PAPER – 4 : CORPORATE AND ALLIED LAWS

Question No.1. is compulsory.

*Answer any **five** questions from the remaining **six** questions*

Question 1

(a) *The Board of Directors of Vishwakarma Electronics Limited consists of Mr. Ghanshyam, Mr. Hyder (Directors) and Mr. Indersen (Managing Director). The company has also employed a full time Secretary.*

The Profit and Loss Account and Balance Sheet of the company were signed by Mr. Ghanshyam and Mr. Hyder. Examine whether the authentication of financial statements of the company was in accordance with the provisions of the Companies Act, 1956?

(5 Marks)

(b) *A complaint was received by the Central Government from some shareholders of a public company that a person had been appointed as the Managing Director of the company without seeking the approval of the Central Government when such approval was required. State as to what action can be taken by the Central Government under the Companies Act, 1956. Also examine the validity of the acts of the Managing Director, if the complaint is found true.* *(5 Marks)*

(c) *The Securities and Exchange Board of India, for the purpose of corporatization and demutualization of a recognized stock exchange issued an order that at least fifty one percent of its equity share capital shall be held, within twelve months, by the public other than share holders having trading rights. Decide whether the said order of the Securities and Exchange Board of India is valid under the provisions of the Securities Contracts (Regulation) Act, 1956 including the time limit of twelve months as stated in the order.*

(5 Marks)

(d) *M/s. USA Industries Limited has constituted "Investor Education and Protection Fund" as required under the Companies Act, 1956 but so far no amounts have been deposited into the said account. Explain with reference to the above said enactment, the amounts payable to the credit of the said account and the period within which the amounts shall be paid.* *(5 Marks)*

Answer

(a) Authentication of Balance Sheet and Profit and Loss A/c (Section 215 of the Companies Act, 1956): The provisions relating to authentication of balance-sheet and profit and loss account are contained in Section 215 of the Companies Act, 1956. Pursuant to the said provisions, except in the case of a banking company, the Balance Sheet and Profit and Loss Account of a company must be signed on behalf of the Board of directors by two directors and the Manager or Secretary, if any. If the company has a Managing Director, he should be one of the signing directors.

In the instant case, the Balance Sheet and Profit and Loss Account have been signed by Mr. Ghanshyam and Mr. Hyder, the directors. In view of Section 215 of the Companies Act, 1956, Mr. Indersen, the Managing Director should be one of the two signing directors. Since the company has also employed a full time Secretary, he should also sign the Balance Sheet and Profit and Loss Account and in addition to the Managing Director, Mr. Indersen, one of the directors, either Mr. Ghanshyam or Mr. Hyder should sign it.

Thus, authentication of financial statement of the company is not in accordance with the provisions of the Companies Act, 1956.

(b) Improper appointment of Managing Director (Section 269 of the Companies Act, 1956): If the appointment or re-appointment is not approved by the Central Government the appointee shall vacate such office immediately on communication of the decision by the Central Government, otherwise he shall be punishable with fine up to Rs. 5,000/- for every day during which he fails to vacate such office [Section 269(6)].

On receipt of the complaint, if the Central Government is prima facie, of the opinion that the Managing Director has been appointed without approval of the Central Government, when in fact such approval was necessary, the Central Government may refer the matter to the Company Law Board for decision [Section 269(7)]. The Company Law Board will issue show-cause notice to the Company as well as the concerned Managing Director [Section 269(8)]. The Company Law Board will hear the case, and if it comes to a conclusion that the appointment is in contravention of requirements of Schedule XIII, it will make an order to that effect [Section 269(9)]. On such order, the appointment of the concerned Managing Director shall be deemed to have come to an end. The person so appointed shall in addition to being liable to pay a fine of Rs 1 lakh, refund to the company the entire remuneration received by him between the date of his appointment and the passing of such an order [Section 269(10)]. But all acts done by him prior to the declaration of invalidity will be valid, if they are otherwise valid [Section 269(12)].

