

PAPER – 4 : CORPORATE AND ALLIED LAWS

Updates on Corporate Laws

Students may note that the subject of corporate laws is subject to amendments from time to time and we are sure that the students are keeping abreast of these developments by reading journals, magazines, newsletter etc. From the point of view of the updating their knowledge in the subject and for preparation of the forthcoming examinations, we are giving below the gist of such of those developments in the related statutes.

I. New Heights and Highlights of Competition Law

The Competition Act was enacted in 2002 keeping in view the economic development that resulted in opening up of the Indian economy, removal of controls and consequent economic liberalization which required that the Indian economy be enabled to allow competition in the market from within the country and outside. The Competition Act, 2002 provided for the establishment of a Competition Commission, to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matter connected therewith or incidental thereto.

The Competition Commission of India was established on the 14th October, 2003 but could not be made functional due to filing of a writ petition before the Hon'ble Supreme Court. While disposing of the writ petition on the 20th January, 2005, the Hon'ble Supreme held that if an expert body is to be created by the Union government, it might be appropriate for the Government to consider the creation of two separate bodies, one with expertise for advisory and regulatory functions and the other for adjudicatory functions based on the doctrine of separation of powers recognized by the Constitution. Keeping in view the judgment of the Hon'ble Supreme Court, the Competition (Amendment) Bill, 2006 was introduced in Lok Sabha on the 9th March, 2006 and the same was referred for examination and report to the Parliamentary Standing Committee. Taking into account the recommendations of the Committee, the Competition (Amendment) Bill, 2007 was introduced and it received the assent of the President of India on 24th September, 2007 as Act No. 39 of 2007.

The Competition (Amendment) Act, 2007, inter alia, provides for the following:-

The Commission shall be an expert body which would function as a market regulator for preventing and regulating anti-competitive practices in the country in accordance with the Act and it would also have advisory and advocacy functions in its role as a regulator;

for mandatory notice of merger or combination by a person or enterprise to the Commission within thirty days and to empower the Commission for imposing a penalty of up to one percent. Of the total turnover or the assets, whichever is higher, on a person or enterprise which fails to give notice of merger or combination to the Commission;

for establishment of the Competition Appellate Tribunal, which shall be a three member quasi judicial body headed by a person who is or has been a judge of the Supreme Court or the Chief Justice of a High Court to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission;

for adjudication by the Competition Appellate Tribunal of claims on compensation and passing of orders for the recovery of compensation from any enterprise for any loss or damage suffered as a result of any contravention of the provisions of the act;

for implementation of the orders of the Competition Appellate Tribunal as a decree of a civil court;

for filling of appeal against the orders of the Competition Appellate Tribunal to the Supreme Court;

for imposition of a penalty by the Commission for contravention of its orders and in certain cases of continued contravention of its orders and in certain cases of continued contravention a penalty which may extend to rupees twenty-five crores or imprisonment which may extended to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit, may be imposed.

The Act also aims at continuation of the Monopolies and Restrictive Trade practices Commission (MRTPC) till two years after constitution of Competition Commission, for trying pending cases under the Monopolies and Restrictive Trade Practices Act, 1969 after which it would stand dissolved. The Bill also provides that MRTPC would not entertain any new cases after the Competition Commission is duly constituted. Cases still remaining pending after this two years period would be transferred to Competition Appellate Tribunal or the National Commission under the Consumer Protection Act, 1986 depending on the nature of cases.

Student may note that in exercise of powers conferred by sub-section (2) of section 1 of the Competition (Amendment) Act, 2007 (39 of 2007), the Central Government hereby appoints 12th day of October, 2007 as the date on which section 1 of the said Act shall come into force.

Student may further note that in exercise of the powers conferred by the proviso to sub-section (2) of section 1 of the Competition (Amendment) Act, 2007 (39 of 2007), the Central Government hereby appoints 12th day of October, 2007 as the date on which the following sections of the said Act shall come into force, namely:-

Section 2;

Section 6;

Section 7;

Section 8;

Section 9;

Section 11;

Section 12;

Section 17;

Section 18;

Section 27;

Section 29;

Section 30;

Section 32;

Section 40;

Section 41;

Section 42;

Section 43; except sections 53B, 53C, 53D, 53E, 53F, 53G, 53H, 53I, 53J, 53K, 53L, 53M, 53N, 53O, 53P, 53Q, 53R, 53T, 53U;

Section 44;

Section 45;

Section 46;

Section 47;

Section 48; and

Section 49.

For the full text on the Competition (Amendment) Act, 2007, students may visit www.competition-commission-india.nic.in or the institutes' website or the Revised Study Material.

II. The Securities Contracts (Regulation) Amendment Act, 2007

The Securities Contracts (Regulation) Amendment Bill, 2005 was introduced in Lok Sabha on 16.12.2005 and referred to the Standing Committee on Finance on 23.12.2006 for examination and report. The rationale behind the amendment proposals of the Bill, are to enable secondary market liquidity for securitised debt instruments, as furnished by the Ministry are delineated as under:

Under the existing legal framework, Securitisation transactions cannot be listed and traded on stock exchanges as these transactions are not included in the definition of "securities" in the Securities Contracts (Regulation) Act, 1956.

At present, securitization transactions are being structured under Trust law and are transacted among a few financial institutions on private placement basis. Listing and trading on stock exchanges would allow wider participation of investors, both of retail and institutional investors.

In the absence of the facility of trading on stock exchanges, potential buyers of securitized instruments get discouraged by the possibility of having to hold the certificate or instrument in respect of securitisation transactions till maturity. This, in turn, restricts the growth of business of housing finance companies and banks.

The entire institutional, supervisory and regulatory architecture of securities law could be made applicable to securitization transactions also.

1. Investment by institutional investors seek would be possible only when these instruments are eligible instruments for investment which in turn requires an active secondary market and appropriate regular disclosure about the quality of assets including recovery mechanism in case of default. The institutional participation would help in further developing the securitized debt market.

2. What is Securitization?

Securitisation is a form of financing involving pooling of financial assets and the issuance of securities that are re-paid from the cash flows by the assets. This is generally accomplished by actual sale of the assets to a bankruptcy remote vehicle, that is, a special purpose vehicle, which finances the purchase through the issuance of bonds. These bonds are backed by future cash flow of the asset pool. The most common assets for securitisation are mortgages, credit cards, auto and consumer loans, student's loans, corporate debt, export receivables, off-shore remittances, etc.

3. What are the advantages of securitization?

Besides other advantages, securitisation

- (a) allows banks and financial institutions to keep these loans off their balance-sheet, thus reducing the need for additional capital;
- (b) provides the banks and financial institutions with alternative forms of funding risk transfer, a new investor base, potential capital relief and capital market development;
- (c) can reduce lending concentration, improve liquidity and improve access to alternate sources of funding for banks and financial institutions;
- (d) facilitates attainment of funding at lower cost as a result of isolating the assets from potential Bankruptcy risk of the originator;
- (e) facilitates better matching of assets and liabilities and the development of the long-term debt market;
- (f) provides diversified pools of uniform assets; and
- (g) has the advantage of converting non-liquid loans or assets which cannot, be easily sold to third party investors into liquid assets or marketable securities. Lower funding costs are also a result of movement of investments from less efficient debt markets So more efficient capital markets through the process of securitisation.

4. What is the legal framework for securitization in India?

In India, the securitisation market remains underdeveloped. Although two major legislative initiatives, namely, (a) the amendment to the National Housing Bank Act, 1987 (NHB Act) in the year 2000; and (b) the enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (SARFAESI Act), have been taken, the market has not picked up because of the absence of the facility of trading on stock exchanges, The potential buyers get discouraged by the possibility of having to hold the certificate or instrument in respect of Securitisation transactions till maturity. This, in turn,

restricts the growth of business of housing finance companies and banks. The Securitisation transactions under the NHB Act are not covered under the definition of "securities" under the SCR Act. As such, trading in certificates or instruments relating to such transactions cannot take place on stock exchanges and buyers of such securitised financial certificates or instruments are left with few exit options. Under the SARFAESI Act, while "security receipts" have been covered under the definition of "securities", the provisions of the said Act restrict sale and purchase only amongst qualified institutional buyers. Besides, the "security receipts" under the SARFAESI Act can be issued only by a Securitisation company or a reconstruction company registered with the Reserve Bank of India. This obviously limits the interest in such receipts and the market has not taken off at all. Keeping in view the potential of the securities market for the certificates or instruments under Securitisation transactions, international trends and consultations held with major institutional participants and market experts it was decided to amend the SCR Act, 1956. inter alia.—

- (i) include Securitisation certificate or instrument under the definition of "securities" and to insert for the said purpose, a new sub-clause (i.e.) in clause (h) of section 2 of the SCR Act, 1956;
 - (ii) to provide for obtaining approval from the Securities and Exchange Board of India for issue of the proposed certificate or instrument and procedure therefore and insert for the said purpose a new section 17A in the SCR Act, 1956; and
 - (iii) to provide for the manner in which contents of such certificate or instrument, being the securities" and acknowledging beneficial interest shall be disclosed.
5. The following Act of Parliament received the assent of the President on the 28th May, 2007 and the amendments are

Amendment of section 2.

