra under the leadership of its Managing Director Mr. DEF. For its business needs, ASL had availed loan facilities from a consortium of banks led by Bank-I to the tune of ₹4,000 crore in the year 2010. In January 2018, ASL defaulted in making payment of interest to the consortium of Banks and the default continued for more than 90 days post which the account has classified as NPA.

In April 2019, BANK-I filed an application as a financial creditor for initiation of Corporate Insolvency Resolution Process (CIRP) against ASL (Corporate Debtor) under the Insolvency and Bankruptcy Code, 2016 (either IBC or Code) before the Mumbai Bench of National Company Law Tribunal (either NCLT or Adjudicating Authority) and had proposed Mr. XYZ as the Interim Resolution Professional (IRP). A copy of the application was dispatched to the registered office of the corporate debtor, post which the corporate debtor filed the following objections before the Adjudicating Authority:

- i. That the Corporate Debtor has initiated One Time Settlement (OTS) with the consortium of banks and the same is under negotiation
- ii. Mr. XYZ, the proposed IRP is ineligible to as there is an apprehension of bias on account of being an ex-employee of BANK-I and currently drawing pension from BANK-I

After hearing the arguments of both parties, the Adjudicating Authority dismissed the objection of the Corporate Debtor with respect to the OTS proposal with the Banks. However, the Adjudicating Authority observed that the objection raised by the Corporate Debtor with respect to the appointment of proposed IRP is valid and that there is indeed an apprehension of bias as the IRP is continuing to draw a pension from the applicant financial creditor (i.e. BANK-I). Accordingly, the NCLT admitted the application for initiation of CIRP filed by BANK-I on 24<sup>th</sup> August 2019 and appointed Mr. UVW from the panel of Insolvency Professionals nominated by the Insolvency and Bankruptcy Board of India to act as the Interim Resolution Professional in the instant matter and declared a moratorium.

Subsequently, on 15<sup>th</sup> October 2019, Mr. DEF preferred an appeal before the National Company Law Appellate Tribunal (NCLAT) on behalf of the Corporate Debtor, against the order passed by the NCLT admitting the application initiating CIRP against the Corporate

Debtor. The NCLAT, without going into merits, dismissed the appeal on the ground that it is barred by limitation as provided in the Code.

After initiation of the CIRP and declaration of a moratorium, the IRP published the public announcement inviting claims from the creditors and other stakeholders of the Corporate Debtor. After verification of the claims, the IRP submitted a report on the constitution of the Committee of Creditors (CoC) and subsequently convened the first meeting of the CoC on 22<sup>nd</sup> September 2019, and to the same meeting, the IRP also invited the Directors of the Corporate Debtor, including Mr. DEF, the Managing Director. During the first meeting of the CoC, the financial creditors resolved to appoint the IRP as the Resolution Professional (RP) of the Corporate Debtor.

Subsequently, the RP appointed two registered valuers who have submitted their valuation reports on fair value and the liquidation value of the Corporate Debtor. The valuation reports were produced by the RP before the CoC in their meeting where the CoC resolved to appoint a third valuer to provide estimates of fair value and liquidation value. As per the instructions of the CoC, the RP appointed another registered valuer and then the average of the two closest estimates are considered as fair value and liquidation value, by the RP.

The RP prepared the information memorandum (IM) and submitted the same for consideration of the CoC. After obtaining the consent of the CoC with respect to the eligibility criteria of the resolution applicant (RA), the RP published Invitation for Expression of Interest (EoI) as per the prescribed form inviting the prospective RAs who meet the eligibility criteria to submit their EoI. The RP received ten EoIs based on which the RP prepared the final list of Resolution Applicants (RAs). To each of the prospective RA in the final list of RAs, the RP shared the IM, evaluation matrix (EM), and request for resolution plan (RFRP). As per the RFRP, the prospective RAs are required to submit their resolution plans within 45 days thereof.

Of the 10 RAs, the RP received resolution plans from 5 RAs within the prescribed timeline of 45 days and 3 of the RAs have withdrawn from the process. The RP verified whether the submitted resolution plans meet the required compliances as per the Code and subsequently, the RP presented only the compliant resolution plans before the CoC and rejected the plans submitted by the other 2 RAs which are not meeting the requirements of the Code.

During the meeting of the CoC where the resolution plans are considered, the financial creditors requested the RP not to allow the Directors from participating in the meeting when the resolution plans are discussed and further requested the RP not to circulate the resolution plans to the Directors as the same were only to be given to the CoC for its consideration. The RP agreed to the request of the CoC and subsequently did not invite the directors to the meeting of the CoC where the resolution plans are considered. Also, the Directors were not provided with the resolution plans. Aggrieved by these actions of the CoC and the RP, the Managing Director Mr. DEF and the other Directors have moved an application before the NCLT with a prayer to direct the RP to invite the Directors of the Corporate Debtor to all the meetings of the CoC, as required under the Code and to circulate all the documents relevant

to the agenda discussed during the meeting of the CoC including the resolution plans to the Directors. The NCLT dismissed the application directing the RP to invite the Directors to all the meetings of the CoC but not to insist upon being provided information that was considered confidential either by the resolution professional or the CoC. Having aggrieved by such decision of the NCLT, the Directors preferred an appeal before the NCLAT which upheld the order of the NCLT and dismissed the appeal. Aggrieved thereof, the Director filed an appeal before the Supreme Court of India. The Supreme Court ruled in favour of the Director by holding that the Directors are entitled to a copy of the resolution plan.

Subsequently, the CoC discussed the resolution plans in the presence of the Directors and finally approved the resolution plan submitted by M/s Rare Steel Limited. The RP filed the approved resolution plan with the Adjudicating Authority for its approval. The NCLT after considering that the plan is met with the requirements under the Code approved the resolution plan.

### **I. Multiple Choice Questions**

1. Which of the following statement/s is/are correct as per IBC regarding the appointment of Mr. XYZ as an Interim Resolution Professional?
  - i. Mr. XYZ being an ex-employee of the applicant financial creditor is ineligible to be appointed as IRP
  - ii. Mr. XYZ is eligible for appointment as IRP of the Corporate Debtor
  - iii. The proposed IRP (Mr. XYZ) shall never be subject to any disciplinary proceeding
  - (a) i only
  - (b) ii only
  - (c) i & iii
  - (d) ii & iii
2. Which of the following does the adjudicating authority look into, before admission of any application for initiation of CIRP by the financial creditor?
  - (a) Occurrence of the default, the existence of the dispute, and application is complete in all respects
  - (b) Occurrence of the default, the application is complete in all respects, and no pending disciplinary proceedings against the proposed IRP
  - (c) Pending suit or arbitration before any other forum with respect to the default, the application is complete in all respects
  - (d) Affidavit of the financial creditor as to there is no existence of dispute in addition

to the occurrence of the default, the application is complete and no apprehension of bias and/or no disciplinary proceedings against the proposed IRP

3. If the CoC, in their first meeting, decided to appoint another insolvency professional as Resolution Professional, which among the following describe the correct procedure?
  - (a) IRP to file an application before the Adjudicating Authority for the appointment of the proposed RP whose name shall be forwarded to the IBBI for its confirmation along with the consent of the proposed RP
  - (b) The proposed RP shall file an application before the Adjudicating Authority for consideration of his/her appointment as the RP, whose name shall then be forwarded to the IBBI for its confirmation
  - (c) The CoC to file an application before the Adjudicating Authority for the appointment of the proposed RP whose name shall be forwarded to the IBBI for its confirmation
  - (d) The CoC and the RP shall file a joint application before the Adjudicating Authority for the appointment of the proposed RP after obtaining confirmation from the IBBI
4. In the appeal filed by Mr. DEF before the NCLAT against the admission order passed by the Adjudicating Authority, which among the following is the correct statement?
  - (a) The limitation for filing an appeal before the NCLAT is 60 days including the time period for condonation of delay.
  - (b) The limitation for filing an appeal before the NCLAT is 30 days and any delay up to 15 days may be condoned by the NCLAT on a case-to-case basis
  - (c) The limitation for filing an appeal before the NCLAT is 30 days and if sufficient cause is shown to the NCLAT then it shall condone any delay up to 15 days thereafter
  - (d) Condonation of delay is the absolute discretion of the NCLAT and no time limit be imposed on NCLAT in this regard.
5. In the case study, after the admission of the application for initiation of CIRP, what is the legal position of the Directors of the Corporate Debtor?
  - (a) The Board of Directors are suspended and their powers are exercised by IRP/RP
  - (b) The IRP/RP shall be the Designated Chief Executive Officer and the Board of Directors shall stand suspended

- (c) The powers of the Board of Directors are suspended
- (d) The Board of Directors are suspended and the Directors are deemed to have resigned from the Board of the Corporate Debtor

## II. Descriptive Questions

6. Mr. DEF wants to initiate disciplinary proceedings against Mr. UVW (for illegality in appointing a third registered valuer with regard to provision detailed in Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016). Mr. DEF approached you to take your opinion regarding his right to file a complaint before the IBBI against Mr. UVW.
7. Assuming Mr. DEF is ineligible to submit a resolution plan, he wants to continue negotiating for One Time Settlement with the consortium of Banks based on the resolution plans received during CIRP and provided to the Directors for their consideration as per the directions of the Supreme Court. Advice on the possibility of withdrawal of application under the IBC.
8. One of the prospective RAs whose resolution plan has been rejected by the RP wants to file an application before the Adjudicating Authority with a prayer to direct the RP to present their plan before the CoC on the ground that RP does not have the power to reject the resolution plans.

## ANSWERS TO CASE STUDY 48

### I. Answers to Multiple Choice Questions

1. (b) ii only

#### Reason

Regulation 3(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, provides that an insolvency professional shall be eligible to be appointed as an interim resolution professional or a resolution professional, as the case may be, for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, **are independent of the corporate debtor.**

Therefore, if the IP is independent of the CD, he can be appointed as IRP/RP. It is irrelevant that the IP was an ex-employee of the FC.

2. (b) Occurrence of the default, the application is complete in all respects, and no pending disciplinary proceedings against the proposed IRP.

**Reason**

Section 7(5)(a) of the IBC provides that where the Adjudicating Authority is satisfied that a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application.

Hence, the option (b) is correct.

3. (c) The CoC to file an application before the Adjudicating Authority for the appointment of the proposed RP whose name shall be forwarded to the IBBI for its confirmation.

**Reason**

Section 22(3)(b) of the IBC provides that where the committee of creditors resolves under sub-section (2) to replace the interim resolution professional, **it shall file an application before the Adjudicating Authority** for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form.

**Hence, the option (c) is correct.**

4. (b) The limitation for filing an appeal before the NCLAT is 30 days and any delay up to 15 days may be condoned by the NCLAT on a case-to-case basis

**Reason**

Section 61(1) of the IBC provides that notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal.

Sub-section (2) states that every appeal under sub-section (1) shall be filed **within thirty days before the National Company Law Appellate Tribunal.**

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall **not exceed fifteen days.**

**Please note that in option (d) the word 'shall' is used, while in option (c) the word 'may' is used. 'May' denotes the discretionary power of the NCLAT.**

**Hence, the option (b) is correct.**

5. (c) The powers of the Board of Directors are suspended.

**Reason**

Section 7(6) provides that the CIRP shall commence from the date of admission of the application.

Section 13(1)(c) provides that the Adjudicating Authority after admission of the application under section 7 or section 9 or section 10, shall by an order appoint and IRP.

Section 17(1)(b) provides that from the date of appointment of the IRP the powers of the board of directors shall stand suspended and exercised by the IRP.

Therefore, the moment the application is admitted by the AA and IRP is appointed the powers of the BoD are suspended and vests with the IRP.

**Hence, the option (c) is correct.**

The student must interpret **section 19 (1)** of Insolvency and Bankruptcy Code, 2016 in light of NCLAT judgement pronounced in case of **M/s. Subasri Realty Private Limited vs. Mr. N. Subramanian & Anr**, wherein NCLAT clearly stated to ensure that Corporate Debtor remains an on-going-concern, all the Director/ employees are required to function and to assist the Resolution Professional who manages the affairs of the Corporate Debtor during the period of moratorium. Hence **reasonable construction** is that the **power of board (of directors) or 'its functions as the board' is suspended, but not the directorship and board** because, in the case of **Hero Fincorp Limited**, the NCLAT clearly noticed that directors of the company do not cease to be directors, as they are not suspended but their function as "board of directors" is suspended.

## II. Answers to Descriptive Questions

6. Pursuant to the provisions of Section 217 of the Insolvency and Bankruptcy Code, 2016 (IBC), A stakeholder, who wishes to file a complaint, shall file it with the Board in Form A along with a demand draft for two thousand and five hundred rupees drawn in favour of the Insolvency and Bankruptcy Board of India payable at New Delhi or an online acknowledgement of **two thousand and five hundred rupees** paid to the credit of the Board towards fee.

Further as per regulation 3(4), a grievance or a complaint, as the case may be, shall be filed within forty-five days of the occurrence of the cause of action for the grievance or the complaint.