(c) Corporatisation and demutualisation (Section 4B of the Securities Contracts (Regulation) Act, 1956) : According to sub section (8) of Section 4B of the Securities Contracts (Regulation) Act, 1956, every recognised stock exchange, in respect of which the scheme for corporatisation or demutualisation has been approved shall, either by fresh issue of equity shares to the public or in any other manner as may be specified by the regulations made by the Securities and Exchange Board of India, ensure that at least fifty-one per cent of its equity share capital is held, within twelve months from the date of publication of the order under sub-section (7) of the said section by the public other than shareholders having trading rights. However the Securities and Exchange Board of India may, on sufficient cause being shown to it and in the public interest, extend the said period by another twelve months.

(d) Investor Education & Protection Fund (Section 205C of the Companies Act, 1956): Any money transferred to the unpaid dividend account of a company in pursuance of

section 205A of the Companies Act, 1956, which remains unpaid or unclaimed for a period of seven years from the date of such transfer shall be transferred by the company to the Investor Education and Protection Fund established under sub-section (1) of section 205C.

According to Section 205C of the said Act, the following amounts shall be credited to the Fund:

(a) amounts in the unpaid dividend accounts of companies;

(b) the application moneys received by companies for allotment of any securities and due for refund;

(c) matured deposits with companies;

(d) matured debentures with companies;

(e) the interest accrued on the amounts referred to in (a) to (d) as above;

(f) grants and donations given to the Fund by the Central Government, State Governments, companies or any other institutions for the purposes of the Fund; and

(g) the interest or other income received out of the investments made from the Fund.

No such amounts referred to in clauses (a) to (d) shall form part of the Fund unless such amounts have remained unclaimed and unpaid for a period of seven years from the date they became due for payment.

Question 2

(a) A group of creditors of a company lodged a complaint with the Registrar of Companies alleging that the Directors of the company are engaged in falsification and destruction of account books and records of the company and urged the Registrar to seize the account books and records of the company. Discuss whether the Registrar can exercise such powers under the provisions of the Companies Act, 1956. *(8 Marks)*

(b) A public limited company created a mortgage over its property in respect of a loan given by the brother of one of the Directors of the company. This fact was known to all the Directors of the company but the interested Director neither disclosed his interest nor abstained from voting when the loan transaction was approved at the Board Meeting. Decide the validity of the said transaction under the provisions of the Companies Act, 1956. *(8 Marks)*

Answer

(a) Seizure of documents by Registrar (Sections 234 and 234A of the Companies Act, 1956): The powers of the Registrar of Companies in respect of seizure of books and records of any company are governed by section 234A of the Companies Act, 1956. Sub-section (1) of the said section provides that if, pursuant to the information in his possession or otherwise, the Registrar has reasonable ground to believe that books and

papers of a company may be destroyed, mutilated, altered, falsified or secreted, the Registrar may make an application to the Magistrate of First Class or the Presidency Magistrate, as the case may be, having jurisdiction for an order for the seizure of such books and records.

According to Section 234(2), the Magistrate, after considering the application and hearing the Registrar, may authorize the Registrar to do the following:

(i) To enter the place or places where such books and papers are kept.

(ii) To search the place or places in the manner as provides in the Magistrate's order.

(iii) To seize the books and papers as he considers necessary.

Section 234(3) authorises the Registrar to keep the seized books and papers for a period of thirty days, after which the same have to be returned to the person from whom the seizure was made. But the Registrar is empowered, before returning the said books and papers, to take copies of or extracts from them or place identification marks on them or deal with them in the manner he considers necessary.

Section 234(4) states that the Registrar, while conducting search and seizure, has to follow the provisions relating to search and seizure as prescribed in the Code of Criminal Procedure, 1898.

In view of the above provisions of section 234A of the Companies Act, 1956, the Registrar of Companies is empowered to seize the books and papers of the company against whom the complaint has been made by following the procedure laid down in the section.

(b) Interested Director (Sections 299 and 300 of the Companies Act, 1956): Section 299 of the Companies Act, 1956 requires the disclosure of interest by a director while section 300 prohibits an interested director to participate or vote in respect of that particular transaction at the Board meeting. Further his presence will not be counted for quorum also. But where a whole body of directors is aware of the facts relating to an interest of a director, a formal disclosure is not necessary. *(Ramakrishna Rao vs. Bangalore Race Club).*

The mere voting by an interested director will not render the contract void or voidable unless with the absence of that vote, there would have been no quorum. The mere fact that voting under such situation is an offence punishable with fine under section 299(4) and 300(4) of the Act does not *ipso facto* render the contract void or voidable. In this case, there is no allegation of earning secret profits. Thus the action against the company will fail as the contract of mortgage is fair and in the interest of the company.