In section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) (hereinafter referred to as the principal Act), in clause (h), after sub-clause (id), the following sub-clause shall be inserted, namely:-

"(i.e.) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case maybe;"

Insertion of new section 17A.

After section 17 of the principal Act, the following section shall be inserted, namely:-

"Public issue and listing of securities referred to in sub-clause (i.e.) of clause (h) of section 2.

17 A. (1) Without prejudice to the provisions contained in this Act or any other law for the time being in force, no securities of the nature referred to in sub-clause (i.e.) of clause (h) of section 2 shall be offered to the public or listed on any recognized stock exchange unless the issuer fulfils such eligibility criteria and complies with such other requirements as may be specified by regulations made by the Securities and Exchange Board of India.

(2) Every issuer referred to in sub-clause (i.e.) of clause (h) of section 2 intending to offer the certificates or instruments referred therein to the public shall make an application, before issuing the offer document to the public, to one or more recognized stock exchanges for permission for such certificates or instruments to be listed on the stock exchange or each such stock exchange.

(3) Where the permission applied for under sub-section (2) for listing has not been granted or refused by the recognized stock exchanges or any of them, the issuer shall forthwith repay all moneys, if any, received from applicants in pursuance of the offer document, and if any such money is not repaid within eight days after the issuer becomes liable to repay it, the issuer and every director or trustee thereof, as the case may be, who is in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at the rate of fifteen per cent. per annum.

Explanation.- In reckoning the eighth day after another day, any intervening day which is a public holiday under the Negotiable Instruments Act, 1881, (26 of 1881) shall be disregarded, and if the eighth day (as so reckoned) is itself such a public holiday, there shall for the said purposes be substituted the first day thereafter which is not a holiday.

(4) All the provisions of this Act relating to listing of securities of a public company on a recognised stock exchange shall, mutatis mutandis, apply to the listing of the securities of the nature referred to in sub-clause (ie) of clause (h) of section 2 by the issuer, being a special purpose distinct entity."

Amendment of section 23.

In section 23 of the principal Act, in sub-section (1), in clause (c), for the word and figures "section 17", the words, figures and letter "section 17 or section 17A" shall be substituted.

Amendment of section 31.

In section 31 of the principal Act, for sub-section (2), the following sub-section shall be substituted, namely:-

"(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

- (a) the manner, in which at least fifty-one per cent. of equity share capital of a recognised stock exchange is held within twelve months from the date of publication of the order under sub-section (7) of section 4B by the public other than the shareholders having trading rights under subsection (8) of that section;
- (b) the eligibility criteria and other requirements under section 17 A."

III. Amendments to SEBI (Disclosure and Investor Protection) Guidelines, 2000.

SEBI/CFD/DIL/DIP/30/2008/17/03, March 17, 2008

1. In exercise of the powers conferred under sub-section (1) of Section 11 of the Securities and Exchange Board of India Act, 1992, it has been decided to amend the SEBI (Disclosure and Investor Protection) Guidelines, 2000 as under:

CHAPTER II

ELIGIBILITY NORMS FOR COMPANIES ISSUING SECURITIES

In sub-clause (v) of clause 2.2.2B, after sub-clause (k), the following sub-clause shall be inserted, namely:-

“1. National Investment Fund set up by resolution F. No. 2/3/2005-DD-II dated November 23, 2005 of Government of India published in the Gazette of India.”

2. The amendments made vide this circular shall come into force with immediate effect.

3. This circular and the entire text of the SEBI (Disclosure and Investor Protection) Guidelines, 2000, including the amendments issued vide this circular, are available on SEBI website at www.sebi.gov.in under the categories “Legal Framework” and “Issues and Listing”.

QUESTIONS

1. The financial year of a holding company ends on 31st March, while that of its subsidiary ends on 30th June. The subsidiary company wants to extend the financial year from 30th June to 31st March, so that the financial year of both the companies would coincide. Is it possible?
2. Considering the provisions of the Companies Act, 1956, advise a foreign company on filing of World Accounts’ and the ‘Indian Business Accounts’ with the Registrar of Companies in India?
3. (i) What is the liability of an auditor for failure to point out in his report that dividend is paid out of sale of the company’s real estate?
 (ii) Can an auditor be disqualified for indebtedness in the following cases:
 - (a) Where he is recovering his fees on a progressive basis even though the job is not complete;
 - (b) Where the auditor’s firm has purchased goods from the auditee company and not paid for them for six months?
4. A company has 11 directors on the Board consisting of the following:
 Mr. Active, Mr. Archive as nominees from two Public Financial Institutions.
 Mr. First, Mr. Second, Mr. Third appointed at the 2nd AGM.
 Mr. Fourth, Mr. Fifth appointed at the 3rd AGM.
 Mr. Addition was appointed as additional director subsequent to 3rd AGM.

Mr. Casual was appointed as director in place of Mr. Soul who died and was earlier appointed during the 3rd AGM.

Mr. Excellent was appointed as Managing Director for 5 years w.e.f/. 2nd AGM.

Mr. One more was appointed as additional Director soon after Mr. Addition was appointed as Additional Director.

List out in order, who shall be vacating the office at the 4th AGM of the company.

5. The Board meeting of Governance Ltd. has the following schedules:

1 st Meeting	- 1 st January, 2005
2 nd Meeting	- 30 th June, 2005
3 rd Meeting	- 1 st July, 2005.
4 th Meeting	- 31 st December, 2005.

State whether the Board Meetings are as per order/compliance of the provisions of the Companies Act, 1956. What would be your views if the meeting to be held on 30th June, 2005 is adjourned due to lack of quorum?

6. A scheme of amalgamation of X Ltd and Y Ltd was worked out and agreed upon by the respective companies. Meanwhile, group of shareholders of the one of the amalgamating companies requisitioned a meeting to compel the company to withdraw, the scheme of amalgamation pending before the court for its sanction. Is the course of action by the shareholders tenable? What action would you contemplate to be taken by the Board in the situation?
7. Mr. Agent having 'substantial interest' in ABC Ltd is appointed as a Sole selling agent by the Board of Directors for a period of 5 years. The company's paid-up share capital is Rs.49 crores. The Board did not place the matter in the AGM and communicated to Mr. Agent about his appointment, who in turn accepted the offer.

Examining the provisions of the Companies Act, 1956,

- (a) Whether the appointment is in order?
 - (b) What course of action you would take as the Secretary of the company, in case Mr. Agent does not have substantial interest?
8. Advise the chairman of your company on the following:
- (i) A company has in its Articles of Association provided for appointment of not less than two-thirds of the total number of its directors according to the principle of proportional representation. Can the directors so appointed be removed by the company in general meeting?
 - (ii) X company wants to increase the fee payable to directors for attending committee meetings from Rs.2,000 to Rs.20,000.

- (iii) Some urgent items are left over in the agenda of Board meeting which concluded and decision cannot be deferred till its next meeting.
 - (iv) Company Y with a paid-up capital of Rs.50 lakhs entered into a contract with company Z in which a director of Y is holding equity shares of the nominal value of Rs.50,000. The director did not disclose his interest at the Board meeting under section 299 of the Companies Act, 1956. Is the director liable for his act?
 - (v) A is proposed to be appointed as a marketing executive on a monthly salary of Rs.60,000 in a company in which his father is a director.
9. An Audit Committee of a Public Limited Company constituted under section 292A of the Companies Act, 1956 submitted its report of its recommendation to the Board. The Board, however, did not accept the recommendations. In the light of the situation, analyse whether:
- (a) The Board is empowered not to accept the recommendations of the Audit Committee.
 - (b) If so, what alternative course of action, would be Board resort to?
 - (c) As a Chairman of the Audit Committee, how would you respond to the situation?
10. The Articles of Association of a private company incorporated appointed X as Managing Director for life on 1st June, 2000. The articles also empowered X to appoint successor. X appointed by will Y to succeed him after his death. Answer with reference to the relevant provision of the Companies Act, 1956 and decided Supreme Court judgement, whether Y can succeed X as Managing Director after the death of X?
11. Mr. X is serving in a company in the dual capacity of a director and an employee? Referring to the provisions of the Companies Act, 1956. State:
- (a) Whether there is any prohibition/restriction serving in the dual capacity?
 - (b) If so whether a director serving as an employee would amount to holding an office or place of profit?
 - (c) Whether the remuneration drawn by the director as an employee of the company would be governed by the provisions relating to managerial remuneration?
 - (d) What would be your answer if the said director is rendering services of a professional nature?
12. State whether the acts done by the Board meeting be invalid if it was found afterwards that there was some defect in the appointment of directors or any person acting as a director?
13. A director of a public company has taken a loan of Rs.10 lakhs from the company without the approval of the Central Government. He seeks your opinion on the following matters:
- (i) Is it possible to avoid prosecution by applying to the government for approval or by refunding the loan?