The proviso to regulation 3(4) states that a grievance or a complaint may be filed after

the aforesaid period, if there are sufficient reasons justifying the delay, but such period shall not exceed 30 days.

**Extra reference notes for students**

As per provisions of Regulation 35 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; the fair value and liquidation value shall be determined as follows;

- (a) the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor;
- (b) if in the opinion of the resolution professional, the two estimates of a value are significantly different, he may appoint another registered valuer who shall submit an estimate of the value computed in the same manner; and
- (c) the average of the two closest estimates of a value shall be considered the fair value or the liquidation value, as the case may be.

Further sub-regulation 2 says, after the receipt of resolution plans in accordance with the Code and these regulations, the resolution professional shall provide the fair value and the liquidation value to every member of the committee in electronic form, **on receiving an undertaking from the member to the effect that such member shall maintain the confidentiality of the fair value and the liquidation value and shall not use such values to cause an undue gain or undue loss to itself or any other person and comply with the requirements under section 29 (2).**

However, in the instant case of Mr. UVW, the **Resolution Professional wrongly produced copies of valuation reports before the meeting of the Committee of Creditors (CoC) where the CoC resolved to appoint a third valuer to provide estimates of fair value and liquidation value. This act of the Resolution Professional is in contravention of Regulation 35(2) of the CIRP Regulations which mandates that the fair value and liquidation value shall be provided to every member of the CoC only after the receipt of the resolution plan.**

7. Withdrawal of application initiating Corporate Insolvency Resolution Process (CIRP) shall be pursuant to Section 12A of the Insolvency and Bankruptcy Code (IBC) read with Regulation 30A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations).

**Section 12A. Withdrawal of application admitted under section 7, 9 or 10:** The Adjudicating Authority may allow the withdrawal of application admitted under section 7



or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.

**Regulation 30A of of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (Regulations).**

- (1) An application for withdrawal under section 12A may be made to the Adjudicating Authority -
- (a) before the constitution of the committee, by the applicant through the IRP.
  - (b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

In the given scenario, the One Time Settlement proposed by Mr. DEF cannot be placed before the CoC as a resolution plan. Hence, Mr. DEF shall ensure that negotiations are made with the CoC members and the applicant who filed the CIRP Application shall obtain the approval of ninety percent voting share of the CoC and subsequently make an application before the Adjudicating Authority through the RP.

**Extra reference note for students**

Hon'ble NCLAT in the matter of Sterling Biotech directed the Adjudicating Authority to allow withdrawal of the CIRP application when the requisite majority of the CoC had given its approval.

8. No doubt, section 30 (3) of the Insolvency and Bankruptcy Code, 2016 (IBC) says the resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

Here it is important to note that sub-section (2) of section 30 specifies certain conditions that resolution professionals need to check in the resolution plans submitted under section 30(1).

But, section 30 (3) of the IBC shall be read in conjunction with section 25 (2) (i) which clearly states it is the duty of the resolution professional to present all resolution plans at the meetings of the CoC. However, in the instant case, the RP rejected the resolution

plan submitted by one of the prospective RAs on the ground that it does not meet the requirements of the Code.

Reasonable construction here signifies that all resolution plans must be presented at the meeting of the CoC, but a resolution plan which is in conformity to conditions laid down by section 30 (2) shall be accepted, and it is the duty of RP under 30 (3) to identify such through due diligence, but not to take a decision of the rejection (the decision to accept reject the resolution plan reserved with CoC)

**Extra reference note for students**

Hon'ble Supreme Court in the matter of *Arcelor Mittal India Private Limited vs. Satish Kumar Gupta & Ors* held;

It must not be forgotten that a Resolution Professional is only to “examine” and “confirm” that each resolution plan conforms to what is provided by Section 30 (2). Under Section 25 (2) (i), the Resolution Professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30 (3), which states that the Resolution Professional shall present to the Committee of Creditors, for its approval, such resolution plans which confirm the conditions referred to in sub-section (2). This provision has to be read in conjunction with Section 25 (2) (i), and with the second proviso to Section 30 (4), which provides that where a resolution applicant is found to be ineligible under Section 29A (c), the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in accordance with the proviso to Section 29A (c). A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it.

In view of the reading of section 30 (3) in light of section 25 (2) (i), and the observations made by the Hon'ble Supreme Court, it is clear that the RP in the instant case had exceeded his authority by taking a decision to reject the resolution plan and by not placing the same before the CoC for its approval. In this regard, it is advised that the prospective RA whose resolution plan is rejected by the RP, may file an application before the Adjudicating Authority under Section 60(5) of the IBC directing RP to present their plan before the CoC.

## CASE STUDY 49

ABC Industries Limited is a company incorporated under the Companies Act, 1956, and holds diverse business interests spanning oil and gas, telecom, and retail, amongst others. It was founded in the year 2002 by Mr. A who is the managing director of ABC Industries Limited. It has five subsidiaries of which two are wholly owned subsidiaries. In the year 2013, the Central Bureau of Investigation, New Delhi registered an FIR under the provisions of the Prevention of Corruption Act, 1988 against the promoters of ABC Industries Limited on the basis of which the Enforcement Directorate started an investigation into the promoters and the company for offences under Prevention of Money Laundering Act, 2002 ("PMLA").

As the investigation kept unfolding, the role of different accused persons and determination of various assets which were proceeds of crime or that of laundered money lead to attachment of property involved in money laundering which is nothing but proceeds of crime to the tune of approximately INR 5000 Cr.

Parallel to this, ABC Industries Limited also defaulted in payment of interest and principal to First Bank Limited, and accordingly the account of ABC Industries Limited was declared as a Non-Performing Asset by First Bank Limited. After the declaration of account as NPA, the promoters of ABC Industries Limited in active connivance with each other and other persons laundered the funds of ABC Industries Limited for their personal advantage and use through a complex web of shell companies controlled and managed by them through dummy directors who are their employees and bought various properties with the such laundered funds.

The promoters of ABC Industries Limited had proposed a one-time settlement with the lenders including First Bank Limited which was rejected by the lenders. The First Bank Limited subsequently filed an application for initiation of the Corporate Insolvency Resolution Process ("CIRP") under the Insolvency and Bankruptcy Code, 2016 (Code or IBC). The Adjudicating Authority admitted the application and thereby declared a moratorium against the Corporate Debtor and appointed Mr. X as the interim Resolution Professional of ABC Industries Limited (Corporate debtor).

One of the responsibilities of an Interim Resolution Professional is to take into custody the assets of the corporate debtor over which it has ownership rights and which may or may not be in the possession of the corporate debtor. While collecting the financial information of the corporate debtor, the interim Resolution Professional was informed by the employees of the corporate debtor of the pending proceedings before the Enforcement Directorate and the provisional attachment order of the Enforcement Directorate on the assets of the corporate debtor.

The Interim Resolution Professional had sent a letter to the Enforcement Directorate requesting the release of the properties of the corporate debtor on the ground that the Code overrides any other enactment including the PMLA. To this letter of the Interim Resolution Professional, the Enforcement Directorate replied that the assets which are provisionally attached are proceeds of crime, and as per the doctrine of priority of precedence enshrined in the constitution of India the state will have first right to confiscate the proceeds of crime over the right of a person to recover their debts from an accused. The Enforcement Directorate further stated in its reply that based on the necessity of public policy if the proceeds of crime are not considered by the state then the criminal will have free play by mortgaging such proceeds with different persons thereby threatening the very existence of a civilized society. It was further stated in the reply that the object of the Code and the PMLA are distinct and different from each other and that the PMLA has been enacted to address the cause of international convention while the Code does not deal with the proceeds of crime at any stretch of the imagination. Having said so, the Enforcement Directorate finally stated that civil law like the IBC cannot be given to stand over a criminal law such as the PMLA, and hence it cannot override the criminal law by any stretch of the imagination. With the above justification, the Enforcement Directorate denied giving possession to the Interim Resolution Professional over the assets of the corporate debtor being provisionally attached by the Enforcement Directorate prior to the insolvency commencement date.

With the Enforcement Directorate not releasing the assets owned by the corporate debtor, the Interim Resolution Professional filed an application before the Adjudicating Authority stating that the Code provides for immunity from attachment against the properties of the corporate debtor for the successful resolution applicant and hence having the attachment continue during CIRP is against the provisions of the Code. In addition to this, the Interim Resolution Professional also stated that the action of the Enforcement Directorate in continuing the attachment even after the declaration of the moratorium is in violation of the provisions inscribed under the Code on the moratorium. In response thereof, the Enforcement Directorate filed its counter stating that the immunity from attachment shall be granted only to the successful resolution applicant and that the Resolution Professional has no locus-standi to plead for the same. It was further stated in the counter that until the Corporate Debtor is successfully resolved under the Code, the attachment order shall continue and the Interim Resolution Professional has no right or power to take custody of the same.

During the pendency of the proceedings, the committee of creditors has been constituted and in its first meeting, the committee of creditors had approved to continue the same Interim Resolution Professional as the Resolution Professional. The Resolution Professional prepared the Information Memorandum in which all the assets of the corporate debtor have been disclosed. However, the Resolution Professional failed to disclose the fact that the majority of

the assets of the Corporate Debtor are under attachment by the Enforcement Directorate. This has been deliberately done by the Resolution Professional with due information to the Committee of Creditors, in order to attract better resolution plans from prospective Resolution Applicants. After due process of law, the Expression of Interest has been received from various resolution applicants. After sending the information memorandum, evaluation matrix, and request for a resolution plan, the resolution applicants have been provided with access to the virtual data room where the details of all the documents and copies thereof have been uploaded. The Resolution Professional took due care not to upload the attachment orders passed by the Enforcement Directorate against the assets of the Corporate Debtor. The Resolution Professional deliberately concealed this information from the Resolution Applicants in order to ensure that the Resolution Applicants do not back off from this process.

However, during the process of the external due diligence undertaken by one of the resolution applicants the attachment order of the Enforcement Directorate has surfaced, and thereby the same information has become public as a result of which even the resolution applicant has backed off since they lost the trust over the information provided to them in the information memorandum.

With the failure of this process and since the Adjudicating Authority did not pass any favorable order directing the Enforcement Directorate to release the assets, no Resolution Applicant has shown interest in the corporate debtor and hence the Committee of Creditors resolved to liquidate the Corporate Debtor.

The liquidator, after passing the liquidation order by the Adjudicating Authority, has filed a fresh application before the Adjudicating Authority for the release of attachments on the assets by the Enforcement Directorate on the ground that the sale of assets during liquidation is only possible when the attachment is released. The Enforcement Directorate argued that only the successful resolution applicants can make such application for release of attachments and since the corporate debtor has been ordered to be liquidated, the liquidator does not have any locus standi to apply before the adjudicating authority for release of the attachments because Adjudicating Authority is not the appropriate forum and moreover the liquidator shall approach the forums under the PMLA in this regard.

The liquidator has been left with confusion as to whether he can sell the assets which are subject to attachment or not. When the liquidator approached the market for the sale of the assets the buyers showed no interest because the assets are under attachment and unless the attachments are released, the buyers cannot purchase the assets.

This time around, the liquidator filed yet another fresh application before the adjudicating authority with a prayer to nullify the effect of attachment of assets made by the Enforcement Directorate as the Code provides for immunity against the attachments against the properties

of the corporate debtor even during sale under the liquidation process. Hence, the liquidator has not pressed for passing an order for detachment but had pleaded for relief to proceed with the sale of the assets which were under an attachment with a liberty to the buyer to apply before the Enforcement Directorate for release of the attachment for which the Enforcement Directorate shall co-operate. The Adjudicating Authority after duly considering the argument of the liquidator and having agreed to the same had passed an order to the effect that the liquidator can proceed with the sale of the assets under liquidation process with the liberty to the buyer to file an application for detachment before the Enforcement Directorate and further directed the Enforcement Directorate to render co-operation to the liquidator to proceed with the sale of the assets. With this order of the Adjudicating Authority, the liquidator proceeded for the sale of all the assets of the corporate debtor including those of the assets which are under attachment.