Under section 299 and 300 of the Act, there is no ban on contract in which a director is interested. The only requirement is that the interest should be disclosed, bonafide and fair. *(P. Leslie & co. vs. Vo Wapshare)*

Even where the interest is not disclosed the transaction is only voidable against the interested director, and not void. *(Narayan Das Shreeram Somani vs Sangli Bank).*

Question 3

(a) *Mr. White is working as Chief Accountant in Ms. White Metal Limited. The Board of Directors of the said company propose to charge him with the duty of ensuring compliance with the provisions of the Companies Act, 1956 so that books of account can be properly maintained and Balance Sheet and Profit and Loss Account can be prepared as per the provisions of law.*

Draft a "Board Resolution" for the said purpose. Also point out the consequences in case of default; when such a resolution is passed. *(8 Marks)*

(b) *What do you understand by "book-building"? State the conditions whereunder an issuer may offer specified securities at different prices.* *(8 Marks)*

Answer

(a) Board Resolution for charging Mr. White, Chief Accountant, with the duty of Compliance with the requirements of Sections 209 & 211 of the Companies Act, 1956:

"*Resolved* that pursuant to section 209(7) and 211(8) of the Companies Act, 1956, Mr. White, Chief Accountant of the company be and is hereby charged with the duty of seeing that the requirements of Sections 209 and 211 of the Companies Act, 1956 are duly and fully complied with.

Resolved further that the said Mr. White is hereby entrusted with the authority to do such Acts or deeds as may be necessary or expedient for the purpose of compliance with the requirements of the said Sections 209 and 211."

Consequences in case of default: According to Section 209(6)(b), all officers and other employees of the company are responsible to ensure that the company duly complies with the provisions of Section 209. Accordingly if Mr. White, Chief Accountant, (being an officer/employee in the instant case) makes a default with the duty of ensuring compliance with the requirements of Sections 209 and 211 of the Companies Act, 1956, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both.

However, in any penal proceedings, it shall be a defense to prove that a competent and reliable person was charged with the duty of seeing that these requirements are complied with and that he was in a position to discharge that duty [proviso to Section 209(5)].

(b) Book Building: Book Building means a 'process undertaken to elicit demand and to assess the price for determination of the quantum or value of specified securities or Indian Depository Receipts, as the case may be in accordance with SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009' (Regulation2(f)).

Differential pricing

According to Regulation 29 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, an issuer may offer specified securities at different prices, subject to the following:

(a) retail individual investors or retail individual shareholders or employees entitled for reservation made under regulation 42 making an application for specified securities of value not more than two lakhs rupees (one lac earlier), may be offered specified securities at a price lower than the price at which net offer is made to other categories of applicants:

Provided that such difference shall not be more than ten per cent of the price at which specified securities are offered to other categories of applicants;

(b) in case of a book built issue, the price of the specified securities offered to an anchor investor shall not be lower than the price offered to other applicants;

(c) in case of a composite issue, the price of the specified securities offered in the public issue may be different from the price offered in rights issue and justification for such price difference shall be given in the offer document.

(d) In case the issuer opts for the alternate method of book building in terms of Part D of Schedule XI, the issuer may offer specified securities to its employees at a price lower than the floor price:

Provided that the difference between the floor price and the price at which specified securities are offered to employees shall not be more than ten per cent of the floor price.

Question 4

(a) On 24th January 2010, the Board of Directors of Ms. Black Limited appointed Mr. Z as the company's Sole Selling Agent for a period of 5 years. At the first general meeting of the company, held after the Board Meeting, on 29th September 2010, the above appointment was disapproved. Referring to the provisions of the Companies Act, 1956:

(i) State the date from which the above appointment comes to an end.