- (ii) Whether the offence is compoundable before or after Institution of prosecution and the authority who can compound the offence.
14. The Board of Directors of Encompass Ltd. has 15 directors and wants to prescribe the quorum for meetings of the Board by the Articles. Referring to relevant provisions of the Companies Act, 1956, advise as are following situation:
- Whether articles can prescribe the quorum limit.
 - How total strength of the Board is to be determined at a Board meeting ?
 - If out of 15 directors, 13 happen to be interested directors, what shall the quorum for the Board meeting?
 - If all the 15 directors were interested directors, how would you resolve the situation?
15. Delegate India Ltd. desires to authorize the managing director to enter into the following transactions:
- Invest Surplus funds in purchase of shares of other companies.
 - Give donations to charitable trusts, where directors act as trustees.
 - Give loan to firms in which directors are interested.
- Analyse the following:
16. Mr. A has been appointed as a director in a Public Limited Company? Referring to the provisions of the Companies Act, 1956 state:
- (a) Whether the director should possess any share qualification?
 - (b) If so what is the number of share(s), which he should acquire and at what value?
 - (c) Whether the articles of the company can insist on the director for compulsory acquiring of share qualification?
17. (a) Due to interinternal problems in the working of M/s Infiting Detergents Ltd., Mr. Satyam, the Executive Director and Mr. Shivam a Director have submitted their resignations and decided to disassociate themselves with the working of the company. Mr. Sundaram, the Managing Director decide to refuse their resignation. Examine whether the MD can compel Mr. Satyam and Mr. Shivam to continue as per provisions of the Companies Act.
- (b) X Ltd. is managed by Mr. Clever as the MD. Serious allegations have been made by some shareholders and creditors of the company that the MD has misused his position and cost enormous loss to the company. The said shareholders and creditors of the company make a complaint to the Central Government to intervene and provide relief to them. Their main prayer is that the MD should be removed from the post. Explain the powers of the Central Government in this regard.
18. Alpha Ltd. and Beta Ltd. entered into a scheme of amalgamation by which Alpha Ltd. would transfer its entire undertaking to Beta Ltd. However, the Central Government raised an objection that unless the objects clause of the companies are similar, and

memorandum empowers to do so, the scheme of amalgamation cannot be permitted. Is the contention of the Central Government correct?

19. A meeting of the Board of Directors of a company was convened to be held on 15th December, 2006, but the meeting could not be held for want of quorum. The last meeting of the Board of Directors was held on 16th August, 2006. Advise in the light of provisions contained in the Companies Act, 1956, whether contravention was made?
20. A group of members seeking relief for the prevention of oppression and mismanagement against the affairs of the company wants to file a composite and simultaneous petition for relief against oppression and mismanagement as well for winding up of the company? Advise the members in the light of provisions of the Companies Act, 1956 and decided case law, if any, whether such a petition maintainable.
21. M/s ABC Ltd. was incorporated on 1st January 2004. On 1st November 2006 a political party approaches the company for a contribution of Rs. Ten lakhs for political purpose. Advise in respect of the following:
 - (i) Is the company legally authorised to give this political contribution?
 - (ii) Will it make any difference, if the company was in existence on 1st October 2003?
 - (iii) Can the company be penalised for defiance of Rules of this regard?
22. ABC Ltd has made an offer to acquire all the equity shares of XYZ Ltd at a certain price. Members of the company who hold 90% of the shares of XYZ Ltd have accepted the offer. The remaining shares are held by 2 persons who do not agree to the deal. Explain the procedure to finalize the deal. State the steps to be taken to acquire the shares of dissenting shareholders? Also, state whether ABC Ltd can acquire all the shares in XYZ Ltd?
23. (a) ABC Ltd is contemplating to fix a higher quorum for the Board meeting than prescribed by the Companies Act, 1956? Advise.
 (b) There are 9 directors and 2 offices of the directors have fallen vacant in a company. What would be the quorum for the meeting of the Board? In a case, where there are 15 directors in a company and of which 13 are happen to be interested directors, what would be the quorum?
24. Mr. N who was appointed as a director at the last AGM resigned. The Board filled up the casual vacancy by appointing Mr. M but within a few days of his becoming director Mr. M died. The Board wishes to fill up the casual vacancy by appointing Mr. P in place of Mr. M at the next Board meeting. State the legal position.
25. A company was using, a flat exclusively as a 'guest house' for its employees and officers. The electricity tariffs was levied on a higher tariff on the ground that it was for a 'commercial purpose.' How would you interpret and construe the meaning of the words used in this case?

26. What are the penalties that have been prescribed under the SEBI Act, 1992 in respect of the following?
 - ◆ For default in case of stock brokers
 - ◆ For insider trading
 - ◆ For non-disclosure of information relating to acquisitions of shares and takeovers.
27. Advise on the following as per the provisions of the SCRA, 1956.
 - (a) Kochi Stock Exchange wants to set up an additional trading floor on its premises
 - (b) A member of a stock exchange wants to transact with member of another stock exchange.
28. Explain the procedure to be followed by stock exchanges for delisting of securities under the SCRA, 1956.
29. Toy is a Japanese company having several business units all over the world. It has a robotic unit with its head quarter in Mumbai and has a branch in Singapore. Headquarter at Mumbai controls the branch of robotic unit. What would be the residential status of robotic unit in Mumbai and that of the Singapore branch?
30. Miss is an airhostess with the British Airways. She flies for 12 days in a month and thereafter a break for 18 days. During the break, she is accommodated of 'base', which is normally the city where the airways are headquartered. However, for security considerations, she was based on Mumbai. During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?
31. What do you understand by the term "Cartel" ? The members of a Lorry Association of India restricted its members in transacting their business with other non-members of the association. Is it a cartel agreement under the Competition Act, 2002?
32. Will a Consumer for Commercial purpose have any claim of right under the Competition Act, 2002?
33. What are the powers of the RBI to control loans & advances granted by a banking company under the provisions of the Banking Regulation Act, 1949?
34. What are the provisions relating solvency margin, advance payment of premium and restrictions on the opening of a new place of business under the IRDA, 1999?
35. What do you understand by Non-Performing Asset? What are the provisions relating to acquisitions of rights of assets under the Securitisation AND Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002t?
36. What do you understand by "Money-Laundering? What are the penalties prescribed for the same under the Prevention of Money Laundering Act, 2002?

37. Explain with illustration the Rule “Ejusdem Generis” in the interpretation of statutes?

SUGGESTED ANSWERS/HINTS

1. In this case, the financial year of the subsidiary precedes that of the holding company by 9 months. In case the subsidiary wants to extend the financial year from 30th June of one year to 31st March of the following year, the financial years of both the holding and subsidiary companies would coincide. But the extension sought for is for 9 months, i.e., from 30th June of one year to 31st March of the following year. Such an extension cannot be granted even by the Registrar under the proviso to sub-section (4) of section 210. It appears that the Central Government can, under this section, direct that the provisions of sub-section (4) of section 210 shall not apply in this case. Similarly, in order to ensure that the financial year of the subsidiary does not precede that of the holding company by more than six months, similar direction can be issued by the Central Government under sub-section (2) of this section, extending the financial year of the holding company from 31st March, 31st December. Here again, the extension will be for a period of nine months. The financial years of the holding and the subsidiary company will not coincide. But, by virtue of direction under sub-section (2) the requirement of clause (c) of sub-section (2) of section 212 will be fulfilled.
2. Filing of World Accounts and Indian Business Accounts with the Registrar of Companies:

World Accounts: Three copies of balance-sheet and profit and loss account, including documents relating to every subsidiary of the foreign company, in such form, containing such particulars and including such documents as required under the provisions of the Companies Act, 1956, are required to be filed with the Registrar of Companies. However, the Central Govt., may exempt any foreign company from this requirement by notification in the official gazette.

The World accounts shall be delivered to the Registrars within a period of 9 months from the close of the financial year of the foreign company. The Registrar at New Delhi may extend the said period by 3 months, vide Rule ISA of Companies (Central Government's) General Rules and Forms, 1957.

Indian Business Accounts: Three copies of balance-sheet and profit and loss accounts of Indian business accounts of a foreign company duly audited by a practising Chartered Accountant in India, in the form prescribed in Schedule VI (as modified in terms of Notification, dated 4-10-1957 and 6-1-1959) shall be filed with the Registrar within 9 months of the close of the financial year. The Registrar at New Delhi may extend this period by 3 months. The accounts shall be audited by such person and in such manner as provided in Section 226 and 227 (as modified in terms of the notifications cited above).