### **I. Multiple Choice Questions**

1. Which of the following statement/s is/are correct in the context of the moratorium declared under the Insolvency and Bankruptcy Code, 2016?
  - i. Pending suits/proceedings shall be prohibited from being continued against the Corporate Debtor during the CIRP
  - ii. Any action to enforce security interest by a secured creditor is prohibited during CIRP
  - (a) i only
  - (b) ii only
  - (c) None of i and ii
  - (d) Both i and ii
2. Which among the following is false in the context of "Proceeds of Crime" under the Prevention of Money Laundering Act, 2002 ("PMLA"):
  - (a) Property derived as a result of criminal activity
  - (b) Criminal activity shall relate to a scheduled offence
  - (c) Intangible property remains excluded from the scope
  - (d) Property includes movable and immovable and tangible property of any kind used in the commission of an offence under PMLA
3. Which among the following statements are not correct in regard to the information

memorandum:

- i. The Information Memorandum shall be prepared by the Resolution Professional in the manner instructed by the Committee of Creditors
  - ii. The resolution professional may provide to the resolution applicant access to all relevant information in the physical and electronic form
  - iii. The Resolution Applicants shall be bound by the principles of confidentiality with respect to the disclosures made in the Information Memorandum
- (a) i and ii only
  - (b) ii and iii only
  - (c) i and iii only
  - (d) i, ii and iii
4. Which of the following is not a ground for initiation of liquidation?
- (a) Non-receipt of resolution plans during CIRP
  - (b) Decision of CoC to liquidate even when the resolution plans have been submitted by resolution applicants during CIRP
  - (c) No business operations of the corporate debtor
  - (d) Contravention of resolution plan approved by Adjudicating Authority
5. Mr. X is duty-bound to which of the following statements?
- i. Collect all information relating to the assets, finances, and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to business operations in addition to financial and operational payments for the previous three years;
  - ii. Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement
  - iii. Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors
- (a) i, ii and iii
  - (b) i and ii only
  - (c) i and iii only
  - (d) ii and iii only

**II. Descriptive Questions**

6. Does the Insolvency and Bankruptcy Code, 2016 provide for immunity from any action against the property of the Corporate Debtor in relation to the offence committed prior to the commencement of the Corporate Insolvency Resolution Process ("CIRP"). If yes, please explain the relevant provisions keeping in view the facts of the case study.
7. In the case study, the Enforcement Directorate argued that "the civil law like the IBC cannot be given to stand over a criminal law such as the PMLA and hence it cannot override the criminal law at any stretch of the imagination". Do you agree with this? Justify.

**ANSWERS TO CASE STUDY 49****I. Answers to Multiple Choice Questions**

1. (d) Both i and ii

**Reason:** Section 14(1) of the IBC provides that Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for **prohibiting the followings:**

- (a) As per this sub-clause, the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.
- (c) As per this sub-clause, any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

2. (c) Intangible Property remains excluded from the scope

**Reason:** According to Section 2(1)(u) of the PMLA, "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

*Explanation.*—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence



but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.

Further, as per section 2 (1) (v) property means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, **tangible or intangible** and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

3. (a) i and ii only

**Reason:** Section 29(1) provides that the **resolution professional shall prepare an information memorandum** in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

(2) The resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes—

- (a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;
- (b) to protect any intellectual property of the corporate debtor it may have access to; and
- (c) not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

**Option (i): This is incorrect** since it says that the Information Memorandum shall be prepared by the Resolution Professional in the manner instructed by the Committee of Creditors, whereas section 29(1) says that **IM shall be prepared by the RP as may be specified by the Board (IBBI)**.

**Option (ii): This is also incorrect**, since in the option the word 'MAY' is used whereas in section 29(1) the word **SHALL** is used.

Option (iii): This is correct as per the provisions of section 29.

4. (c) No business operations of the corporate debtor

**Reason: Option (a):** Yes, this is one of the ground for initiation of liquidation in terms of section 33(1)(a).

**Option (b):** Yes, this is also one of the ground for initiation of liquidation in terms of section 33(2).

**Option (c):** This is incorrect, since there is no mention of it in section 33.

**Option (d):** Yes, this is also one of the ground for initiation of liquidation in terms of section 33(3).

5. (d) ii and iii only

**Reason: Option (i): No.** As per section 18(a)(i) The interim resolution professional shall collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to business operations for the previous two years.

However, in the option it is mentioned as three years, which is incorrect.

**Option (ii):** Yes, as per section 18(b), it is the duty of IRP to receive and collate all the claims submitted by creditors to him.

**Option (iii):** Yes, as per section 18(d), it is the duty of the IRP to monitor the assets of the CD and manage its operations until a resolution professional is appointed by the CoC.

Therefore option (ii) and (iii) only are correct.

## II. Answers to Descriptive Questions

6. Section 32A of the Insolvency and Bankruptcy Code, 2016 (IBC) was inserted by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 promulgated by the president of India with effect from 28-12-2019, in order to provide for immunity from any action against the property of the Corporate Debtor in relation to the offences committed prior to the Insolvency Commencement Date (ICD).

In the instant case, the Enforcement Directorate, using its powers conferred under the Prevention of Money Laundering Act, 2002 (PMLA) attached the assets of the Corporate Debtor on the ground that the assets are proceeds of crime. Subsequently, the CIRP commenced and during the CIRP no resolution plans were received during the maximum period of CIRP and hence the Adjudicating Authority ordered for liquidation of the Corporate Debtor.

**Notes for students**

One shall refer to the matter of Nathella Sampath Jewelry Private Limited decided by National Company Law Tribunal Division Bench, Chennai (NCLT). An application was filed by the Resolution Professional one day before the publication of expression of interest. The properties of the Corporate Debtor were attached by the Joint Director, Directorate of Enforcement (ED). The COC did not find any evincing Resolution applicant and passed the resolution with a requisite majority of 97.90% voting share to liquidate the company. The Corporate Insolvency resolution process was at standstill due to an appeal pending before the Hon'ble Appellate Tribunal of PMLA. The NCLT Division Bench, at Chennai, passed the order for liquidation and held that this order of liquidation does not affect the enforcement proceeding which is pending against the erring of the promoters. However, the NCLT Division Bench at Chennai did not answer the issue of whether the assets attached by the ED form part of the Liquidation estate of Corporate Debtor or not.

Section 32A(2) of the IBC states that no action shall be taken against the property of the Corporate Debtor in relation to an offence committed prior to the commencement of the CIRP where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II or this Code to a person, who has not –

- (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

In the instant case, the relevant situation is that of the sale of liquidation assets under the IBC. As per the facts of the instant case, the offences were committed by the erstwhile promoters of the Corporate Debtor before the ICD. Applying the legal provision provided under Section 32A(2) to the facts of the Case, one can infer that the Enforcement Directorate cannot take any action against the properties of the Corporate Debtor which were attached as proceeds of crime. In order to clarify this position, we can rely on the explanation provided under Section 32A wherein it is clarified that:

- (i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor.
- (ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through CIRP or liquidation process under this Code and fulfils the requirement specified in this section, against whom such an action may be taken under such law as may be applicable.

From this, it can be inferred that the Enforcement Directorate may continue to act against the promoters of the Corporate Debtor or their assets but not against the Corporate Debtor or its properties.

Hence, we can conclude that the object behind Section 32A is to ensure that the successful Resolution Applicant or the buyer of liquidation assets, shall not be put to the burden of regulatory action against the assets of the Corporate Debtor which will derail the entire object of the Code. Keeping this in view adequate immunity has been provided under Section 32A to ensure that no action is taken against the properties of the Corporate Debtor for any offence committed prior to the ICD.

**Notes for students**

In the insolvency proceedings initiated by M/S Bhushan Power & Steel Limited, M/ S JSW Steels was the resolution applicant. In the meantime, the ED attached the properties of M/S Bhushan Power & Steel Limited stating that the assets were acquired from proceeds of crime. The resolution applicant approached the National Company Law Appellate Tribunal seeking protection from attachment by the ED. The Hon'ble NCLAT opined that the ED would have a claim over the assets in the nature of Operation Debt. The Ministry of Corporate Affairs, the respondent in the pertinent matter filed an affidavit before the NCLAT stating that once the Resolution is approved it is binding on every stakeholder including the government agencies. The NCLAT opined that there is a need to solve the tussle between the two wings of the Central Government. The matter was still pending before the NCLAT Hon'ble President of India promulgated an ordinance which later became an act wherein Section 32A was introduced in IBC. The NCLAT based on the amendment ordered that the right to object is available till the time resolution plan is not approved. When the resolution plan is approved it is binding on all stakeholders. Thus, the resolution plan by JSW Steels

stands approved and all the proceedings against Corporate Debtor are abated. The parties in the matter preferred an appeal and the matter is sub-judice before the Supreme Court.

The legislative intent on the conflict between PMLA and IBC is clear as after the ordinance which later became an Act introduced Section 32A in IBC which states that no liability will be attracted towards the corporate debtor and no proceeding can continue against the corporate debtor when the resolution plan is approved.

7. No, the contention of the enforcement directorate is not tenable.

Section 238 of the Insolvency and Bankruptcy Code, 2016 (“Code” or “IBC”) states that The provisions of this Code shall have an effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

The language of Section 238 clearly suggests the intention that is to allow the IBC to override any other law, including civil and criminal, which is inconsistent with the provisions of the IBC.

Section 238 of the IBC and section 71 of the Prevention of Money Laundering Act, 2002 (PMLA) contains non-obstante clauses, hence inconsistent with each other. The argument shall be on the inconsistency between two laws and not the two laws per se.

Hence, where the IBC provides for immunity from taking any action against the assets of the Corporate Debtor for any offence committed prior to the Insolvency Commencement Date, the Enforcement Directorate cannot purely rely on the provisions of the PMLA and thereby over-ride the provisions of the Code.

Students are advised to note, very carefully that on 9 April 2021, the National Company Law Appellate Tribunal, Delhi (NCLAT) passed a landmark judgment in ***the Directorate of Enforcement vs. Sh. Manoj Kumar Agarwal and Ors*** on the interplay between the provisions of PMLA and IBC. The issue before the NCLAT was whether an attachment of property made under the PMLA would be impacted by the imposition of moratorium following the initiation of the corporate insolvency resolution process (CIRP) under the IBC. The NCLAT held that there is no conflict between the PMLA and the IBC and property attached under the PMLA which belongs to the corporate debtor should become available to fulfill the objects of the IBC following the commencement of the CIRP.

**Note** – The above judgement was passed in two connected appeals in The Directorate of Enforcement v. Sh. Manoj Kumar Agarwal and Ors. (Company Appeal (AT) Insolvency No. 575/2019) and the Directorate of Enforcement v. Sh. Vishal Ghisulal Jain & Ors. (Company Appeal No. 576/2019).

While recognizing that both IBC and PMLA are special statutes, the NCLAT held that the IBC (enacted later in time) will override the PMLA by virtue of section 238 of IBC. But here is also important to note that NCLAT's view is at variance with the Delhi High Court judgment in ***The Deputy Directorate of Enforcement Delhi & Ors vs. Axis Bank & Ors 259 (2019) DLT 500*** which inter alia held that IBC cannot prevail over the PMLA. A Special Leave Petition (SLP (Crl.) No. 7927/2019) against the said judgment is pending before the Supreme Court, hence the matter is sub-judice.

## CASE STUDY 50

XYZ Consumer Products Limited (XCPL) is a company incorporated under the Companies Act 1956, with the Registrar of Companies - Mumbai, Maharashtra. ABC Petrochemicals Private Limited (APPL) as the del-credere agent of DEF Industries Limited (DIL) had supplied PVC materials to XCPL.

APPL raised the following invoices on XCPL for the same to be paid by XCPL to DIL.

S. No.	Invoice Details		
	Number	Date	Due Date
1.	105/XYZ0291	22 <sup>nd</sup> July 2017	2 <sup>nd</sup> August 2017
2.	307/XYZ0321	28 <sup>th</sup> July 2017	8 <sup>th</sup> August 2017
3.	567/XYZ0511	11 <sup>th</sup> August 2017	22 <sup>nd</sup> August 2017
4.	568/XYZ0512	11 <sup>th</sup> August 2017	22 <sup>nd</sup> August 2017
5.	569/XYZ0513	11 <sup>th</sup> August 2017	22 <sup>nd</sup> August 2017
6.	750/XYZ0642	22 <sup>nd</sup> August 2017	2 <sup>nd</sup> September 2017
7.	788/XYZ0669	26 <sup>th</sup> August 2017	6 <sup>th</sup> September 2017
8.	821/XYZ0721	28 <sup>th</sup> August 2017	8 <sup>th</sup> September 2017
9.	823/XYZ0722	28 <sup>th</sup> August 2017	8 <sup>th</sup> September 2017
10.	922/XYZ0789	9 <sup>th</sup> September 2017	20 <sup>th</sup> September 2017

The total amount payable against the invoices was ₹ 52,94,356/- and the XCPL failed to make the payment to DIL. In the capacity of a del-credere agent, the APPL had ended up paying an amount of ₹ 83,79,552/- on behalf of XCPL for material supplied to XCPL against various invoices for the period from 1<sup>st</sup> July 2017 to 30<sup>th</sup> September 2017 along with interest thereon and to that effect DIL issued a certificate. Eventually, APPL followed up with XCPL for the payment made on its behalf. Subsequently, XCPL issued Cheque No.151546 dated 10<sup>th</sup> November 2018 for a sum of ₹ 78,54,982/- which was dishonoured when presented to the XCPL's bankers.