(ii) What would be your answer in case a clause in the above appointment that "the appointment must be made by the company in General Meeting" was not inserted as a condition? (8 Marks)

(b) Various complaints have been made against the activities of a Co-operative Banking Company to the effect that if unchecked, the shareholders, depositors and others will suffer heavily and the complainants requested for the appointment of directors by Reserve Bank of India. Discuss whether the Reserve bank has any powers to inspect the records of the Co-operative Bank to ascertain the truth or otherwise in the complaints

and to appoint directors in the Co-operative Bank under the Banking Regulation Act, 1949. *(8 Marks)*

Answer

(a) Appointment of Sole Selling Agent (Section 294 of the Companies Act, 1956): According to Section 294(2) of the Companies Act, 1956, the Board of Directors of M/s Black Limited shall not appoint a sole selling agent for any area except subject to the condition that the appointment shall cease to be valid if it is not approved by the company in the first general meeting held after the date on which the appointment is made. It has been held that the appointment of a sole selling agent must be made by the company in its general meeting and such clause must be inserted as a mandatory condition in all appointments of sole selling agents; an appointment without such a clause being inserted is void ab-intio *(Arante manufacturing Corp. Vs. Bright Bills Private Ltd. 1967 Com/Case 769, Shelagram Jhaigharia Vs National Co. Ltd. 1965 Com. Cas. 706).* If the company in the general meeting disapproves the appointment, it shall become invalid from the date of the general meeting.

(i) Thus, appointment of Mr. Z as the sole selling agent will come to an end on 29th September, 2010.

(ii) As discussed above, in absence of the above clause, the appointment of Mr. Z as the sole selling agent of the company will be void ab-initio.

(b) Power of Reserve Bank of India to inspect banks (Section 35 of the Banking Regulation Act, 1949): RBI is empowered to conduct inspection of any bank and to give them direction as it deems fit. All banks are bound to comply with such directions. Every directors or other officer of the bank shall produce all such books, documents as required by the inspector. The inspector may examine on oath any director or other officers.

RBI shall supply the bank a copy of such report of the inspection. RBI submits report to Central Government and the latter, on scrutiny, if is of the opinion that the affairs of the bank are being conducted detrimental to the interest of its depositors, it may, after giving an opportunity of being heard, to the bank, may order in writing prohibiting the bank from receiving fresh deposits, direct the RBI to apply section 38 for winding up of the bank.

Power of RBI to appoint Directors (Section 36AB of the Banking Regulation Act, 1949): RBI is empowered to appoint additional Directors for the banking company with effect from the date to be specified in the order, in the interest of the bank or that of depositors. Such additional directors shall hold office for a period not exceeding three years or such further periods not exceeding three years at a time.

Question 5

(a) M/s. Zebra Private Limited was incorporated in the year 2010 under the Companies Act, 1956 by 3 brothers, namely A, B and C. All the three were Promoter-directors named in

the Articles of Association and subscribed for 100 shares each in the company through Memorandum of Association. Thereafter, from time to time, further shares were allotted in proportion of one-third to each of them and in due course the company started earning substantial profits. Due to greed of money, the two brothers, namely A and B joined hands together and assumed complete control of the company leaving their brother C in lurch. Both the brothers got further shares allotted to themselves, thereby their joint shareholding increased from 66% to 90%, while the shareholding of C got reduced from the erstwhile 33% to 10%. No notice of any Board Meeting was sent to C, who was sidelined and was also removed as a Director.

Aggrieved by the decisions taken by his two brothers at his back, C seeks your advice for taking out appropriate proceedings before the Court or Judicial authority of competent jurisdiction. Also suggest the nature of reliefs he may claim while filing his case.(8 Marks)

(b) An Inter-state co-operative society was incorporated on 1st May 2011 as a Producer company under the provisions of the Companies Act, 1956. Advise the company in respect of the following proposals:

(i) The company decides to have 18 Directors on its Board after incorporation.

(ii) Transferability of shares and

(iii) Share capital and voting rights. (8 Marks)

Answer

(a) Powers of the Company Law Board (Sections 397 and 399 of the Companies Act, 1956)

Under Section 397 of the Companies Act, 1956, on an application by any member of a company, if the Company Law Board (CLB) is of the opinion that –

(i) the company's affairs are being conducted in a manner which is prejudicial to public interest or in a manner oppressive to any member(s); and

(ii) to wind up the company would unfairly prejudice such member(s), but that otherwise the facts justify winding up of the company on just and equitable ground.