The aforesaid accounts have to be filed with the Principal Registrar (i.e., Registrar of Companies, New Delhi) and the concerned Registrar having jurisdiction over the principal place of business of the foreign company (Section 597).

It may be pointed out that the Indian accounts have to be drawn up in Indian rupees as per the requirements of Schedule VI.

The profit and loss account of the Indian business in respect of a foreign company which, if not incorporated under this Act would be deemed to be a private company, shall not be open for inspection by any person other than a member of the company.

3. (i) An auditor who is party to such payment of improper dividend is liable to proceeding by action, or, in case of winding up, to misfeasance summons and that the improperly paid dividend may be recovered from him with interest.
- (ii) (a) No. The Auditor cannot be said to be indebted within the meaning of Section 226(3)(d) Companies Act.
- (b) In this case the Auditor of the company is said to be indebted if the amount outstanding from him regarding goods and services purchased from the company audited by him exceeds Rs. 1000 irrespective of the nature of purchase or period of credit allowed to other customers, the provisions regarding disqualification of auditor as contained in Section 225 (3)(d) will be attracted (Guidance Note on Independence of Auditors), Also when the firm is indebted to the company, each and every partner of the firm also is deemed to have been indebted.
4. Section 255 of the Companies Act, 1956, provides that unless the Articles provide for retirement of all the directors at every general meeting, not less than two-thirds of the total number of directors of a public company, or of a private company which is a subsidiary of a public company, shall retire by rotation. In terms of section 256 of the Act, one-third of the directors liable to retire by rotation shall retire at the Annual General Meeting of the Company. If the number of directors liable to retire by rotation is not three or a multiple of three, then the number of nearest to one-third shall retire from the office of director.

In order to determine the directors who shall retire by rotation at every general meeting, it is provided that the persons who have been longest in office since their last appointment shall be liable to retire. As between the persons who became directors on the same day, the directors who shall retire may be determined by agreement among themselves. In the absence of any such agreement the persons liable to retire shall be chosen by lot.

Of the 11 directors mentioned in the question, Mr. Active and Mr. Archive, who are nominees of Public Financial Institutions respectively, are non-rotational directors and are not liable to retire. Mr. Excellent being the Managing Director, is also not liable to retire. The position in regard to the remaining 8 directors is as under:

- (i) Mr. Addition & Mr. One More who were appointed as Additional Directors in subsequent to 3rd Annual General Meeting respectively, shall vacate office on the date of 4th Annual General Meeting.
 - (ii) Mr. Casual was appointed in place of Mr. Soul who died and will, therefore, hold office till the date. Soul would have held office.
 - (iii) Of the 6 rotational directors, [viz., Mr. First, Mr. Second, Mr. Third, Mr. Fourth, Mr. Fifth and Mr. Casual, 2 directors who constitute one-third, and who have been longest in office are liable to vacate office. Accordingly, two amongst Mr. First, second and third who were appointed in 1st AGM and have been longest in office, shall vacate office. Amongst themselves, either they can decide by mutual consent or by draw of lots.
5. As per Section 285, in the case of every company, a meeting of the Board of Directors shall be held at least once in every three months and at least four such meetings shall be held in every year. The section does not state the gap between two board meetings. In the present case four meetings have been scheduled for the year 2005 even though the gap between two board meetings is more than 3 months. However, as per the section there appear to be no contravention.
- If the Board meeting to be held on 30th June, is adjourned due to lack of quorum, again a meeting is held on some other date, the company shall not be deemed to have contravened the provisions of Section 285. If the said meeting is held on 30th June, 2005 and was adjourned for want of quorum, the meeting automatically stand adjourned by virtue of Section 288 (1) till the same day in the next week, at the same time and place. And if the same day is a public holiday, then the meeting stands adjourned till the next succeeding day which is not a public holiday.
6. It was held in *Centron Industrial Alliance v. Pravin Kantilal Vakil* that under section 396, read with Rule 79 of the Companies (Court) Rules after a scheme is approved at the statutory meeting held for the purpose, the company is under an obligation to present a petition for confirmation of the scheme within 7 days of the filing of the report by the chairman of such meeting/s. Accordingly, the company was under a statutory obligation to present a petition for sanctioning the scheme. A scheme of amalgamation affects not merely the company and its shareholders, but it also vitally concerns an important body of outsiders viz., the creditors of the company, both secured and unsecured. It is, therefore, important that any opposition to the scheme should be expressed and taken note of in the manner provided in section 391 and not by the shareholders requisitioning a meeting in order to compel the company to withdraw the petition. The meeting was requisitioned for a purpose, which was totally different from the purpose for which such meetings are ordinarily held. Therefore, the shareholders could not requisition such a meeting for compelling the company to withdraw its petition from the High Court and it is in order for the Board of Directors to refuse to call the meeting.

7. Appointment of Sole Selling Agent: Section 294 and 294AA of the Companies Act, 1956 regulate the appointment of sole selling agents. These sections provide that:
 1. No company shall appoint a sole selling agent for any areas for a term exceeding 5 years at a time and the term may be extended for another period but not exceeding 5 years on each occasion. [Section 294(1)].
 2. The Board of Directors may appoint a sole selling agent but only 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. In case, the company in general meeting, as aforesaid, disapproved the appointment, it shall cease to be valid with effect from the date of that general meeting [Section 294(2) and (2A)].
 3. Where the Central Government is of opinion that the demand for goods of any category, to be specified by that government is substantially in excess of the production or supply of such goods and the services of sole selling agents will not be necessary to create a market for such goods, the Central Government may by notification in the Official Gazette, declare that sole selling agents shall not be appointed by a company for the sale of such goods, for such period, as may be specified in the declaration.
 4. No company shall appoint any individual firm or body corporate, who or which has a substantial interest in the company as sole selling agent of that company unless such appointment has been previously approved by the Central Government.
 5. A company having a paid-up share capital of Rs.50 lakhs or more shall not appoint a sole selling agent except with the consent of the company accorded by a special resolution and the approval of the Central Government.
 6. The Central Government may vary the terms and condition of appointment of a sole selling agent if those are found to be prejudicial to the interest of the company.
 7. In case a company has more than one selling agents in any area, the Central Government may declare any one of such agents as the sole selling agent for such area after obtaining from the company and considering the terms and conditions of appointment of the selling agents.

Procedure for appointment of sole selling agents:

1. Call a meeting of the Board of Directors and determine the name of the sole selling agent to be appointed. If the paid-up share capital of the company is less than Rs.50 lakhs and the appointee does not have a substantial interest in the company, the Board may also resolve to appoint him as sole selling agent subject to the approval of the general body meeting. Date for the general meeting may also be fixed by the Board in its meeting, appointing the sole selling agent.
2. In case the appointee either has a substantial interest in the company, or the paid-up share capital of the company is Rs.50 lakhs or more, application for the approval

of the Central Government should be made in Form 1 of the Companies (Appointment of Sole Agents) Rules, 1975.

3. See that the terms and conditions of appointment or reappointment do not contain the tenure exceeding 5 years, at a time.
4. Issue notices for holding the general meeting. Where the paid-up share capital of the company is Rs.50 lakhs or more, it shall require passing a special resolution; otherwise an ordinary resolution shall be sufficient.
5. Forward three copies of the notices and a copy of the proceedings of the general meeting to the Stock Exchange(s) with which the shares of the company are listed (if listed).
6. If the proposed sole selling agent is to be appointed in a foreign country, obtain the prior permission of the RBI.

Thus applying the above provisions (i) the appointment of J is not in order, as there have been a number of violation on the part of the company as per the Companies Act, 1956. Appointment without the approval of the general meeting and without the approval of the Central Government is not valid since the company's paid-up share capital is more than Rs.50 lakhs in this case. Moreover, since J has substantial interest in the company, approval of Central Government in Form 1 is must. Thus, the appointment of J is not in order.

In the second question (ii), the answer would not be different, as the capital (paid-up share capital) is more than 50 lakhs Rupees. In this case though the appointee (J) does not have substantial interest, but the company's paid up share capital is more than 50 lakhs, consent of the company in general meeting (special resolution) and the approval of the Central Government is required.

8. (i) The articles of a public company or a private company which is subsidiary of a public company may adopt the principal of proportional representation for appointing not less than $\frac{2}{3}^{\text{rd}}$ if the total number of the directors, whether by a single transferable vote or by a system of cumulative voting or otherwise. In such a case, appointments will be so made once in every three years and interim casual vacancies will be filled in conformity with the provisions of Sections 262 and 265. Cumulative voting denotes that if there are five candidates or distributes his five votes. He can cast all the five votes in favour of one candidate or distribute his five votes among different candidates. This system of voting ensures that the Board will have fair representation of the minority interest.
- (ii) According to Section 310, any increase in the remuneration of a director by way of fee for each meeting of the Board or a committee thereof attended by him does not require the approval of the Central Government, if the amount of such fee, after such increase does not exceed such sum as may be prescribed by the Central Government.