APPL in the capacity of an operational creditor of XCPL (Corporate Debtor) had sent a demand notice under the provisions of the Insolvency and Bankruptcy Code, 2016 (Code or IBC) to the Corporate Debtor on 16<sup>th</sup> December 2018 to which the Corporate Debtor has sent a reply on 2<sup>nd</sup> January 2019 wherein they have, *inter alia*, the alleged existence of the dispute. However, the operational creditor filed the application for initiation of Corporate Insolvency

Resolution Process (CIRP) on 1<sup>st</sup> January 2019 with the amount of default as ₹ 83,79,552/- before the Adjudicating Authority. In the application, the name of Mr. Kamran was proposed as interim resolution professional. Corporate Debtor has set up the following defence against the application:

- (a) Material was supplied directly by DIL and the APPL is only a consignee;
- (b) The APPL is not carrying on business in accordance with the main objects of its Memorandum of Association. The APPL was incorporated to carry on the business of authorised distributors, commission agents, sub-agents, brokers of Indian Petrochemicals Corporation Limited, Baroda. The APPL is claiming to be acting as a del-credere agent of DIL in the present Petition, which is not the main object of APPL. Therefore, the alleged transaction is ultra vires and therefore void;
- (c) The Demand Notice is invalid since it has not been issued by the APPL but by the Advocate;
- (d) There is no cause of action for filing the present petition since there are no pleadings of default in terms of section 47 of the Sale of Goods Act;
- (e) The statement of accounts and bank certificate is not as per provisions of section 2A and section 4 of the Bankers Books Evidence Act;
- (f) In addition to all the above grounds, there was an existence of a dispute between the Corporate Debtor and the APPL and hence, this application filed by the APPL under the provisions of the Insolvency and Bankruptcy Code, 2016 is completely baseless and against the objective of the Code.
- (g) APPL has to plead on the documents on which he relies, but this has not been done in terms of the CPC

Having heard both the parties, the Adjudicating Authority observed that the reply of the Corporate Debtor is predicated wholly on technical grounds such as non-compliance with various provisions of the Code of Civil Procedure, the Sale of Goods Act, the law of evidence, the law relating to affidavits, etc. and that these defences are wholly untenable within the IBC architecture. It further observed that the enquiry in an application filed by the operational creditor for initiation of CIRP against any Corporate Debtor under the IBC is essentially restricted in scope and extent only to the three Ds – Debt, Default and Dispute and that the legislature clearly did not intend it to conform to the rigid requirements of the Civil Procedure Code. It also observed that any such exercise will effectively injure the legislative construct of the IBC itself and that as the Adjudicating Authority, it is not inclined to travel beyond its remit.



With respect to the Corporate Debtor's objection that the objects clause in the MoA failed to contain any clause on del credere agency based on which the APPL (Operational Creditor) filed the application for initiation of CIRP, the Adjudicating Authority held that it is not concerned with this aspect, nor does it consider this a valid defence that can be taken in a petition filed by the operational creditor for initiation of CIRP against any Corporate Debtor under the IBC.

Finally, the Adjudicating Authority held as follows:

- (a) The application made by the APPL (Operational Creditor) is complete in all respects as required by law.
- (b) It clearly shows that the Corporate Debtor is in default of a debt due and payable, and the default is in excess of the minimum amount of one lakh rupees stipulated under the provisions of the IBC.
- (c) Therefore, the default stands established and there is no reason to deny the admission of the Petition.
- (d) In view of this, this Adjudicating Authority admits this Petition and orders initiation of CIRP against the Corporate Debtor.

Accordingly, the Adjudicating Authority passed its order on 25<sup>th</sup> February 2019 admitting the application for initiation of CIRP by the operational creditor and declared moratorium against the Corporate Debtor. Mr. Kamran was appointed as Interim Resolution Professional.

A week later the Managing Director of the Corporate Debtor, filed an appeal before the Appellate Authority against the order passed by the Adjudicating Authority on the ground that there was an existence of a dispute between the Corporate Debtor and the Operational Creditor even before the demand notice has been issued by the Operational Creditor under the provisions of the Code

The matter is pending hearing the argument of the Operational Creditor by the Appellate Authority.

#### **I. Multiple Choice Questions**

1. Which of the following is not mandatory for an application filed by the APPL (Operational Creditor) for initiation of CIRP under the Code?
  - (a) No existence of dispute before the receipt of demand notice by the Corporate Debtor

- (b) Proof of occurrence of default
  - (c) Proposing the name of an Interim Resolution Professional
  - (d) Sending demand notice to the Corporate Debtor before filing an application for initiating CIRP against the Corporate Debtor
2. Which among the following constitutes a default under the Code?
- (a) Non-payment of a creditor's claim
  - (b) When both principal and interest are unpaid
  - (c) The liability or obligation in respect of a claim shall become due and payable and remains unpaid
  - (d) Non-payment of financial or operational debt
3. On 25<sup>th</sup> February 2019, the adjudicating authority admit the application for initiation of CIRP. Which of the following statements hold truth?
- i. Adjudicating authority shall listen to both the parties only then admit the application
  - ii. Adjudicating authority may give notice to the applicant before rejecting the application
  - iii. Adjudicating authority shall within 14 days of receipt of the application, by order either accept or reject the application
- (a) ii only
  - (b) iii only
  - (c) i and iii only
  - (d) ii and iii only
4. Whether APPL as an operational creditor, on behalf of DIL, can initiation CIRP against XCPL :
- (a) No, because APPL is simply an agent acting on behalf of its principal DIL.
  - (b) Yes, the application for CIRP can be made by both DIL and APPL jointly.
  - (c) Yes, APPL can initiate CIRP since the debt has been assigned by the DIL
  - (d) No, Only DIL can initiate CIRP against XCP .

5. Mr. Kamran (Interim Resolution Professional) shall hold the office till;
- (a) 30 days from the commencement of the corporate insolvency resolution process.
  - (b) Till the date first meeting of the committee of creditors.
  - (c) Till the date of appointment of the resolution professional under section 22.
  - (d) Till the date notified by adjudicating authority in the order wherein corporate insolvency resolution process was ordered.

## II. Descriptive Questions

6. With the reference to facts given in the case study, explain how APPL qualifies as an Operational Creditor under the provisions of the Insolvency and Bankruptcy Code, 2016.
7. Imagine you are approached by the APPL to counter the appeal made by the Corporate Debtor before the Adjudicating Authority. How do you defend the case of an Operational Creditor? Advance any three counter-arguments.
8. APPL seeks your advice on the relevance of the 'existence of a dispute' in the context of an application filed for initiation of CIRP against the Corporate Debtor. Does NCLT need to look into the merit of the cause of dispute prior to admit the application?

## ANSWERS TO CASE STUDY 50

### I. Answers to Multiple Choice Questions

1. (c) Proposing the name of an Interim Resolution Professional
- Reason:** Section 9(3) of the IBC provides that the operational creditor shall, along with the application furnish—
- (a) **a copy of the invoice** demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
  - (b) **an affidavit** to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
  - (c) **a copy of the certificate from the financial institutions** maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

- (d) **a copy of any record with information utility** confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and
- (e) **any other proof confirming** that there is no payment of an unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

As per the above provisions, proposing the name of an IRP is not mandatory.

2. (c) The liability or obligation in respect of a claim shall become due and payable and remains unpaid

**Reason:** According to Section 3(12) of the IBC “default” means **non-payment of debt** when whole or any part or instalment of the amount of **debt has become due and payable** and is not paid by the debtor or the corporate debtor, as the case may be.

3. (b) iii only

**Reason:** The proviso to section 9(5) provides that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause (ii) **give a notice to the applicant to rectify** the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

Section (5) of the IBC states that the Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), by an order (i) admit; or (ii) reject the application.

**Students must note consciously**

Statement ii become incorrect because the word may is used instead of shall. Proviso to section 9(5) of the Insolvency and Bankruptcy Code 2016, provides Adjudicating Authority, **shall** before rejecting an application under sub-clause (a) (i.e. Incomplete) of clause (ii) to section 9(5) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the Adjudicating Authority.

4. (c) Yes, APPL can initiate CIRP since the debt has been assigned by the DIL

**Reason:** As per Section 5(20) of the IBC “operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. In the given case, the APPL is working as del-credere agent of DIL.

5. (c) Till the date of appointment of the resolution professional under section 22.

**Reason:** Section 16(5) of the IBC states that the term of the interim resolution professional shall continue **till the date of appointment of the resolution professional under section 22.**

**II. Answers to Descriptive Questions**

6. A del-credere agency is a type of principal-agent relationship wherein the agent acts not only as a salesperson, or broker, for the principal, but also as a guarantor of credit extended to the buyer.

As per section 5 (20) of the Insolvency and Bankruptcy Code 2016, an operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

In the instant case, APPL has filed the CIRP Application, due to its capacity as a del-credere agent. APPL after making payment to the Principal (DIL) shall step into the shoes of the Principal to recover dues from the customer i.e. the Corporate Debtor (XCPL) in this case.

Further, it is worth noting as per section 5 (21) operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

In the instant case, the claim of APPL is in respect of the provision of goods to the Corporate Debtor Hence, in view of the above APPL qualifies the definition of an operational creditor under the provisions of the IBC.

7. The appeal made by the Corporate Debtor can be rebutted on the following grounds (refer to any three)
- a) APPL is a del-credere agent and hence DIL will not be the operational creditor in this case as it has received all the payments from APPL.
  - b) The IBC does not warrant MoA and AoA of the Operational Creditor to ascertain whether a transaction is operational in nature.
  - c) The Demand Notice is valid and as per the orders of the Hon'ble Supreme Court in the matter of *Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd* (Supreme Court, Civil appeal number 15135 of 2017) demand notice can be issued by the Advocate of the Operational Creditor;
  - d) There is absolutely no intent behind IBC to mandate the creditors to conform to the rigid requirements of the Civil Procedure Code.
8. Facts given in case and issue on which question is raised are more or less similar to what was decided by the Hon'ble Supreme Court in civil appeal 9405 of 2017 in the matter of *Mobilox Innovations Private Limited vs Kirusa Software Private Limited*. It is better to go through the legal provision prior to referring to judicial precedence.

Section 8 (2) (a) says the corporate debtor shall, within a period of ten days of the receipt of the demand notice bring to the notice of the operational creditor, the existence of a dispute if any, **or** record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.

It is important to note that the word '**and**' was written in section 8 (2) (a) earlier, such '**and**' is substituted by '**or**' in 2018, with the retrospective effect from 6<sup>th</sup> June 2018. The reason for substitution highlighted by interpretation of section 8 (2) (a) by the apex court in the stated case;

Court held the word 'and' occurring in Section 8 (2) (a) must be read as or. The Supreme Court was of the opinion that such an understanding shall lead to great hardship as the corporate debtor would then be able to stave off the bankruptcy process provided a dispute is already pending in a suit or arbitration proceedings.

Further, the Supreme Court held that the existence of the dispute and/or suit or arbitration proceeding necessarily be pre-existing, that is to say, it should exist prior to receipt of the Demand Notice.

Supreme Court provided a new test plausible contention to determine the existence of a dispute.

The Supreme Court holds that while determining the existence of a dispute, all that the NCLT is to see is whether there is a plausible contention that requires further investigation and that the dispute is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

**Extra reference notes for students**

Plausible means possible and feeble mean not capable of hold on

Court says under section 9, NCLT must answer these three questions to accept or reject the application;

1. Whether there is an operational debt of more than the threshold notified under section 4?
2. Whether the documentary evidence provided with the application shows the debt is due and payable and has not yet been paid?
3. Whether there is an existence of a dispute between the concerned parties or any record of the pendency of the suit or arbitration proceeding filed before the receipt of Demand Notice?

Finally, the court says NCLT is not required to satisfy itself that the defence is likely to succeed or to examine the merits of the dispute.

## CASE STUDY 51

Anuradha cleared B.Tech from IIT, Kanpur in June 2015. She got a good placement in a US based company. She joined the ABC(US) Ltd. at Boston. on 01.09.2015. She was offered company's furnished flat along with car. She opened a bank account there, where in her employer credited her salary. Every month she remits half of the amount of salary to her NRE-SB Account at SBI, Mumbai.

In the month of February 2016, Radha, Anuradha's mother, was diagnosed cancer. Mohan, Anuradha's father decided to get the medical services of US Hospital and accordingly planned to visit in Boston by the first week of March, 2016. Mohan was having an International Credit Card, issued by Axis Bank. Apart from this he also took Forex Card from his bank and USD 1,00,000 was taken in that Forex Card.

After reaching Boston, Anuradha took care of her parents to meet out all the necessary medical requirements. During the course of hospitalization of her mother, she came closer to Dr John, who is a Cancer Specialist in the hospital and was very much impressed with the way he treated her mother. Radha was slowly recovering from cancer and was finally discharged from the hospital in the month of August, 2016.

Anuradha went on dating with Dr John and finally they both decided to get married. Anuradha talked to her parents and they too were happy. Dr. John's parents also agreed to this decision and finally the marriage was solemnised in the month of September 2016. Radha and Mohan thought to return to Mumbai and accordingly informed Anuradha. Anuradha and Dr. John decided to visit India and all the four persons came to Mumbai on 20.10.2016, which was Diwali time and enjoyed the festival.