The CLB may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

As per section 399, a member holding 10% shares is entitled to file such a petition.

In the present case, C was holding 33% shares in the company which is nothing but a quasi partnership and was participating in the management. By further allotment of shares in a clandestine manner and without the consent of C, his shareholding was reduced to 10% while the shareholding of his brothers stood at 90%. This is a serious act of oppression of C, a minority shareholder. On similar facts, it was held by Supreme Court in *Dale & Carrington Invt. Private Ltd. Vs. P.K. Prathpan, (2004) 122 Comp cases 175(SC)* that assuming meetings of board of directors did take place, the manner in

which the shares were issued in favour of R without informing other shareholders about it and without offering them to any other shareholder, was totally mala fide and the sole object of R in this was to gain control of the company by becoming a majority shareholder. This was clearly an act of oppression on the part of R. The only relief that has to be granted in the present case was to undo the advantage gained by R through his manipulation and fraud. The allotment of all the additional shares in favour of R had to be set aside.

Section 397 protects the rights of shareholders and not as a director. It has, however, been held by CLB in a number of cases that in a family company like the present one, removal of the promoter–director is also an act of oppression.

In the facts and circumstances of this case, C is advised to file a petition under Section 397 of the Act. Being a 10% shareholder he is entitled to file the petition before the Principal Bench of CLB at New Delhi. He may seek the following reliefs:

(i) the alleged allotment of further shares be declared null and void and set aside;

(ii) the alleged removal of the petitioner, C be declared as null and void and set aside;

(iii) The Board of Directors be re-constituted with the petitioner and his two brothers and an independent person, as the Chairman of the board of directors to be appointed by the CLB with casting vote;

(iv) the petitioner may be appointed as Managing director of the company having substantial powers of management.

(b) (i) Appointment of 18 directors: According to Section 581O of the Companies Act, 1956, every producer company shall have at least 5 directors and not more than 15 directors. The proviso to the Section states that in the case of the Inter-State Co-operative Society incorporated as a producer company, such company may have more than 15 directors for a period of one year from the date of its incorporation as a producer company.

Thus, in the instant case, an Inter-State Co-operative Society which was incorporated on 1st May, 2011 as a producer company can appoint 18 directors on its Board for a period of one year after incorporation.

(ii) Transferability of shares (Section 581ZD): According to the said provisions,

(1) The shares of a member of a producer company shall not be transferable except as otherwise provided in sub-sections (2) to (4),

(2) A member of a producer company may, after obtaining the previous approval of the Board, transfer the whole or part of his shares along with any special rights, to an active member at par value.

(3) Every member within three months of his becoming a member, of Producer Company, nominate, as specified in articles, a person to whom his shares in the producer company shall vest in the event of his death.

(4) The nominee shall, on the death of the member, become entitled to all the rights in the shares of the producer company and the Board of that Company shall transfer the shares of the deceased member to his nominee:

Provided that in a case where such nominee is not a producer, the Board shall direct the surrender of shares together with special rights, if any, to the producer company at par value or such other value as may be determined by the Board.

(5) Where the Board of a producer company is satisfied that—

(a) any member has ceased to be a primary producer; or

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

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

(iii) Share capital and voting rights: The share capital of a producer company shall consist of equity shares only. The shares held by a member in a producer company, shall as far as may be, be in proportion to the patronage of that company. (Section 581ZB)

The articles of any producer company may provide for the conditions, subject to which a member may continue to retain his member, and the manner in which voting rights shall be exercised by the members. (Section 581D)

These voting's rights are:

(a) In a case where the member consists solely of individual member, the voting rights shall be based on a single vote for every member, irrespective of his shareholding or patronage of the producer company.

(b) In a case where the member consists of producer institutions only, the voting rights of such Producer institutions shall be determined on the basis of their participation in the business of the producer company in the previous year, as may be specified by articles.

Provided that during the first year of registration of a producer company, the voting rights shall be determined on the basis of the shareholding by such Producer institutions.

(c) In a case where the member consists of individuals and producer institutions, the voting rights shall be computed on the basis of a single vote for every member. However, a producer company may, if so authorised by its articles, restrict the voting rights to active member, in any special or general meeting.