For the purposes of the first proviso to Section 310, the amount of remuneration by way of fee shall be as under:

Companies with a paid-up share capital and free reserves of Rs.10 crore and above or turnover of Rs.50 crore and above.	Sitting fees not to exceed the sum of twenty thousand rupees.
Other companies	Sitting fees not to exceed the sum of ten thousand rupees.

In the present situation, if the company wants to increase its fees from Rs.2,000/- to Rs.20,000/-, it is advised to observe the above guidelines, otherwise it is required to approach the Central Government for necessary approval.

- (iii) Items of business left unconsidered at the Board meeting and which cannot be deferred till the next Board meeting may be referred to the Directors for consideration by circulation in terms of Section 289. For the purpose, of passing a resolution by circulation, requirement is that the draft resolution should be circulated to all the directors in India, who are not below the quorum fixed for a board meeting and to all other directors at the usual address in India and the resolution should be approved by the directors in India or by a majority of them.
 - (iv) As per Section 299, the disclosure of interest by directors do not apply to any contract or arrangement within two companies where any of the directors of one company or two or more of them together holds or hold not more than 2% of the paid up share capital in the other company. In the present case, if the holding is less than 2%, the director is not liable.
 - (v) As per Section 314(1B) no relative of a director of a company shall hold any office or place of profit which carries a total monthly remuneration of not less than such sum as may be prescribed except with the prior consent of the company by a special resolution and the approval of the Government. The limit of monthly remuneration prescribed by the Central Government presently is Rs.50,000/-, therefore, the company is required to pass a special resolution and get approved by Central Government before Mr. A is appointed.
9. (i) As per Section 292A, a recommendations of the audit Committee on any matter relating to financial management, including the audit report, shall be binding on the Board.
- (ii) If the Board does not accept the recommendations of the Audit Committee, it shall record the reasons therefore and communicate such reasons to the shareholders.
- (iii) The Chairman of the Audit Committee shall attend the Annual General Meeting(s) of the company to provide any clarifications on matters relating to Audit.
10. Assignment of office by director: Any assignment of office made after the commencement of the Act by any director is void [Section 312].

It was held in *Oriental Metal Pressing Works Private Ltd. vs. B.K. Thakoor* (A.I.R.) 1960 Bom. 167 that the appointment of one as managing director by the will of one was void in view of the provisions contained in Section 312, since, according to the High Court, the words 'any assignment' were comprehensive enough to include every assignment to transfer of a director or of the appointment by a director of a person to the office of a director in his place, whether by a deed inter vivos or by will. But this ruling has been reversed by the Supreme Court (vide A.I.R. 1961 S.C. 573). The Court considers that the word 'assignment' in Section 312 does not mean or include appointment. From its every nature transfer inevitably imports the passing of a thing from one person to another. A transfer without the passage of the thing, even when that is an office is inconceivable. On the other hand, an 'appointment' has nothing to do with passing from one person to another; it connotes the putting in of someone in a vacancy. So transfer and appointment are dissimilar. It would be an unusual statute, which by using a single word intended to prohibit at the same time, two wholly different acts. A construction leading to such a result cannot be permitted.

11. There is no prohibition is contained in the Companies Act for a director acting in the dual capacity of a director and an employee. However, Section 314 puts a restriction for a director while accepting office or place of profit in the company. For this purpose, the director appointment in the office or place of profit need to be approved by the shareholders in the general meeting. A director however, without recourse to Section 314 can render services to the company in his professional capacity on one time basis.
12. All Acts done by the Board meeting by its committee meeting or by any person acting as a director shall be as valid as if every such director or such person had been duly appointed and was qualified to be a director. The validity of all such acts done is not affected even if it discovered later on that there was some defect in the appointment of any one or more of such directors or of any person acting as a director. The said acts will also remain unaffected even the directors are later on discovered to be disqualified (Article 80). This provision has been intended to prevent the validity of transactions from being questioned where there has been a slip in the appointment of a director. But the provision cannot be utilized to ignore or override the substantive provisions pertaining to such appointment. It is applicable only to acts of directors whose appointment or qualification is later on discovered to be faulty. Where, however, their appointments have not taken place at all but they merely choose to act on the company's behalf, the protection prescribed by either Article 80 or Section 290 cannot be invoked [Morris vs. Danssen (1964) 1, A.E.R. 586 (H, L.)] This is because the said subsequent discovery must be a discovery of the defect; it must not be discovery of facts which go to constitute the defect [British Asbestos Co. vs. Body (1903) 2 Ch. 439].

Suppose a regulation like Articles 80 is included in the Article of association of a company. What would be the possible impact of this? The impact has been summed up in Halsbury's Laws of England (vide p. 277, 3rd Edition, Vol. VI) thus: "An Article

validating the acts of persons acting as directors, though it is afterwards discovered that there was a defect in their appointment or qualification, operates not only between the company and outsiders but also as between the company and its members; as where defecto directors make a call, summon meetings of the company, elect other directors or allot shares, A defecto director may be ordered to furnish a statement of affairs in winding up. Directors can not take advantage of any infirmity in their proceedings in which they have themselves participated; they are stopped as between themselves and the company; they are also stopped from saying they have been improperly appointed if, they have acted after appointment, persons dealing with them who know of the invalidity are likewise stopped."

It should also be noted that Section 290 applies to act of an individual director, whereas Article 80 covers Act of the Board and of its committee.

13. (i) According to Section 295 of the Companies Act, no public company shall make any loan to any of its directors either directly or indirectly without obtaining the previous approval of the Central Government. As the Act envisages prior approval, Central Government will not entertain any application from the company seeking approval for a loan already given to its directors.

The company has, therefore, contravened the provisions of Section 295(1) and for this offence every person who is knowingly a party to this contravention including the person to whom the loan is made shall be punishable either with fine which may extend to Rs.5,000 or with simple imprisonment for a term which may extend to six months [Section 255(4)]. Where any such loan has been repaid in full, no punishment by way of imprisonment shall be imposed and where the loan has been repaid in part, the maximum punishment that may be imposed by way of imprisonment shall be proportionately reduced. So, by refunding the loan in full, it is possible to avoid punishment in the form of imprisonment, but it is not possible to avoid prosecution and punishment in the form of fine.

- (ii) All offences other than an offence which is punishable under the Companies Act with imprisonment only or with imprisonment and also with fine are compoundable under Section 621A. As the offence under Section 295 is punishable with fine or imprisonment, it is compoundable but with the permission of the court [Section 621A(2)]. The offence may be compounded either before or after the institution of prosecution. If the offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder or by any person authorised by the Central Government. Where the composition of any offence is made after the institution of any prosecution, such composition shall be brought to the notice of the court by the Registrar in writing and on such notice of the composition of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged [Section 621A(4)].

The offence may be compounded by the Regional Director where the maximum amount of fine which may be imposed for such offence does not exceed Rs,5,000 and in other cases by the Company Law Board. In this case, the offence may be compounded by Regional Director, as the maximum fine is only Rs.5,000. On receipt of applications from the persons liable for penalty under Section 295(4) along with the comments of the Registrar, the Regional Director may specify the amount not exceeding the maximum fine which shall be paid to the Central Government for compounding of the offence.

14. A quorum is the prescribed minimum number of qualified persons authorised to transact the business at a meeting. In relation to a Board meeting quorum implies fully qualified and disinterested directors who must be present at the meeting so as to enable the Board of which they are the constituents to legally transact the business thereat.

Can the articles of a company fix such a quorum? No, in view of Section 287 which has fixed the quorum of the Board meeting. Accordingly such a quorum is one third of the total strength of Board (any fraction contained in the said one third being rounded off as one) or two directors whichever is higher. The total strength is to be derived after deducting the number of directors whose offices are vacant. Therefore, the Quorum = $1/3$ (of the total strength vacancies). Where total number of directors are 9 and 2 offices of the directors have fallen vacant, we find: $1/3$ of $(9-2) = 1/3$ of $7 = 2\frac{1}{3}$ directors. If the fraction of 3^{rd} were to be rounded off as one then 3, i.e. $2+1$ directors would constitute the quorum for the Board meetings. If at any time the number of the remaining directors exceeds or is equal to two thirds of the total strength, the number of the remaining directors who are non-interested but present at the meeting, not being less than two shall constitute the quorum. For example, there are in all 15 directors and the Board meeting commences with all the 15 directors. During the currency of the meeting, an item comes up for discussion in respect of which 13 happen to be "interested" directors. In this case, in spite of the excess of the interested directors being more than two-thirds, the prescribed minimum number of non-interested directors constituting the quorum, namely, 2 present at the meeting are to transact the particular item of business.