Some of the builders of Mumbai, gave advertisement in the newspaper for booking of flats. Anuradha also saw such advertisements. She planned to have a flat in Mumbai, so she informed her proposal to Dr. John. They both agreed and contacted Shivam Builders Pvt. Ltd (SBPL), who was constructing a township in Panvel. After seeing the sample flats and site plan, Anuradha agreed to book the flat. The cost of the flat was 50 lakh rupees plus ₹ One lakh for AMC amount of one year, till the formation of society. The promoter asked her to deposit 10 lakh rupees as booking amount. Anuradha was having sufficient balance in her NRE-SB a/c, so she gave cheque of 10 lakh rupees to the builder on the eve of auspicious day of Dhanteras. Agreement for sale was executed after 15 days of taking booking amount. The possession of the flat was to be given by the end of October, 2019. The further amount of 40 lakh rupees was to be deposited in quarterly instalments as under:

Date	Instalment (in ₹ )	Slab completion
Nov. 2016	10,00,000	Booking Amount

31.12.2016	5,00,000	On completion of 5 <sup>th</sup> Slab
31.03.2017	5,00,000	On completion of 8 <sup>th</sup> Slab
30.06.2017	5,00,000	On completion of 10 <sup>th</sup> Slab
30.09.2017	5,00,000	On completion of 13 <sup>th</sup> Slab
31.12.2017	5,00,000	On completion of 15 <sup>th</sup> Slab
31.03.2018	5,00,000	On completion of plastering, light and sanitary fitting
30.06.2018	5,00,000	On completion of flooring and installation of doors and windows
30.09.2018	5,00,000	One month before the possession date i.e., 31.10.2019
<b>Total</b>	<b>50,00,000</b>	

Dr. John was planning to purchase this flat in the joint name of Anuradha. But the builder's advocate suggested that as per the Indian Law, Dr. John cannot buy immovable property jointly with his spouse. So Anuradha finalised the deal in her individual name only.

After booking the flat and enjoying the Diwali festival in November, 2016, Anuradha and Dr. John went out to explore India and visited some prominent places and returned back to Boston on 01.12.2016.

The construction of the township at Panvel went on without any interruption. Anuradha paid instalments on due dates upto 30.09.2017. Till this date, she has paid ₹ 30 lakh (including the advance amount). But now she was getting it difficult to pay, so she approached her SBI branch for availing of the loan of remaining amount of 20 lakh rupees. The SBI agreed to give the loan of 20 lakh rupees on the basis of her income and good market value of the township, constructed by the SBPL, on account of upcoming airport at New Panvel. Anuradha executed a power of attorney in favour of her father Mohan for documentation and mortgaging of the property papers with the bank. The loan of ₹ 20 lakh was sanctioned to Anuradha for 10 years @ 7.50% and the EMI was fixed at ₹ 25,000 per month starting from January 2020.

Out of the loan, the remaining instalments of ₹ 20 lakh was paid through the SBI. For AMC for one-year Anuradha paid ₹ one lakh from her NRE-SB account.

SBPL was committed to its promise and handed over the possession of flats on 31.10.2019 to each of the flat owner. Mohan took the possession of the flat on the basis of Power of Attorney executed by Anuradha.

In the month of March 2020 Anuradha planned to visit India to meet her parents and also to see her newly purchased flat. Dr. John was busy in his upcoming medical operations, so he did not accompany Anuradha. She arrived on 5<sup>th</sup> March, 2020 in Mumbai. At this time the wave of Covid-19 was spreading and thus many of the international flights were getting cancelled. Anuradha was to return back to Boston by the end of March 2020, but could not get the flight ticket. She had to remain in India with her parents in Mumbai. Due to her long stay in



India and not resuming back to her official duties at Boston, her employer expelled her in June 2020. The salary income almost stopped and Anuradha was not able to service the EMI to the Bank.

The house loan account was turned NPA by the end of November 2020. The Bank took legal recourse and send a notice under section 13(2) of the SARFAESI and recalled the entire loan amount (which was ₹ 20 lakh + interest accrued) and to pay before the expiry of the notice period as mentioned, days, else the Bank will be forced to take possession of the flat.

On account of continuous contact with the patients, Dr. John also got infected of Covid-19. His position was very much critical. Anuradha felt so bad, she was not able to help her husband nor she was able to regularise the housing loan account. Due to critical condition of Dr. John, she could not take financial help from him to liquidate the housing loan account.

The notice of 60 days given under the SARFAESI by the Bank was going to expire on 5<sup>th</sup> January 2021. Since Anuradha did come forward to negotiate / liquidate the house loan account, the Bank took the possession of the flat and put its lock and displayed a notice on the flat door 'Under possession of SBI'.

The SBI after taking possession of the flat advertised in sale of the mortgaged property. The expression of interest was invited from the prospective buyers with a reserve price of ₹ 60 lakh. The flat was finally auctioned for ₹ 65 lakh.

Based on the above facts answer the following questions.

### **I. Multiple Choice Questions**

1. What is the residential status of Anuradha as per the provisions of FEMA for the Financial Year 2015-16:
  - (a) Person resident in India
  - (b) Person resident out of India
  - (c) Overseas Citizen of India
  - (d) US Citizen
2. Mohan used his International Credit Card (ICC) in making various payments when he was in Boston:
  - (a) Yes, Mohan can use ICC without any prior approval of RBI
  - (b) No, Mohan cannot use ICC
  - (c) Use of ICC requires prior approval of RBI
  - (d) There is a limit / ceiling on use of the ICC
3. Dr. John was planning to purchase a flat in Mumbai. Whether Dr. John, not being an

Indian Citizen, can buy a flat in Mumbai:

- (a) Yes, he can buy a flat in Mumbai, since he was married with Anuradha
  - (b) No, he cannot buy a flat in Mumbai, since two years has not been elapsed of his marriage with Anuradha
  - (c) There is no bar in purchasing of flat by foreign national in India
  - (d) Dr. John can purchase the flat with prior approval of the RBI
4. What is the notice period, under section 13(2) of SARFAESI, after expiry of which the Bank can take possession of the flat:
- (a) 30 days
  - (b) 45 days
  - (c) 60 days
  - (d) 90 days
5. Under the provisions of RERA, how much amount can be taken as advance at the time of booking of flat:
- (a) Not more than 5%
  - (b) Not more than 10%
  - (c) Not more than 15%
  - (d) Not more than 20%

## **II. Descriptive Questions**

6. What are the pre-conditions for exercising rights by the lender under the SARFAESI for taking possession of the secured assets without the intervention of the court?
7. When can a foreign national (Non- Resident Indian) acquire an immovable property of flat in India? What will be your answer, if that foreign national wish to purchase a farm house in India?
8. (i) In the given case, if Anuradha had bought agricultural land near Panvel (instead of a flat) then whether the Bank would be entitled to take possession of farm house, due to non-payment of loan EMI.
- (ii) If the outstanding amount including interest, in the housing loan account remains 9 lakh rupees, whether the Bank is entitled to issue notice under SARFAESI.

**ANSWERS TO CASE STUDY 51****I. Answers to Multiple Choice Questions**

1. (b) Person resident out of India

**Reason:**

According to Section 2(v) of the FEMA “person resident in India” means—

- (i) a person residing in India for more than 182 days during the course of the preceding financial year but does not include—

- (A) a person who has **gone out of India** or who stays outside India, in either case—

- (a) for or on taking up employment outside India, or
- (b) for carrying on outside India a business or vocation outside India, or
- (c) for any other purpose,

in such circumstances as would indicate his intention to stay outside India for an uncertain period;

- (B) a person who has come to or stays in India, in either case, otherwise than—

- (a) for or on taking up employment in India, or
- (b) for carrying on in India a business or vocation in India, or
- (c) for any other purpose,

in such circumstances as would indicate his intention to stay in India for an uncertain period.

Section 2(w) defines the meaning of “**person resident outside India**”, which means a person who is not resident in India.

In order to know the residential status for FY 2016-17, the preceding FY 2015-16 is to be seen.

Anuradha went to Boston on 01.09.2015 for the purpose of employment and returned back to Mumbai on 20.10.2016. So, during the FY 2015-16 **she stayed in India from 01.04.2015 to 31.08.2015 only i.e., for 153 days**, which is less than minimum requirement of 182 days. Since Anuradha is not fulfilling the criterion of section 2(v)(i) hence she will be treated as **person resident outside**

India as per section 2(w) of FEMA.

2. (a) Yes, Mohan can use ICC without any prior approval of RBI

**Reason:**

Rule 5 of the Foreign Exchange Management (Current Account Transactions) Rules, 2000 provides that certain transactions require prior approval of the RBI. However, Rule 7 which deals with the matter relating to the **use of International Credit Card while outside India**, further states that **nothing contained in rule 5 shall apply to the use of International Credit Card for making payment by a person towards meeting expenses while such person is on a visit outside India.**

3. (b) No, he cannot buy a flat in Mumbai, since two years has not been elapsed of his marriage with Anuradha

**Reason:**

Regulation 6 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 deals with the matter relating to **Joint acquisition by the spouse of an NRI or an OCI. It reads as under:**

A person resident outside India, not being a Non-Resident Indian or an Overseas Citizen of India, who is a spouse of a Non-Resident Indian or an Overseas Citizen of India may acquire one immovable property (other than agricultural land/ farm house/ plantation property), jointly with his/ her NRI/ OCI spouse.

The proviso (iii) provides that the marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the acquisition of such property.

In the given case, the two years were not elapsed of marriage, so Dr. John cannot purchase immovable property in India.

However, in terms of Regulation 3 an NRI or an OCI may acquire immovable property in India, other than agricultural land/ farm house/ plantation property. Hence Anuradha can buy the property in her individual name only.

4. (c) 60 days

**Reason:**

Section 13(2) of the SARFAESI states that where any borrower, who is under a liability to a secured creditor under a security agreement, **makes any default in repayment of secured debt** or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as **non-performing asset**, then, the secured creditor may require the borrower by notice in writing to

discharge in full his liabilities to the secured creditor **within sixty days** from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

5. (b) Not more than 10%

**Reason:**

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

Here, the cost of the flat is Rs 50 lakh, so 10% of it comes to Rs 5 lakh only. While the SBPL has taken Rs 10 lakh as an advance which come to 20% of the cost of flat, which is wrong.

## II. Answers to Descriptive Questions

6. Section 13(1) of the Act provides that notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

Section 13(2) states that where any borrower, who is under a liability to a secured creditor under a security agreement, **makes any default in repayment of secured debt or any instalment** thereof, and his account in respect of such **debt is classified by the secured creditor as non-performing asset**, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

Section 13(3) specifies that the notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

Section 13(4)(a) states that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the **secured creditor may take recourse to one or more of the following measures** to recover his secured debt, **take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset**.

7. Regulation 3 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 deals with the Acquisition and Transfer

of Property in India by a Non-Resident Indian or an Overseas Citizen of India. It reads as under:

**An NRI or an OCI may -**

- (a) acquire immovable property in India other than agricultural land/ farm house/ plantation property:

Provided that the consideration, if any, for transfer, shall be made out of (i) funds received in India through banking channels by way of inward remittance from any place outside India or (ii) funds held in any non- thereunder.

Provided further that no payment for any transfer of immovable property shall be made either by traveller's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause.

- (b) acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;
- (c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;
- (d) transfer any immovable property in India to a person resident in India;
- (e) transfer any immovable property other than agricultural land/ farm house/ plantation property to an NRI or an OCI.

As per the above provisions, foreign national (Non- Resident Indian) cannot purchase a farm house in India.

8. (i) Section 31(i) of the SARFAESI provides that the provisions the Act shall not apply to any security interest created in agricultural land. Accordingly, even if the finance availed by Anuradha and loan accounts becomes NPA, the Bank would not be having the legal authority to issue notice under section 13(2) to the borrower.
- (ii) Section 31(j) of the SARFAESI provides that the provisions of the SARFAESI Act shall not apply in any case in which the amount due is less than 20% of the principal amount and interest thereon. The question states that the loan amount remains 9 lakh rupees including the interest, which is less than 20% of the loan amount (20% of 50 lakh comes to 10 lakh rupees) taken by Anuradha, hence the Bank would not be legally entitled to issue notice under section 13(2) to the borrower.

## CASE STUDY 52

Mridula Textiles Ltd. is a company engaged in the business of manufacturing polyester and woollen suitings. The company have an expansion plan to enter into the business of the readymade garments for which the company needs 50 crores rupees for importing and installing of high technology machines. The company approached its bankers and a consortiums of bankers sanctioned a term loan of 40 crores rupees and 10 crores rupees towards the working capital finance.

In consortiums of bankers, the lead banker is SBI. The other bankers and their proportion of share in lending is as under:

Name of bank	Term Loan (₹ in Crores)	Working Capital (₹ in Crores)	Total (₹ in Crores)	% of share
SBI	15	10	25	50
Federal Bank	5	0	5	10
Bank of Baroda	7	0	7	14
ICICI Bank	8	0	8	16
Axis Bank	5	0	5	10
Total	40	10	50	100

Plant and Machineries were imported and installed. The company started producing the ready garments for men's wear in premium category, party wears, office wears and casuals. Initially the company got good response specifically for its range in casual and party wears. So, the company was focussing on this segment.

In March 2020, the COVID-19 spread all over the globe and its effect also affected the company's operations. The skilled labours started to migrate to their home town, inspite of the making the best efforts by the company to retain them. The production unit remained closed for almost a year.