Subject to Sections 581D, (1) & (3), every member shall have one vote and in the case of equality of votes, the Chairman or the person presiding shall have a casting vote except in the case of election of the Chairman.

Question 6

(a) State in the light of the provisions of the Companies Act, 1956, as to how the, auditor will be appointed in the following cases:

(i) A company in which a nationalized bank is holding 30% of the subscribed capital.

(ii) A Government company, within the meaning of section 617 of the Companies Act, 1956.

(iii) A company in which office of auditor has become vacant on account of resignation by the auditor. *(8 Marks)*

(b) M/s. Neemuch Pharma Limited is a company listed with Malhargarh Stock Exchange. Some small shareholders of the said company want to appoint Mr. Avadhesh as a Director as their representative on the Board of Directors of the said company. Mr. Avadhesh is holding 1000 equity shares of 10 each in the said company. State the provisions of the Companies Act, 1956 in relation to the proposal to appoint Mr. Avdhesh as a Small Shareholders' Director. *(8 Marks)*

Answer

(a) Appointment of Auditor (Section 224A, 619 and 224 of the Companies Act, 1956)

(i) The case of appointment of auditor of a company whose 25% or more of the subscribed capital is held by Government, financial institutions, nationalised banks, General insurance companies is governed by the provisions of section 224A of the Companies Act, 1956. According to the provisions of the said section, in the instant case of a company in which a nationalized bank is holding 30% of the subscribed capital the appointment or re-appointed of an auditor or auditors at each annual general meeting shall be made by a Special Resolution.

If the above mentioned company omits or fails to pass at annual general meeting any special resolution appointing an auditor or auditors, it shall be deemed that no auditor or auditors had been appointed by the company at its annual general meeting, the Central Government may appoint a person to fill the vacancy.

(ii) The appointment and re-appointment of auditor in the case of a Government Company is governed by the provisions of section 619 of the Companies Act, 1956. The said section states that the auditor of a Government Company shall be

appointed or re-appointed by the Comptroller and Auditor General of India. Accordingly, the auditor of a Government Company shall be appointed by the Comptroller and Auditor General of India.

(iii) The situation as stated in the question is covered by the provisions of section 224(6) of the Companies Act, 1956. Clause (a) of the said section states that the Board of Directors may fill any casual vacancy in the office of an auditor, but proviso thereto states that where such vacancy is caused by the resignation of an auditor, the vacancy shall only be filled by the company in general meeting. Hence, in the case of resignation by the auditor, the company is required to convene and hold a general meeting and appoint the auditor thereat.

(b) Manner of election of small shareholders' director:

(1) A company may act *suo moto* to elect a small shareholders' director from amongst small shareholders or upon the notice of small shareholders, who are not less than 1/10th of total small shareholders and have proposed name of person who shall also be a small shareholder of the company.

(2) Small shareholders intending to propose a person shall leave a notice of their intention with the company at least 14 days before the meeting under the signature of at least 100 small shareholders specifying name, address, shares held and folio number and particulars of share with differential rights as to dividend and voting, if any, of the person whose name is being proposed for the post of director and of other small shareholders proposing such person as a candidate for the post of director or small shareholders.

(3) A person whose name has been proposed for the post of small shareholders' director shall sign, and file with the company, his consent in writing to act as a director.

(4) The listed public company shall elect small shareholders nominee subject to sub-rules (1), (2) and (3) above through the postal ballot.

(5) The unlisted company may appoint such small shareholders' nominee subject to above conditions if majority of small shareholders recommend his candidates for the post of director in their meeting.

(6) Tenure of such small shareholders' director shall be for a maximum period of 3 years subject to meeting the requirement of provisions of Companies Act except that he need not have to retire by rotation.

(7) On expiry of his tenure, the same person if so desired by small shareholders may be elected for another period of 3 years.

(8) Such director shall be treated as director for all other purposes except for appointment as whole time director or managing director.