Now suppose all the 15 directors cited in the above illustration are equally interested in that particular item of business and the time is so vital that but for a decision thereon, the business of the company will be greatly hampered. How to resolve this impasse?

The act has not made any direct provision to take with such a situation, but the Article 48 of Table A of Schedule 1 of the Act, provides a remedy. According to the said article, the Board may, whenever it thinks fit, call an extraordinary general meeting. By invoking this Article, the Board should get the aforesaid impasse resolved by the shareholders at the general meeting. Since according to Section 173(1) (b), all business in the case of any other meeting than the annual general meeting is to be deemed special, by virtue of sub-section (2) the notice of the extraordinary meeting must annex to it a statement setting

out all the material facts concerning the item of business, including, in particular, the nature of the concern or interest there in of every director.

15. (a) Although Section 292 empowers the Board of Directors of a company to delegate to the Managing Directors the power to invest, in general terms, the funds of the company nevertheless because of the overriding provisions of Section 372(5) (which Section we shall discuss in detail in Study paper 3), the transaction in the instant case would be invalid. Section 372(5) provides that no investment in shares of a company can be made by the Board of Directors of an investing company in pursuance of sub-section (2), unless it is sanctioned by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting except those not entitled to vote thereat, and unless further notice of the resolution to be moved at the meeting has been given to every director in the manner specified in Section 286. Since Section 372 does not provide for delegation of the power, the proposed delegation to the Managing Director in question, notwithstanding the general provision of Section 292, cannot be made.
- (b) In terms of Section 292 the Board of Directors may also delegate to the Managing Director the power to borrow money otherwise than debentures, which it can exercise only by means of resolutions passed at Board meetings. As per Explanation to Section 292(1), it is the arrangement for an overdraft or cash credit that constitutes the exercise of the borrowing power and not the actual utilisation of the arrangement. In other words, an arrangement for an overdraft or cash credit to the tune of say Rs. 5 lakhs constitutes the exercise of the borrowing power and not the actual drawing of this amount on the basis of the overdraft or cash credit. Consequently, the transaction in the instant case shall be valid. But before implementation of the proposal, the Board must pass a resolution at its meeting authorising the Managing Directors to borrow from banks money required for the purpose of the company's business. Also the resolution delegating this power shall specify the total amount outstanding at any one time up to which the delegate may borrow money.

If however, the moneys to be borrowed together with the money already borrowed by the company (apart from temporary loans obtained from the Company's bankers in the ordinary course of business) will exceed the aggregate of the paid up capital of the company and its free reserves, [that is to say, reserves not set apart for any specific purpose] the Board of Directors of the company in question must obtain the consent of the company in its general meeting. Consequently, care should be taken to ensure that while delegating the power to the managing director the aforesaid provision has not been violated; also it should be ensured that the memorandum of association permits borrowing.
- (c) Since according to Section 295(1), without obtaining prior approval of the Central Government in that behalf, a company can not directly or indirectly lend money to persons including firms, in which directors or their relatives are partners, the company in question must in the first instance seek the Central Government's

approval. Secondly since the power to make loans may be delegated under Section 292(1)(e), the Board of Directors of the company in question must pass a resolution therefore and every resolution delegating this power to the Managing Director shall specify the total amount up to which loans may be made by the delegate, the purpose for which loans may be made and the maximum amount of loans which may be made for each such purpose in individual cases. Thirdly, by virtue of Section 291(1), the Board must see with reference to the memorandum and articles whether the company is authorised to exercise the power.

- (d) Under Section 293(1) (e), the Board of Directors of a public company can contribute or donate to charitable and other funds not directly related to the business of the company or the welfare of its employees any amount the aggregate of which will not, in any financial year exceed Rs. 50,000 or 5% of its average net profits during the three financial years preceding whichever is greater. If this power of the company is not ultra vires the memorandum of the company, then only the Board can act in pursuance of the above-mentioned resolution of the company and in so acting, it can authorise the Managing Director to exercise the power on behalf of the Board.

16. SHARE QUALIFICATION FOR DIRECTORS

It is that number of shares which a shareholder must hold in order to be eligible for election as a director. The Companies Act, 1956 does not prescribe for any share qualification for a director. However, Regulation 66 of Table A provides that the qualification for being a director of a company is the holding of at least one share in the company. The articles of a company usually prescribe for such qualifications so that a director has a personal interest in the company. In the event of such a provision by the articles, it becomes incumbent on the part of every director to hold qualification shares and if does not hold them at the time of his appointment as director, he must acquire them within two months after his appointment as director. Any provision, made in the articles of the company requiring a person proposed for directorship to hold qualification shares either before appointment or within a third shorter than two months after his appointment will be void. The nominal value of qualification shares must not exceed Rs. 5,000 and if the nominal value of each share is Rs. 5,000 or more than the number of shares prescribed, as qualification will be only one. It is, of course, not necessary for any company to insist upon the holding of shares for the purpose of qualification for directors. For the purpose of share qualification, the bearer of a share warrant is not deemed to be the holder of the shares mentioned in the warrant (Section 270). A Director acting without qualification shares is punishable with fine, which may extend to Rs. 500/- for every day during which he continues as director (Section 272). The provisions relating to the share qualification of a director do not apply to a private company, unless it is subsidiary of a public company (Section 273): nor do they apply to directors appointed by the Central Government under Section 408.

17. (a) There is no provision in the Companies Act, 1956 relating to the resignation of his office by a director. If there is any provision in the articles giving the right to a director to resign at any time, the resignation shall take effect without any need for its acceptance by the Board or the Company in General Meeting. However, it is not clear what will be the position if the articles do not contain any provision relating to resignation of directors. One view is that the ordinary rule of common law as regards resignation by an officer or agent must be followed namely, resignation by; notice given either to the Company or the Board and acceptance of the same. (Glossop V. Glossop; Latchford Premier Cinema Ltd. V. Ennioin). Another view is where the resignation says that it is to take effect immediately, acceptance is not necessary unless the articles or any provision of law makes it necessary. Further the directors do not have the power to refuse the resignation of the co-director unless such a provision is there in the Articles of Association. (Re. Neokratine Safety Explosive Co. of New Ltd. (1891). Hence in the absence of contrary provision in Articles, the Company (i.e., Mr. Sundaram) can not compel Mr. Shivam to continue as a director.

However, the position is somewhat different in the case of a managing or whole time director. In such a case a formal acceptance of resignation by the company is essential so as to make it complete and effective. This is because the managing director occupies two positions (i) one that of a director and (ii) the other that of a whole time employee. An employee cannot give up office at his pleasure simply by giving notice. The notice or letter or resignation is required to be accepted by the company and the officer concerned has to be relieved of his duties and responsibilities, attaching to the office which he has resigned from [Achuta Pai Vs. registrar of Companies (1956) 36 Comp. Case 598]. Thus as the Executive Director, Mr. Satyam is full time employee of the company, the managing Director (Mr. Sundaram) can compel him to work as per the terms of employment agreed into at the time of appointment.

- (b) On receipt of the complaint from some of the shareholders and creditors of X Ltd., that its managing director Mr. Clever has misused his office and thereby caused loss to the company, the Central Government, if satisfied with the contents of the complaint may make a reference to the Company Law Board with a request to inquire into the case and record a finding whether or not Mr. Clever is a fit and proper person to hold the office of Managing Director. The application made to CLB must contain a concise statement of the circumstances and material as the Central Government may consider necessary for the purpose of the enquiry. The Company Law Board will hear both the parties viz. (1) The Central Government and (2) The Respondent Mr. Clever as well as the company. The CLB has powers to pass any interim order to the effect that the respondent Mr. Clever shall not discharge any of the duties of his office until further orders and appointment suitable person in place of the respondent. At the conclusion of the hearing the CLB will record its finding. If the finding of the CLB is against the respondent, the Central Government, by order, shall remove him from office, as provided in Section 388E(1) of the

Companies Act, 1956. The person against whom such an order is passed is debarred from holding the post of director etc., for a period of 5 years from the date of order of removal. Also no compensation is payable to him for termination of office.

18. The power to amalgamate may flow from the memorandum or it may be acquired by resorting to the statute. Section 17 of the Companies Act, 1956 indicates that a company which desires to amalgamate with another company will take necessary steps to come before a court for alteration of its memorandum in aid of such amalgamation. The statute confers a right on a company to alter its memorandum in aid of amalgamation with another company. The provisions contained in sections 391 to 396 and 494, illustrate instances of statutory power of amalgamating a company with another company without any specific power in the memorandum. [Hari Krishna Lokia (v) Hoolungooree Tea Co. Ltd, 1996].

Section 391 is not only a complete code, but it is in the nature of a single window clearance system to ensure that parties are not put to avoidable, unnecessary and cumbersome procedure for making repeated applications to court for various alterations and changes. What is to be seen is the overall fairness and feasibility of scheme of amalgamation and there need not be any unison of objects of both transferor and the transferee company. [R Morarjee Gokuldas spg. & wrg. Co., 1995].