Due to stoppage of production, the distribution channel effected. Moreover, the demand also went down due to lock-down in most of the urban areas. As a result, the cash flow of the company mismatched and the term loan account and cash credit working capital account were classified by the bankers as Non-performing Accounts.

In the consortium of meeting, the members bank decided to take legal action against the borrower company and they issued a recall notice followed by a legal notice from a lawyer. The company

asked some time to pay the overdue interest on the credit facilities and to regularise the account. However, after allowing sufficient time, the company was not able to regularise the credit facilities.

The consortium of bankers decided to issue a demand notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI). The member banks authorised State Bank of India (SBI) to initiate action and take possession of the secured assets and also take control of the management of the affairs of the company.

Accordingly a demand notice dated 01.09.2020 was issued under section 13(2) to the company mentioning therein to repay the entire outstanding of the bankers within a given period, failing which the bank shall exercise its power given under SARFAESI to take possession of the secured assets of the borrower, take over the management of the business of the borrower, appoint a manager to manage the secured assets (the possession of which has been taken over by the secured creditor) and/or require the payment of the secured debt by any person from whom money is due to the borrower.

After the lapse of the specified period as mentioned in the notice the bankers took possession of the secured assets which were mortgaged exclusively with the Financial Creditor since the Corporate Debtor failed to repay the debt due.

After following the procedure as mentioned in the SARFAESI, the banker made an advertisement for sale of the secured assets by way of e-auction. The secured assets were successfully auctioned on 01.02.2021 for ₹ 35 crore and the successful bidder deposited 25% of the bid amount (₹ 8.75 crore) instantly and the balance of 75% (₹ 26.25 crore) of the bid amount was supposed to be deposited within 15 days by the successful bidder.

In the meantime, the Mridula Textiles Ltd, filed an application under section 10 of the Insolvency and Bankruptcy Code, 2016 (IBC). Upon committing a default, the corporate applicant itself can file an application for initiating Corporate Insolvency Resolution Process (CIRP) before the Adjudicating Authority i.e. the National Company Law Tribunal (NCLT).

The application filed by the company was admitted by the NCLT on 05.02.2021. The NCLT declared a moratorium under section 14(1) of the IBC and appointed a Resolution Professional (RP).

On 08.02.2021, the Financial Creditors (all the members of the consortium members) filed a claim of ₹ 65 crore with the RP in Form C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The operational creditors who supplied the raw materials to the company, also lodged their claim was for Rs 5 crore. Besides the employees and labours' whose salaries were due, also filed their claim which was of ₹ 0.75 crore.



The RP admitted the claim and constituted the Committee of Creditors (CoC) which was comprising of the bankers only. The operational creditors and the employees also raised the issue before the Resolution Professional for inclusion of their names as a member of the CoC. However, the RP refused to entertain their request for inclusion of their names in the CoC, but he allowed them to attend only the CoC meeting, if they wish so.

However, after receipt of the balance 75% of the bid amount on 11.02.2021, the Bankers filed a revised claim of ₹ 38.75 crore (65-26.25 = 38.75 crore) in Form C on 11.02.2021 post disclosing that the Bankers had realised the collateral security through an e-auction of the secured assets of the Corporate Debtor.

Thereafter, the company being the Corporate Debtor filed an application in the NCLT requesting to set aside the sale made by the bankers since moratorium was imposed. The NCLT set aside the sale made by the bankers in the light of the initiation of the CIRP and moratorium was imposed.

Aggrieved by the order of NCLT, the Banker filed an appeal in the National Company Law Appellate Tribunal, New Delhi (NCLAT).

### **I. Multiple Choice Questions**

1. What is the main purpose of issue of demand notice under section 13 of the SARFAESI:
  - (a) To enforce the security interest without the intervention of the court or tribunal
  - (b) To recover the amount outstanding from the borrower
  - (c) To threaten the borrower for not repaying the dues of the bankers
  - (d) To do business by acquiring the machinery of the borrower
2. Whether the provisions of the IBC supersedes the provisions of the SARFAESI:
  - (a) No, the SARFAESI was enacted in 2002, while IBC in 2016, hence SARFAESI will supersede
  - (b) As per Section 35 of the SARFAESI, this Act will have effect.
  - (c) As per Section 238 of the IBC the provisions of the Code have overriding effect on any other laws.
  - (d) The SARFAESI and IBC stands on equal footing.
3. In the given case, who shall be the member of the Committee of Creditors:
  - (a) The Bankers (being the financial creditors) only
  - (b) The Operational Creditors

- (c) The Employees and Labours
  - (d) The Bankers as well the operational creditors only
4. Where a borrower makes any default in repayment of secured debt, the secured creditor may require the borrower by notice in writing to discharge, in full, his liabilities to the secured creditor ----- from the date of notice:
- (a) within 30 days
  - (b) within 45 days
  - (c) within 60 days
  - (d) within 75 days
5. Under the provision of SARFAESI, on failure of the borrower to discharge his liability in full within the period specified in the notice, the secured creditor may:
- I take possession of the secured assets of the borrower
  - II take right to transfer the secured assets of the borrower by way of lease, assignment or sale for realising the secured asset;
  - III take over the management of the business of the borrower
- Choose the correct option from below:
- (a) Only I
  - (b) Only I and III
  - (c) Only II and III
  - (d) I, II and III

## **II. Descriptive Questions**

6. What are the conditions prescribed under the SARFAESI before issuing a notice under section 13(2)?
7. In the given case, the Resolution Professional has included only the bankers as members of the CoC. Whether the operational creditors have the right to be member of the CoC. What would be your answer, if in any case there are no financial creditors and only operational creditors are there?
8. In the given case, bankers have already received 25% of the bid offer and remaining 75% was to be payable within 15 days by the successful bidder. Meanwhile the corporate debtor initiated CIRP. Since the sale exercise through auction was already

initiated by the bankers, prior to initiation of CIRP, by the corporate debtor, whether such sale transaction will be nullified in light of the declaration of moratorium by the Adjudicating Authority?

## ANSWERS TO CASE STUDY 52

### I. Answers to Multiple Choice Questions

1. (a) To enforce the security interest without the intervention of the court or tribunal  
**Reason:**  
Section 13(1) of the SARFAESI states that notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, **without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.**
2. (c) As per section 238 of the IBC the provisions of the Code have overriding effect on any other laws.  
**Reason:**  
Section 238 of IBC provides that the provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Further various judicial pronouncement also supports this view that IBC overrides the provisions of any other law.
3. (a) the Bankers (being the financial creditors) only  
**Reason:**  
Section 21(2) states that the committee of creditors shall comprise all financial creditors of the corporate debtor.

4. (c) within 60 days

**Reason:**

Section 13(2) of the SARFAESI states that where any borrower makes any default in repayment of secured debt, the secured creditor may require the borrower by notice in writing to discharge, in full, his liabilities to the secured creditor **within 60 days** from the date of notice.

5. (d) I, II and III

**Reason:**

Section 13(4) of the SARFAESI provides in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—

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

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

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

<b>II. Answers to Descriptive Questions</b>
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6. Section 13 of the SARFAESI prescribes certain conditions for issue of notice under sub-section (2), which are as under:
- ◆ The borrower shall under a liability to a secured creditor under the security agreement.
  - ◆ The borrower has defaulted in making repayment of the secured debt or any instalment thereof.

- ◆ The borrower's loan account has been classified as NPA in the books of the secured creditor as per the guidelines of the RBI
- ◆ The secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice.
- ◆ If the borrower do not liquidate the account within the prescribed period of 60 days, the secured creditor shall be entitled to exercise all or any or rights as mentioned in sub-section (4).

**What is security interest:**

The security interest has been defined in section 2(1)(zf) which means means right, title or interest of any kind, **other than those specified in section 31**, upon property created in favour of any secured creditor and includes—

- (i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or
- (ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset

Further the following condition are also prescribed under section 31 of the SARFAESI, before invoking the section 13(2), which are as under:

- ◆ The security interest for securing repayment of any financial asset should not be exceeding one lakh rupees. [Section 31(h)]
  - ◆ Security interest should not have been created in agricultural land. [Section 31(i)]
  - ◆ The amount outstanding (principal plus interest) should not be greater than 20% of the principal amount and interest thereon. [Section 31(j)]
7. Section 21(2) of the IBC provides that the committee of creditors shall comprise all financial creditor of the corporate debtors.

Further section 21(3) states that subject to sub-sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

Sub-section (6) provides that where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

- (a) authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;
- (b) represent himself in the committee of creditors to the extent of his voting share;
- (c) appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or
- (d) exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

Section 24(3)(d) of the IBC states that the resolution professional shall give notice of each meeting of the CoC to operational creditor or their representatives if the amount of their aggregate dues is not less than 10% of the debt.

Section 24(4) states that the operational creditors, may attend the meetings of CoC, but shall not have any right to vote in such meetings.

**Situation where there is no financial creditor**

Regulation 16 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides as under:

- (1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation.
- (2) The committee formed under this Regulation shall consist of members as under –

**(a) Eighteen largest operational creditors by value:**

Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors; 14

- (b) **one representative elected by all workmen** other than those workmen included under sub-clause (a); and (c) one representative elected by all employees other than those employees included under sub-clause (a).

8. Section 10(1) of the IBC states that where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

Section 14(1)(c) of the IBC provides that on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The facts given the question are similar to that of *Indian Overseas Bank v. RCM Infrastructure Ltd. and Ors.* [Company Appeal (AT) (Insolvency) No. 736 of 2020]<sup>1</sup> decided on 26 March 2021 by the National Company Law Appellate Tribunal, New Delhi.

The NCLAT expressed that imposition of moratorium as per Section 14 of IBC is to protect the interest of the Corporate Debtor by protecting the assets of the Corporate Debtor for the sole objective to maximisation the value of assets. This Tribunal in the matter of “*Encore Asset Reconstruction Company Pvt. Ltd. Vs. Charu Sandeep Desai and Others*” reported in 2019 SCC OnLine NCLAT 284 also held that Section 238 of IBC will prevail over any of the provisions of the SARFAESI Act, 2002 if it is inconsistent with any of the provisions of IBC. Paragraphs 12,14 & 15 of the said judgment is reproduced here at:

“12. From the explanation below Section 18, it is clear that the terms “assets” do not include the assets owned by a third party in possession of the ‘Corporate Debtor’.

14. Decision in “*Transcore v. Union of India*” was rendered in the year 2008 when the ‘I&B Code’ was not in existence. The ‘I&B Code’ came into force w.e.f. 1st December, 2016 and Section 238 read as follows: “238. Provisions of this Code to override other laws:- The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

15. ‘SARFAESI Act, 2002’ being an existing law, Section 238 of the ‘I&B Code’ will prevail over any of the provisions of the ‘SARFAESI Act, 2002’ if it is inconsistent with any of the provisions of the ‘I&B Code.’”

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<sup>1</sup> <https://ibbi.gov.in/uploads/order/8bbf86d680dc29641ac757b40ef1d3c5.pdf>

The NCLAT stated that from the above judgment of the Hon'ble Supreme Court it is clear that when the Adjudicating Authority commences the CIRP proceeding and imposes moratorium, no proceeding shall be continued or commenced and not to carry out any auction of the assets of the Corporate Debtor.

The NCLAT opined that, in the facts of the present case and upon deliberating the issues as framed in paragraph 22 above, we hold that:

- (1) When the moratorium was imposed by the learned Adjudicating Authority, receipt of the balance sale consideration is illegal and the learned Adjudicating Authority rightly set aside the sale transaction.
- (2) Further **Section 238 of IBC, have overriding effect over other laws** as held by the Hon'ble Apex Court, and this Tribunal in Encore Asset Reconstruction Company Ltd.



## CASE STUDY 53

Unique Builders and Developers Ltd. (UBDL) advertised for booking of 40 residential flats, which are to be constructed in Jaipur. The cost of each flat was kept as Rs. 50 lakh. On the very first day, when the booking was opened, all the flats were booked. The UBDL took booking amount of Rs. 8 lakh from each of allottees. The agreement of sale was executed with all the allottees within a period of one month from the date of receipt of the booking amount.

On the date and venue of booking of flats, the AXIS Bank displayed their counter and offered housing loan to the allottees. The Bank offered the competitive rates to the allottees with a loan amount of 90% of the cost of flat. All the allottees agreed to the terms and conditions narrated by the Bank. When the agreement to sale deed was executed, the Bank sanctioned the loan amount to each of the allottees by executing the simple documentation and equitable mortgage of the document 'agreement to sale', income tax returns for the last 3 years, KYC documents and Income Proof. The Bank also got it registered with the Central Registry of Securitisation Asset reconstruction and Security Interest of India (CERSAI).

The UBDL started the construction work. The UBDL for the purpose of working capital, raised loan on the land (on which the construction is going on) of Rs. 20 crores from the ICICI Bank. This was done after the allotment of flats was made. According to the allottees this was done without verification of existing charge on the properties in question. The allottees therefore alleged before RERA that such loan was sanctioned wholly fraudulently and with malafide intentions.