Question 7

Attempt any four:

(a) *The Central Government on the recommendation of selection committee appoints Mr. Ramesh aged 56 years as Member of the Competition Commission of India to be effective from 1st January, 2010. State with the reference to the provisions of Competition Act, 2002 the term for which he will be appointed and whether he can be reappointed as such and also if he resigns after two years whether the vacancy can be filled up by the Chairman of the Commission.* *(4 Marks)*

(b) *Explain the importance of "Preamble" and "Proviso" being internal aids to interpretation.* *(4 Marks)*

(c) *A person aggrieved by an order made by the Special Director (Appeals) desires to file an appeal against the said order to the Appellate Tribunal but the period of limitation of 45 days as prescribed in Section 19(2) of the Foreign Exchange Management Act, 1999 has expired. Advise.* *(4 Marks)*

(d) *The Banking Companies, Financial Institutions and Intermediaries of securities market are under some obligations under the Prevention of Money Laundering Act, 2002. State, in brief, these obligations.* *(4 Marks)*

(e) *Explain briefly the procedure relating to enforcement of security interest under SARFAESI Act, 2002.* *(4 Marks)*

Answer

(a) Term of office of chairperson and other members as contained in Section 10 of the Competition Act, 2002: As per this section 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. They shall not hold office as such after attaining the age of sixty-five years. [Section 10(1)]

A vacancy caused by the resignation or removal of the chairperson or any other member by death or otherwise shall be filled by fresh appointment in accordance with the provisions of Sections 8 and 9 of the Act. [Section 10(2)]

Keeping the above provision in mind Mr. Ramesh can be appointed as member of the commission for a term of 5 years as he is aged 56 years on 1st January, 2010. He can also be reappointed but his reappointment will be only up to the age of 65 years. If Mr. Ramesh resigns as member after working for two years the resulting vacancy can be filled up by fresh appointment approved by the Selection Committee and the Chairman has no power to fill up the vacancy on his own.

(b) Preamble: The Preamble expresses the scope, object and purpose of the Act more comprehensively than the Long Title. The Preamble may recite the ground and the cause making a statute and the evil which is sought to be remedied by it.

Like the Long Tile, the Preamble of a Statute is a part of the enactment and can legitimately be used for construing it. However, the Preamble does not over-ride the plain provision of the Act but if the wording of the statute gives rise to doubts as to its proper construction, e.g., where the words or phrase has more than one meaning and a doubt arises as to which of the two meanings is intended in the Act, the Preamble can and ought to be referred to in order to arrive at the proper construction.

In short, the Preamble to an Act discloses the primary intention of the legislature but can only be brought in as an aid to construction if the language of the statute is not clear. However, it cannot override the provisions of the enactment.

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

It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. *(Ram Narain Sons Ltd. vs. Assistant Commissioner of Sales Tax, AIR 1955 SC 765)*.

(c) Appeal to Appellate Tribunal (Section 19 of the Foreign Exchange Management Act, 1999): Any person aggrieved by an order made by the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal under Section 19 (1) of the Foreign Exchange Management Act, 1999. Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Special Director (Appeals) is received by the aggrieved person shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed.

Provided that the Appellate Tribunal may 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.

Thus, in the instant case, appeal may be entertained by the Tribunal after the expiry of forty five days on the ground of sufficient cause.

(d) Obligation of Banking Companies, Financial Institutions and Intermediaries of securities market (Section 12 of Prevention of Money Laundering Act, 2002):

Every banking company, financial institution and intermediary shall –

(a) maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions integrally connected to each other, and where such series of transactions take place within a month. Such records shall be maintained for a

period of ten years from the date of cessation of the transactions between the clients and the banking company or financial institution or intermediary, as the case may be.

(b) furnish information of the above transactions to the Director within the prescribed time.

(c) verify and maintain the records of the identity of all its clients, in the prescribed manner.

If the principal officer of a banking company or financial institution or intermediary, has reason to believe that a single transaction or series of transactions integrally connected to each other have been valued below the prescribed value so as to defeat the provisions of this section, such officer shall furnish information in respect of such transactions to the Director within the prescribed time.

(e) Procedure relating to enforcement of security interest (Section 13 of SARFAESI Act, 2002): 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.

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 installment thereof, and his account in respect of such debt is classified by the secured creditor as on-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) of Section 13. This notice 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. The procedure for the service of the notice is prescribed in the Security Interests (Enforcement) Rules.

Sub-section (4) of Section 13 provides that if the borrower fails to discharge his liability in full within the above specified period, the secured creditor may take recourse to one or more of the following measures to recover his secured debt:-

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

(b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.