To amalgamate with another company is the power of the company and not an object of the company. [Re. Hari Krishna Lohia, 1996]. Irrespective of the objects clause, the court is empowered to sanction scheme of amalgamation provided it does not prejudice the interest of the public. Therefore, based on the above judicial rulings, the contention of the central government is not correct. [Golkunda Engg. Enterprises Ltd (v) the G. V. Ltd, 1997].

19. As per Section 288, of the Companies Act, 1956 if a meeting of the Board could not be held for want of quorum, then unless the articles provide otherwise, the meeting shall automatically stand adjourned to, the same day in the next week, at the same time and place or if that day is a public holiday till the next succeeding day which is not a public holiday. Sub-section (2) of Section 288 further provides that the provisions of Section 285 shall not be deemed to have been contravened merely by reasons of the fact that meeting of the Board which has been called in compliance with the terms of that section, could not be held for want of quorum.
20. The Madhya Pradesh High Court in Kilpest (P) Ltd. v. Shekhar Mehra (supra) held that the petition, if initially made under Sections 397 and 398, cannot be converted into a winding up petition under section 433(f) and even no composite petition can be filed.

The aforesaid decision of the Madhya Pradesh High Court was overruled by the Supreme Court in Worldwide Agencies (P) Ltd. v. Mrs. Margaret T. Desor [1990] 67 The Comp.Cas. 607(SC). The Supreme Court in this case observed that "though there may

be some differences in the procedure to be adopted, it is not such which is irreconcilable and cannot simultaneously be gone into. The Supreme Court held that "a composite petition under sections 397, 398 and 433(f) of the Act is maintainable."

21. (i) Since ABC Co. has not completed three years of existence on 2nd November 2004, it is not eligible to give political contribution.
 - (ii) Yes, because in that case, ABC limited shall complete three financial years of its existence, therefore, will be eligible to give political contribution subject to the condition that such a. Contravention of the provisions of this section will make a company liable to fine which may extend to three times the amount so contributed. Further every officer of the company in default would be liable to imprisonment for a term which may extend to three years and also to fine.
 - (iii) The amended section 293A seeks to impose an obligation on every company to disclose in its profit and loss account contributions made by it to any political party or for any political purpose. Contravention of the provisions of this section will make a company liable to fine which may extend to three times the amount so contributed. Further every officer of the company in default would be liable to imprisonment for a term which may extend to three years and also to fine.
22. Applying the provisions of section 395 of the Companies Act, 1956, ABC Ltd., can acquire all the shares of XYZ Ltd. including those held by 2 persons. It can acquire the shares held by 2 persons if no application is made to the court for avoiding the sale of their shares or if the court refused it accordingly. In *Bombay Gas Company (P) Ltd., vs. Central Government* (1997) (CC) 89, the Bombay High Court held that Section 394(4)(b) provides for amalgamation of a foreign country with the Indian company. The transferee company, however, cannot be a foreign country. The expression member is not only holders of equity shares but also preference shareholders who had to be taken into account and value of their shares be included. The scheme may provide for the dissolution without winding up of any transferor company [Section 394(i)].
 23. A quorum is the prescribed minimum number of qualified persons authorised to transact the business at a meeting. In relation to a Board meeting quorum implies fully qualified and disinterested directors who must be present at the meeting so as to enable the Board of which they are the constituents to legally transact the business thereat. In view of Section 287 which has fixed the quorum of the Board meeting, the articles cannot fix the higher quorum.. Accordingly such a quorum is one third of the total strength of Board (any fraction contained in the said one third being rounded off as one) or two directors whichever is higher. The total strength is to be derived after deducting the number of directors whose offices are vacant. Therefore, the Quorum = $\frac{1}{3}$ (of the total strength vacancies). Where total number of directors are 9 and 2 offices of the directors have fallen vacant, we find: $\frac{1}{3}$ of $(9-2) = \frac{1}{3}$ of 7 = $\frac{21}{3}$ directors. If the fraction of $\frac{1}{3}$ were to be rounded off as one then 3, i.e. 2+1 directors would constitute the quorum for the Board meetings. If at any time the number of the remaining directors exceeds or is equal

to two thirds of the total strength, the number of the remaining directors who are non-interested but present at the meeting, not being less than two shall constitute the quorum. For example, there are in all 15 directors and the Board meeting commences with all the 15 directors. During the currency of the meeting, an item comes up for discussion in respect of which 13 happen to be “interested” directors. In this case, in spite of the excess of the interested directors being more than two-thirds, the prescribed minimum number of non-interested directors constituting the quorum, namely, 2 present at the meeting are to transact the particular item of business.

24. Section 262, (Companies Act, 1956) provides that in the case of a public company or a private company which is a subsidiary of a public company, if the office of any director appointed by the company in general meeting is vacated before the expiry of his term of office in the normal course, the resulting casual vacancy may, subject to any regulations in the Articles of the company, be filled by the Board of directors at a meeting of the Board. It would thus be noted that the Board of directors is empowered to fill a casual vacancy only in respect of a director appointed by the company in general meeting. If a casual vacancy arises in the office of a director appointed in the casual vacancy under Section 262, there is no casual vacancy within the meaning of Section 262. However, the Ministry of Corporate Affairs has opined that the same may be filled by the Board of directors as a casual vacancy. Consequently Board can appoint Mr. P. in place of Mr. M.
25. For giving a plain and literal meaning to each of the words in the expression “exclusively used as a private residential premises”, it is difficult to hold that the guest house maintained by a company or commercial undertaking would come within the aforesaid expression. It connotes that the premises must be exclusively used as a residential premises which in other words would mean where the premises which were used by any person privately for its own residence for a sufficiently continued period and not a premises where a person could come and spend a day or a night and then go back. Guest houses were maintained by companies or commercial undertakings as a part of their commercial ventures and such premises could not be held to be meant for exclusive use as private residential premises.
26. Penalty for default in case of stock brokers (Section 15F): If any person who, is registered as a stock broker under this Act
 - (a) fails to issue contract notes in the form and in the manner specified by the stock exchange of which such broker is a member, he shall be liable to a penalty not exceeding five times the amount for which the contract note was required to be issued by that broker;
 - (b) fails to deliver any security or fails to make payment of the amount due to the investor in the manner or within the period specified in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less;

- (c) charges an amount of brokerage which is in excess of the brokerage may be specified in the regulations, he shall be liable to a penalty of one lakh rupees or five times the amount of brokerage charged in excess of the specified brokerage, whichever is higher.

Penalty for insider trading (Section 15G) :

If any insider who:

- (i) either on his own behalf or on behalf of any other person, deals in securities of corporate on any stock exchange on the basis of any unpublished price sensitive information; or
- (ii) communicates any unpublished price sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or
- (iii) counsels, or procures for, any other person to deal in any securities of any body corporate on the basis of unpublished price sensitive information, shall be liable to a penalty twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher.

Penalty for non-disclosure of acquisition of shares and takeovers (Section 15H): If any person who, is required under this Act or any rules or regulations made there under fails to,

- (i) disclose the aggregate of his shareholding in the body corporate before he acquires any shares of that body corporate; or
- (ii) make a public announcement to acquire shares at a minimum price, he shall be liable to a penalty twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.
- (iii) make a public offer by sending letter of offer to the shareholders of the concerned company; or
- (iv) make payment of consideration to the shareholders who sold their shares pursuant to letter of offer,

27. Establishment of Additional Stock Exchange (Section 13A)

According to Section 13A of the Securities Contracts (Regulation) Act, 1956, a Stock Exchange may establish additional trading floor with the prior approval of the Securities Exchange Board of India in accordance with the terms and conditions stipulated by the said Board.

For the purpose of this section 'Additional Trading Floor' means a trading ring or trading facility offered by a recognized stock exchange outside its area of operation to enable the investor to buy and sell securities through such trading floor under the regulatory frame work of that Stock Exchange.

Members not to act as Principals

Members of Stock Exchange normally carry out transactions on behalf of investor and hence, principal agent relationship exists. Member can enter into transaction as principal with another member of the Exchange only. If he desires to enter into contract as principal with a non member then he has to get written consent from such person to act as principal. Contract note should indicate that member is acting as Principal. 'Spot delivery' contracts would be outside the purview of this section.

28. Delisting of securities (Section 21A)

- (1) A recognised stock exchange may delist the securities, after recording the reasons therefore, from any recognised stock exchange on any of the ground or grounds as may be prescribed under this Act:

Provided that the securities of a company shall not be delisted unless the company concerned has been given a reasonable opportunity of being heard.