In the meantime, since the developer failed to repay the dues to the bank, the ICICI Bank treated the account as NPA and tried to recover its unpaid dues by resorting to provisions of SARFAESI Act. Some of the allottees approached the Debts Recovery Tribunal (DRT) and thereafter Debts Recovery Appellate Tribunal (DRAT) to prevent the ICICI Bank from auctioning the properties and thereafter approached RERA for taking suitable action against all concerned including the ICICI Bank.

Before RERA the ICICI Bank raised several contentions including that RERA has no jurisdiction to entertain any complaint against the ICICI Bank and that in view of the proceedings which are pending before the DRT and DRAT, the complaints should not in any case be entertained.

The UBDL being unable to pay the debt of the ICICI Bank filed an application for initiation of the CIRP under section 10 of the IBC with the NCLT. The NCLT admitted the application, declared moratorium and appointed a Resolution Professional. As a result of the declaration of the moratorium, the suits lying against the UBDL in the DRT/ DRAT were stayed.

The Interim Resolution Professional (IRP) collated all the claims and constituted a committee of creditors. The RP invited the expression of interest from the prospective resolution applicants. In the meeting of the CoC the members confirmed the continuation of same IRP as RP.

Satguru Builders Ltd (SBL) expressed its interest and submitted the Resolution Plan to the RP. The SBL offered to take over all the existing liabilities and assets of the UBDL and also agreed to the same terms and conditions which were agreed by the allottees at the time of booking of the flat, except some minor changes as recommended by the company's Architect are necessary due to architectural and structural reasons. However, the allottees objected for it and threatened to refer the matter to the RERA Authority.

### **I. Multiple Choice Questions**

1. The cost of the flats offered for sale by the UBDL was Rs. 50 lakh. How much advance UBDL can take from the customers without entering into a written agreement:
  - (a) Rs. 2,50,000
  - (b) Rs. 5,00,000
  - (c) Rs. 7,50,000
  - (d) Rs. 10,00,000
2. What is the effect of the registration of transactions of creation security interest by a secured creditor under the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI):
  - (a) It shall be deemed to constitute a notice to the other lenders
  - (b) It shall be deemed to constitute a notice to the other builders
  - (c) It shall be deemed to constitute a notice to the other allottees
  - (d) It shall be deemed to constitute a public notice for creation of such security interest
3. The following particulars of creation, modification or satisfaction of security interest are NOT eligible for registration on the CERSAI portal:
  - I Immovable property by mortgage other than mortgage by deposit of title deeds
  - II Hypothecation of plant and machinery, stocks, debts including book debts or receivables, whether existing or future.
  - III 'Under construction' residential or commercial or a part thereof by an agreement or instrument other than mortgage

- IV Intangible assets, being know how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature.

**Choose among the following options:**

- (a) Only I
  - (b) Only I and III
  - (c) Only II and IV
  - (d) I, II, III and IV
4. The Resolution Professional constitute a Committee of Creditors. Who shall be entitled to become a member of the COC:
- (a) Only ICICI Bank
  - (b) Only Axis Bank
  - (c) Only Home Allottees
  - (d) Only ICICI Bank and Home Allottees
5. After the transfer of the new project, the new promoter intend to do some minor changes. Can he do so?
- (a) No, the after transfer of the project, the new promoter cannot make changes in the sanctioned plan
  - (b) The promoter can make major changes if the allottees do not object
  - (c) The promoter can make changes subject to the approval of the RERA Authority
  - (d) The minor changes as per the recommendation of the architect can be done after proper declaration and intimation to the allottee.

## **II. Descriptive Questions**

6. What is the effect of the registration of transactions of creation of security interest and how it gets the priority over the secured creditors?
7. What conditions have been prescribed under the IBC for initiation of CIRP by the Corporate Debtor itself?
8. The registration of creation of security interest over any property of the borrower secures the repayment of any financial assistance granted by any secured creditor. Elucidate the statement.

**ANSWERS TO CASE STUDY 53****I. Answers to Multiple Choice Questions**

1. (b) Rs. 7,50,000.

**Reason:**

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

The 10% of Rs. 50 lakh comes to Rs. 5 lakh, therefore the UBDL cannot take advance more than Rs 5 lakh from the customers.

2. (d) It shall be deemed to constitute a public notice for creation of such security

**Reason:**

Section 26C of the SARFAESI provides that without prejudice to the provisions contained in any other law, for the time being in force, any registration of transactions of creation, modification or satisfaction of security interest by a secured creditor or other creditor or filing of attachment orders under this Chapter **shall be deemed to constitute a public notice** from the date and time of filing of particulars of such transaction with the Central Registry for creation, modification or satisfaction of such security interest or attachment order, as the case may be.

3. (d) I, II, III and IV

**Reason:**

The RBI vide its circular No. RBI/ 2018-19/ 96 DBR.Leg.No.BC.15/ 09.08.020/ 2018-19, dated 27.12.2018 at Para No. 2 has stated that the Government of India has issued a Gazette Notification dated January 22, 2016 for filing of the following types of security interest on the CERSAI portal:

- (a) Particulars of creation, modification or satisfaction of security interest in immovable property by mortgage other than mortgage by deposit of title deeds.

- (b) Particulars of creation, modification or satisfaction of security interest in hypothecation of plant and machinery, stocks, debts including book debts or receivables, whether existing or future.
- (c) Particulars of creation, modification or satisfaction of security interest in intangible assets, being know how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature.
- (d) Particulars of creation, modification or satisfaction of security interest in any 'under construction' residential or commercial or a part thereof by an agreement or instrument other than mortgage.

Therefore, all options mentioned at I, II, III and IV are eligible.

4. (d) Only ICICI Bank and Home Allottees

**Reason:**

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

Section 5(7) states that "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

Explanation (i) of section 5(8) states that for the purposes of this sub-clause, any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

Therefore, who ever have financed the UBDL (i.e. ICICI Bank and the Home Allottees only) will be considered the financial creditors. Here it is to be mentioned that AXIS Bank has given loan to the home allottees and not to the UBDL hence AXIS Bank is not the part of the CoC.

5. (d) The minor changes as per the recommendation of the architect can be done after proper declaration and intimation to the allottee.

**Reason:**

The provision to section 14(2)(i) states that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

**II. Answers to Descriptive Questions**

6. The provisions relating to Central Registry are contained in Sections 20 to 26A of Chapter IV of the SARFAESI. Further Chapter IVA consisting of section 26B to 26E of the SARFAESI deals with the registration by secured creditors and other creditors.

**Section 26C of the SARFAESI deals with the matter relating to the effect of the registration of transactions, etc., which reads as under:**

- (1) Without prejudice to the provisions contained in any other law, for the time being in force, any registration of transactions of creation, modification or satisfaction of security interest by a secured creditor or other creditor or filing of attachment orders under this Chapter shall be deemed to constitute a public notice from the date and time of filing of particulars of such transaction with the Central Registry for creation, modification or satisfaction of such security interest or attachment order, as the case may be.
- (2) Where security interest or attachment order upon any property in favour of the secured creditor or any other creditor are filed for the purpose of registration under the provisions of Chapter IV and this Chapter, the claim of such secured creditor or other creditor holding attachment order shall have priority over any subsequent security interest created upon such property and any transfer by way of sale, lease or assignment or licence of such property or attachment order subsequent to such registration, shall be subject to such claim.

Provided that nothing contained in this sub-section shall apply to transactions carried on by the borrower in the ordinary course of business.

7. **Section 10 of the IBC deals with the initiation of corporate insolvency resolution process by corporate applicant, which reads as under:**

- (1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.
- (2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.
- (3) The corporate applicant shall, along with the application, furnish—
  - (a) the information relating to its books of account and such other documents for such period as may be specified;

- (b) the information relating to the resolution professional proposed to be appointed as an interim resolution professional; and
  - (c) the **special resolution passed by shareholders of the corporate debtor** or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.;
- (4) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order—
- (a) admit the application, if it is complete; and no disciplinary proceeding is pending against the proposed resolution professional or
  - (b) reject the application, if it is incomplete: or any disciplinary proceeding is pending against the proposed resolution professional

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority.

- (5) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

8. **Section 20 (1)** of Chapter IV of the SARFAESI provides that the Central Government may, by notification, set up or cause to be set up from such date as it may specify in such notification, a registry to be known as the Central Registry with its own seal for the purposes of registration of transaction of securitisation and reconstruction of financial assets and creation of security interest under this Act.

Accordingly, the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI) was set up under section 20(1) of the SARFAESI Act. The CERSAI is a Government of India company, licensed under section 8 of the Companies Act, 2013. The company has been incorporated for the purpose of operating a Registration System Later, CERSAI was entrusted upon the responsibility of operating and maintaining a KYC Registry, governed under PML Rules 2005 (Maintenance of Records).

**Registration by secured creditor and other creditors - Section 26B(1)** further states that the Central Government may by notification, extend the provisions of Chapter IV relating to Central Registry to all creditors other than secured creditors as defined in section 2(1)(zd), **for creation, modification or satisfaction of any security interest over any property of the borrower for the purpose of securing due repayment of any financial assistance granted by such creditor to the borrower.**

- (2) From the date of notification under sub-section (1), any creditor including the secured creditor may file particulars of transactions of creation, modification or satisfaction of any security interest with the Central Registry in such form and manner as may be prescribed.
- (3) A creditor other than the secured creditor filing particulars of transactions of creation, modification and satisfaction of security interest over properties created in its favour shall not be entitled to exercise any right of enforcement of securities under this Act.
- (4) Every authority or officer of the Central Government or any State Government or local authority, entrusted with the function of recovery of tax or other Government dues and for issuing any order for attachment of any property of any person liable to pay the tax or Government dues, shall file with the Central Registry such attachment order with particulars of the assessee and details of tax or other Government dues from such date as may be notified by the Central Government, in such form and manner as may be prescribed.
- (5) If any person, having any claim against any borrower, obtains orders for attachment of property from any court or other authority empowered to issue attachment order, such person may file particulars of such attachment orders with Central Registry in such form and manner on payment of such fee as may be prescribed.



## CASE STUDY 54

M/s MT Agencies Pvt. Ltd, is engaged in the business of whole sale distributorship of Rice and Pulses, in Anaz Madi, Jaipur. In order to increase the business, the company requires some additional working capital finance. The company approached his banker- HDFC Bank for increase of the Cash Credit Limits from the existing 25 lakh rupees to 75 lakh rupees and offered to the Bank, three immovable properties (which are in the name of Rajesh Kumar, Managing Director and Guarantor of the company) which were purchased through registered sale deed dated 13.10.2019) as mortgage for securing the cash credit limit. HDFC Bank after having the equitable mortgage of the property, sanctioned a credit limit of Rs. 75 lakh to the company.

The HDFC Bank also got the registration of the mortgage of the properties with the CERSAI under the provisions of the SARFAESI.

After some time, the business of the company could not run well and was classified as NPA in the books of the HDFC Bank. A recall notice was sent to the company but not response was given. The company issued a notice under section 13(2) of the SARFAESI to the company mentioning there in that the Bank shall take possession of the secured assets and will also take over the management of the company.

After receipt of the notice, the company applied for the initiation of the CIRP under section 10 of the IBC. The CIRP application was admitted by the Adjudicating Authority, moratorium was declared and an Interim Resolution Professional (IRP) was appointed.

The IRP collated the claims from the creditors. HDFC Bank submitted its claim as the financial creditor. Apart from the HDFC Bank, some other operational creditor also lodged the claim. The Committee of Creditor was constituted in which there was a single financial creditor i.e. HDFC Bank.

Meanwhile the notice period under section 13(2) of the SARFAESI was closed and the HDFC Bank started to take possession of the secured assets which were mortgaged by Rajesh Kumar in the capacity of personal guarantor.

Rajesh Kumar objected that since the company is under moratorium all the legal proceedings against the company are put on hold by the Adjudicating Authority and the decision of Bank to take possession of the mortgaged properties is not valid. He filed a case in the NCLT pleading that since the moratorium is under way, so the enforcement of security interest under the SARFAESI against the company be stopped at once.

Meanwhile, the Enforcement Directorate (ED), on the basis of some solid information, that the

company on the guise of dealing in Rice and Pulses, is dealing with the prohibited drugs which is an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985. The ED along with its team, in the early hours of morning, raided at the office of the company and at the residence of Rajesh Kumar and found huge quantity of poppy straw at the office of the company as well as at in the garage of Rajesh Kumar. The ED ordered for the provisional attachment of the office premises and the residence of Rajesh. Both these properties were already under mortgaged with the HDFC Bank.