- (2) A listed company or an aggrieved investor may file an appeal before the Securities Appellate Tribunal against the decision of the recognised stock exchange delisting the securities within fifteen days from the date of the decision of the recognised stock exchange delisting the securities and the provisions of sections 22B to 22E of this Act, shall apply, as far as may be, to such appeals:

Provided that the Securities Appellate Tribunal may, if it is satisfied that the company was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding one month."

29. Toy being a Japanese company would be a person resident outside India. [Section 2(w)]. Section 2(u) defines 'person'. Under clause (viii) thereof person would include any agency, office or branch owned or controlled by such 'person'. The term such 'person' appears to refer to a person who is included in clauses (i) to (vi). Accordingly robotic unit in Mumbai, being a branch of a company, would be a 'person'.

Section 2(v) defines 'person resident in India'. Under clause (iii) thereof 'person resident in India' would include an office, branch or agency in India owned or controlled by a person resident outside India. Robotic unit in Mumbai is owned or controlled by a person 'resident outside India'. Hence, it would be 'person resident in India'.

However, robotic unit in Mumbai, though not 'owned' controls Singapore branch, which is a person resident in India. Hence prima facie, it may be possible to hold a view that the Singapore branch is 'person resident in India'.

30. Miss stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. The issue here is whether staying can be considered to 'residing'. While the FERA emphasised 'stay', FEMA emphasises 'residing'. 'Stay' is a physical attribute, while 'residing' denotes permanency. Thus, while Miss may be a stayed in India for more than

182 days, it is doubtful whether he can be said to her 'resided' in India for more than 182 days.

Further under section 2(v)(a), she would become resident only if she has come to or stayed in India for employment. It would be doubtful and debatable, whether by staying at Mumbai base during the break, Miss can be said to have come to a stayed in India for or on taking up employment. Hence Miss would continue to be non-resident.

31. Cartel [Section 2(c)]

"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;

The term cartel like agreement has been given an inclusive meaning. Thus an association for the welfare of the trade or formed for any other purpose not mentioned in the aforesaid definition will not be a cartel. It is only when an association, by agreement amongst themselves, limits control or attempts to control the production, distribution, sale or price of, or, trade in goods or provision of services, that it will be a cartel.

32. Consumer [Section 2(f)] – Competition Act, 2002

"Consumer" means any person who—

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;
- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;

It is noteworthy that the definition of consumer is substantially the same has given to the expression under Section 2(d) of the consumer protection Act, 1986. The difference is that under clause (i), in the Competition Act, it uses the words "whether such purchase of goods is for the resale of for any commercial purpose or for personal use" in places of the words "but does include a person who obtains such goods for resale of for any commercial purpose", as in the Consumer Protection Act. Likewise, in clause (ii), the words used in the Competition Act are "whether such hiring or availing of services is for any commercial purpose or for personal use" in place of the words "but does not include

a person who avails of such services for any commercial purpose” as in the Consumer Protection Act. Thus, the interpretation of “consumer” in the Consumer Protection Act will be the same as in Competition Act. In the latter, “consumer” will also include a person who purchases goods for resale or for any commercial purpose or for personal use.

33. RBI's power to control loans & advances granted by banking company (Section 20.5) – Banking Regulation Act, 1949

RBI is empowered to issue directives to a banking company to determine the policy in relation to loans and advances. Such direction may relate to:

- (i) Purpose for which loan may or may not be made
- (ii) Margin stipulation
- (iii) Maximum amount of advances to any company, firm, individual or association of persons (popularly known as exposure norms which is at present 15 % for individual borrower without infrastructure project, if infrastructure project it may go by additional 10%, 40% for group borrower and for infrastructure project of group borrower it may be upto 50 % of bank's capital and reserve (presently tier-I & Tier-II capital from capital adequacy point of view)
- (iv) Maximum amount of guarantee liability on behalf of any individual/ firm/ company (above exposure norm includes non-fund facilities like bank guarantee/ letter of credit etc)
- (v) The rate of interest and other terms and condition on which such advances are made or guarantee given

(It may be noted that at present, in this deregulated interest rate regime RBI gives directives on for loans and advances with sanctioned limit upto Rs. 2.00 lakhs where rate of interest should not exceed individual bank's Benchmark Prime Lending Rate (BPLR), BPLR is fixed by Bank's Board, Rate of interest for advances with sanctioned limit above Rs. 2 lakhs is determined according to credit rating exercise done by bank,

{RBI's stipulation on this score is rate of interest should not exceed BPLR+4) RBI exercise its power through its selective credit control though under selective credit control list, at present no item except sugar for buffer stock is kept. More}

[Moreover, with credit policy measures of RBI Cash Reserve Ratio, Bank Rate and Repo & Reverse Rate is announced on which Bank's BPLR is somehow depended]

Section 21A:- Rate of interest charged by banking company on the basis of loan contract between the bank and debtor is not to be subject to scrutiny by the court

34. Solvency margin, advance payment of premium and restrictions on the opening of a new place of business – IRDA, 1999

Assets are valued as per their market or realisable values with few exemptions. Liabilities are to be properly valued including share capital, general revenue and revenues. The insurers at all times has to maintain surplus of assets over liabilities which is not less than amount arrived as per Section 64VA (i) and (ii) , subject to rates framed by IRDA Act 1999. Along with various relevant provisions of Insurance Amendment Act 1968 and Cooperative Societies Act 1912 are also to be complied with no insurer shall assure risk in India in respect of any insurance business unless he receives the premium either in cash / cheque / PMO. Payment of premium to insurance agent not always leads to contract between the assured and the insurer.

No insurer shall be allowed to open new office unless prior permission for the same has not been obtained from the Authority. Place of business includes a branch, sub branch, inspectorate, organisation office and any other office by whatever name called.

35. SARFAESI Act, 2002 - "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset, in accordance with the directions or under guidelines relating to asset classifications issued by the Reserve Bank [Section 2(o)]

Acquisition of rights or interest in financial assets (Section 5)

Notwithstanding anything contained in any agreement or any other law for the time being in force, any securitisation company or reconstruction company may acquire financial assets of any bank or financial institution-

- (a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between him; or
- (b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

Debenture as we commonly know, is an acknowledgement of debt. Bond also refers to the same nature of instrument as a debenture. Both of them acknowledge a debt and hence an obligation to pay.

In case the bank or financial institution is a lender in relation to any financial assets acquired by the securitisation company or the reconstruction company, then such securitisation company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to the subject financial assets.

Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever

nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the securitisation company or reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of securitisation company to reconstruction company, as the case may be.

If, on the date of acquisition of financial asset, any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be.

36. Prevention of Money Laundering Act, 2002 - Clause (p) of sub section 1 of Section 2 provides that "money-laundering" has the meaning assigned to it in section 3. Moving to Section 3, it is observed 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 and projecting it as untainted property shall be guilty of offence of money laundering.

Section 2(1)(u) 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.

In terms of Clause (v) of sub – section (1) of Section 2, "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.

PUNISHMENT FOR THE OFFENCE OF MONEY LAUNDERING

Chapter II comprises of Sections 3 and 4. Section 3 deals with the offence of money laundering which has been discussed in the definition part above. Section 4 provides for the punishment for Money-Laundering. Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees. But where the proceeds of crime involved in

money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to ten years instead of seven years.

37. Rule of Eiusdem Generis: The term 'ejusdem generis' means 'of the same kind or species'. Simply stated, the rule means:

- (i) Where any Act enumerates different subjects, general words following specific words are to be construed (and understood) with reference to the words that precede them. Those general words are to be taken as applying to things of the same kind as the specific words previously mentioned, unless there is something to show that a wider sense was intended. Thus the rule of ejusdem generis mean that where specific words are used and after those specific words, some general words are used, the general words would take their colour from the specific words used earlier. For instance 'in the expression in consequence of war, disturbance or any other cause', the words 'any other cause' would take colour from the earlier words 'war, disturbance' and therefore, would be limited to causes of the same kind as the two named instances. Similarly, where an Act permits keeping of dogs, cats, cows, buffaloes and other animals, the expression 'other animals' would not include wild animals like lions and tigers, but would mean only domesticated animals like horses, etc.

Where there was prohibition on importation of 'arms, ammunition, or gunpower or any other goods' the words 'any other goods' were construed as referring to goods similar to 'arms, ammunition or gun powder' (AG vs. Brown (1920), 1 KB 773).

- (ii) If the particular words used exhaust the whole genus (category), then the general words are to be construed as covering a larger genus.
- (iii) We must note, however, that the general principle of 'ejusdem generis' applies only where the specific words are all the same nature. When they are of different categories, then the meaning of the general words following those specific words remains unaffected-those general words then would not take colour from the earlier specific words.

It is also to be noted that the courts have a discretion whether to apply the 'ejusdem generis' doctrine in particular case or not. For example, the 'just and equitable' clause in the winding-up powers of the Courts is held to be not restricted by the first five situations in which the Court may wind up a company.