**Based on the above facts answer the following questions.**

<b>I. Multiple Choice Questions</b>
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1. The provisions of the IBC are not applicable on:
  - (a) Private Limited Company
  - (b) Limited Liability Company
  - (c) Personal Guarantors to corporate debtors
  - (d) None of the above
2. Who is the Adjudicating Authority for the personal guarantor:
  - (a) The National Company Law Tribunal
  - (b) The Debt Recovery Tribunal
  - (c) The District Court
  - (d) The High Court
3. Keeping of Poppy Straw is an offence under which Act:
  - (a) The Indian Penal Code, 1860
  - (b) The Narcotic Drugs and Psychotropic Substances Act, 1985
  - (c) The Unlawful Activities (Prevention) Act, 1967
  - (d) The Protection of Plant Varieties and Farmers Rights Act, 2001
4. Who among the following shall not be entitled to exercise any right of enforcement of securities by registration with CERSAI under the SARFAESI Act:
  - (a) Secured creditor
  - (b) Unsecured creditor

- (c) Both secured and unsecured creditor
  - (d) None of the above
5. Which among the following Act, overrides the other laws:
- (a) The Insolvency and Bankruptcy Code, 2016
  - (b) The Prevention of Money Laundering Act, 2002
  - (c) The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
  - (d) The Recovery of Debts and Bankruptcy Act, 1993

## II. Descriptive Questions

6. After the expiry of the notice issued under section 13(2), how the secured creditor may proceed to take the possession of the security interest under the SARFAESI?
7. Whether moratorium declared by the Adjudicating Authority is also applicable on the personal guarantor? Examine the statement in light of the provisions contained in the IBC.

## ANSWERS TO CASE STUDY 54

### I. Answers to Multiple Choice Questions

1. (d) None of the above

#### Reason:

Section 2 of the IBC provides that the provisions of this Code shall apply to—

- (a) **any company** incorporated under the Companies Act, 2013 (18 of 2013) or under any previous company law;
- (b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;
- (c) any **Limited Liability Partnership** incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009);
- (d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf;

- (e) **personal guarantors to corporate debtors;**
- (f) partnership firms and proprietorship firms; and
- (g) individuals, other than persons referred to in clause (e),

2. (a) The National Company Law Tribunal

**Reason:**

Section 60(1) of the IBC provides that the **Adjudicating Authority**, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and **personal guarantors thereof shall be the National Company Law Tribunal** having territorial jurisdiction over the place where the registered office of the corporate person is located.

3. (b) The Narcotic Drugs and Psychotropic Substances Act, 1985

**Reason**

Paragraph 2 of Schedule of PML Act provides the list of offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 under which section 15 deals with the contravention in relation to poppy straw.

4. (b) Unsecured creditor

**Reason:**

Section 26B(3) of the SARFAESI provides that a creditor **other than the secured creditor** filing particulars of transactions of creation, modification and satisfaction of security interest over properties created in its favour **shall not be entitled to exercise any right of enforcement of securities** under this Act.

5. (b) The Prevention of Money Laundering Act, 2002

**Reason:**

Section 71 of the PMLA states that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

The High Court of Delhi in the matter of The Deputy Director Directorate of Enforcement, Delhi Vs. Axis Bank & Ors [CRL.A. 143/2018 & CrI. M.A. 2262/2018 dated 2nd April, 2019] held at Para 171 (V), (vi), (vii) and (viii) held as under:

- (v). If the person accused of (or charged with) the offence of money-laundering objects to the attachment, his claim being that the property

attached was not acquired or obtained (directly or indirectly) from criminal activity, the burden of proving facts in support of such claim is to be discharged by him.

- (vi). The objective of PMLA being distinct from the purpose of RDBA, SARFAESI Act and Insolvency Code, the latter three legislations do not prevail over the former.
- (vii). The PMLA, by virtue of section 71, has the overriding effect over other existing laws in the matter of dealing with "money-laundering" and "proceeds of crime" relating thereto.
- (viii). The PMLA, RDBA, SARFAESI Act and Insolvency Code (or such other laws) must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show the same to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" and consequently being "proceeds of crime", within the mischief of PMLA.

## II. Answers to Descriptive Questions

6. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset

**Section 14** of the SARFAESI Act deals with this matter. It reads as under:

- (1) Where the **possession of any secured assets is required to be taken by the secured creditor** or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the **secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate** within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be, the **District Magistrate shall**, on such request being made to him—

- (a) **take possession** of such asset and documents relating thereto; and
- (b) **forward such asset and documents to the secured creditor:**

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that—

- (i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;
- (ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;
- (iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;
- (iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;
- (v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;
- (vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;
- (vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;
- (viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;
- (ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets within a period of 30 days from the date of application:

Provided also that if **no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of 30 days** for reasons beyond his control, he may, after recording reasons in writing for the same, pass the

order within such further period **but not exceeding in aggregate 60 days.**

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

- (1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,—
- (i) to take possession of such assets and documents relating thereto; and
  - (ii) to forward such assets and documents to the secured creditor.
- (2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.
- (3) No act of the Chief Metropolitan Magistrate or the District Magistrate any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

7. According to Section 5(22) of the IBC, “personal guarantor” means an individual who is the surety in a contract of guarantee to a corporate debtor.

Section 13(a) states that the Adjudicating Authority, after admission of the application under section 7 or section 9 or section 10, shall, by an order declare a moratorium for the purposes referred to in section 14.

Section 14(1) states that on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

- (a) the institution of suits or continuation of pending suits or proceedings **against the corporate debtor** including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

*Explanation.*—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

In the case of ***State Bank of India Vs. Ramkrishnan*** [Civil Appeal Nos. 3595 & 4553 of 2018, (2018) 17 SCC 394], the **Supreme Court** held that **section 14 did not apply to the personal guarantor of the CD but only to the CD**. The court held that in a contract of guarantee, the liability of surety and that of principal debtor is coextensive and hence, the creditor can proceed against assets of either the principal debtor or the surety, or both, in no particular order. The court also took into consideration the Insolvency and Bankruptcy (Amendment) Ordinance, 2018 which amended the provision of section 14 and held the same to be retrospective (clarificatory in nature).



## CASE STUDY 55

Mahesh after having completed an engineering degree in agriculture got a placement in a bank as Agriculture Officer. He worked in the bank for about 4 years, but was not having the job satisfaction. So, he decided to quit the job and to associate with his father in agriculture business. He belongs to a village Peethawas, near to Jaipur city. He planned to purchase an agriculture land in the village and ultimately found out one seller. He negotiated deal with the seller and purchased that land out of his savings.

Mahesh wanted to grow some agriculture produce on that land and for this he needs money for purchasing the seeds, fertilizers etc. He approached SBI which is having branch in his village and applied for the Kisan Credit Card (KCC) Limit. A limit of Rs. 5 lakh was given on the KCC by the bank by mortgaging the land with the bank. The name of the bank was registered with SDO record and so of with the CERSAI.

Mahesh hired some labours for the day-today work on the farm and started the cultivation of the vegetables and fruits.

Mahesh got married with Yukti of Jaipur. Yukti is a Chartered Account and presently is in employment with a CA firm in Jaipur. Since his area of scope is in city, so Mahesh also decided to settle down in Jaipur.

In Jaipur, the builders regularly advertise for booking of flats. Mahesh and Yukti contacted some builders and also saw some sample flats and finalised the deal with Yash Builders Ltd. The cost of the 3 BHK flat was Rs. 75 lakh. Mahesh and Yukti decided to avail loan facility and approached Axis Bank in Jaipur. Based on the profile of Mahesh and Yukti, the Axis Bank sanctioned loan of 90% of the cost of flat and 10% as margin money was to be contributed from their own savings.

Yash Builders demanded Rs. 10,000/- as token amount of commitment and Rs. 7 lakh on the execution of agreement to sale. Mahesh and Yukti demanded from the builder the names of the person who have booked the flats so far, to know who is in their known list, but builder denied to provide the same.

In the village, the farming was not upto the mark due low rainfall. SBI asked Mahesh to liquidate the KCC limit, but since the money was utilised in paying the margin money for booking of the flat in Jaipur, Mahesh was short of liquidity, so he requested the bank to wait for some time. The Agricultural Loan account was classified as NPA in the books of the bank. The bank served a notice under section 13(2) of the SARFAESI to Mahesh and to liquidate the

KCC loan account within 60 days from the date of notice, failing which the bank may take possession of the land.

Mahesh's friend Arvind is an Advocate. When Mahesh discussed with Arvind about the notice of SARFAESI, his lawyer friend said that the notice issued by the bank is tenable in the eyes of law.

The builder after getting the booking amount from all the allottees started constructing the site on full swing. The builder observed that some structural changes are required to be made which differ from the sanctioned plan / outlay. So called a meeting of the allottees and described the need of such changes. Some of the allottees objected and threatened to approach the RERA authority. However, the builder tried to convince them and majority of the allottees agreed with the builder. Those who did not agree with the proposal of the builder, were offered the refund. These vacant flats were again booked by the present allottees who attended the meeting since the location was having the prime advantages in near future.

The construction work was on its full swing and the builder was committed to complete the work as per the agreement. The builder asked the allottees to have a look of their flats to ensure that everything is complete as per the agreement and obtain a completion certificate from the Jaipur Development Authority (JDA), then only he will provide the possession of the flats. Mahesh together with Arvind argued with the builder that obtaining of the completion certificate from the competent authority is not the allottees duty and complete this formality at your end and provide the possession of the flat.

At last, Mahesh got the possession of the flat and shifted in it along with Yukti.

### **I. Multiple Choice Questions**

1. The promoter at the time of booking and issue of allotment letter is NOT responsible to make available to the allottee:
  - (a) Sanction plans as approved by the competent authority
  - (b) Stage wise time schedule of completion of the project
  - (c) Provisions for civil infrastructure like water, sanitation and electricity
  - (d) List of allottees who have booked the flats showing their names, addresses, cast/ religion
2. Where the borrower is aggrieved by the measures taken by the secured creditor under the SARFAESI, the borrower may make an application ----- from the date on which such measure had been taken:
  - (a) Within 30 days

- (b) Within 45 days
  - (c) Within 60 days
  - (d) Within 75 days
3. Who shall be responsible to obtain the completion certificate:
- (a) The Real Estate Agent
  - (b) The Banker who provided loan to the allottee
  - (c) The promoter
  - (d) The allottee himself
4. The provisions of the SARFAESI shall be applicable on which of the following:
- (a) Security interest created on Agricultural Land
  - (b) Outstanding amount is less than 20% of the principal amount and interest thereon
  - (c) Where the loan account is irregular but not classified as NPA in the books of the lender
  - (d) Security interest for securing repayment of any financial asset not exceeding one lakh rupees
5. After completion of the real project and handing over the possession to the allottees, who shall form an association:
- (a) The Allottees
  - (b) The Promoter
  - (c) The Registrar of Co-operative Society
  - (d) The Real Estate Agent

## **II. Descriptive Questions**

6. In the given case the Mahesh is not happy with the way his banker has exercised its right of enforcement of the security interest. What recourse is available to Mahesh?
7. The RERA casts some obligations on the promoter to observe adherence to the sanctioned plans and project specifications by the promoter. Elucidate the statement.

**ANSWERS TO CASE STUDY 54****I. Answers to Multiple Choice Questions**

1. (d) List of allottees who have booked the flats showing their names, addresses, cast/ religion

**Reason:**

Section 11(3) of the RERA provides that the promoter, at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:-

- (a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;
- (b) the stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.

2. (b) Within 45 days

**Reason:**

Section 17 of the SARFAESI states that any person (including borrower), aggrieved by any of the measures referred to in section 13(4) taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter **within forty-five days** from the date on which such measure had been taken.

3. (c) The promoter

**Reason:**

Section 11(4)(b) of the RERA provides that **the promoter shall be responsible to obtain the completion certificate or the occupancy certificate**, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be.

4. (c) Where the loan account is irregular but not classified as NPA in the books of the lender

**Reason:**

**Section 13(2)** of the SARFAESI provides that where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of **such debt is classified by the secured creditor as non-performing asset**, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

**Further, Section 31(h), (i) and (j)** of the SARFAESI provides that the provisions of the SARFAESI Act shall not apply to –

- (h) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;
- (i) any security interest created in agricultural land;
- (j) any case in which the amount due is less than twenty per cent. of the principal amount and interest thereon.

5. (b) The Promoter

**Reason:**

Section 11(4) (e) of the RERA provides that the **promoter shall enable the formation of an association** or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable.

**II. Answers to Descriptive Questions**

6. Section 17 of the SARFAESI deals with the measures against measures to recover secured debts. It provides that-

Sub-section (1) state that any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter **within forty-five days** from the date on which such measure had been taken:

The Explanation attached to this sub-section provides that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including

borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

Sub-section (1A) provides that an application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction the cause of action, wholly or in part, arises; where the secured asset is located; or (c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

Sub-section (2) states that the Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

Sub-section (3) states that if , the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

- (a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and
- (b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and
- (c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

Sub-section (4) states that if, the DRT declares the recourse taken by a secured creditor under section 13(4), is in accordance with the provisions of this Act then, the secured creditor shall be entitled to take recourse to one or more of the measures specified under section 13(4) to recover his secured debt.

Sub-section (5) provides that any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application. The DRT may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, **shall not**

**exceed four months** from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the DRT within the period of four months, any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the DRT for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the DRT.

(7) Save as otherwise provided in this Act, the DRT shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.

7. Section 14 of the RERA deals with the adherence to sanctioned plans and project specifications by the promoter.

(1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

(2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—

(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

*Explanation.*—For the purpose of this clause, “minor additions or alterations” excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to

the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

- (ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

*Explanation.* —For the purpose of this clause, the allottee, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

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