

CORPORATE RESTRUCTURING AND INSOLVENCY

Time allowed : 3 hours

Maximum marks : 100

NOTE : All references to sections relate to the Companies Act, 1956 unless stated otherwise.

PART A

(Answer Question No.1 which is compulsory
and any three of the rest from this part)

Question 1

- (a) State whether the following statements are correct or incorrect citing briefly relevant provisions of the law :
- (i) Court cannot refuse to sanction a scheme of arrangement which has been approved by majority of shareholders/creditors of the companies concerned.
 - (ii) Court would not insist on prior approval of stock exchange(s) while sanctioning a scheme of arrangement.
 - (iii) The word 'amalgamation' or 'merger' is not defined anywhere in the Companies Act, 1956.
 - (iv) The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 also apply to acquisition of global depository receipts (GDRs) or American depository receipts (ADRs).
 - (v) Filing of draft letter of offer with SEBI should be deemed or construed as conclusive evidence that the same has been vetted or approved by SEBI.
 - (vi) An offer made by the acquirer can be withdrawn unconditionally at any time without any demur or resistance of any party since the acquirer is at liberty to withdraw his offer.
 - (vii) The order of court sanctioning the scheme of arrangement is final and effective. Companies need not do any thing thereafter in respect of courts sanction. (2 marks each)
- (b) Distinguish between 'management buy-out' and 'management buy-in'. (3 marks)
- (c) A company whose shares were listed on a stock exchange for 3 months as on the relevant date made preferential allotment at Rs. 100 per share. On completing the period of 6 months of being listed on the stock exchange, the company recomputed the share price based on the guidelines issued by SEBI in this respect and price of share so recomputed came to Rs.150 per share. The company demanded additional amount of Rs. 50 per share from the allottees of shares. Is the action of the company justified ? Give reasons. (4 marks)
- (d) Grow Well Ltd. wants to adopt strategic planning to ensure its growth in the present day highly competitive scenario. As part of the management team, you are assigned with the role of highlighting the essential features such a planning should have. Suggest the features which you consider are vital for any strategic planning. (4 marks)

Answer 1(a)(i)**Statement is correct.**

When a scheme of compromise/arrangement is sound not opposed to public policy and does not violate any law/statute and nature justice and is supported by majority of shareholders/creditors, the Court would sanction the scheme under Section 391 of the Companies Act, 1956.

Answer 1(a)(ii)**Statement is correct.**

However, pursuant to clause 24 of the listing agreement, all listed companies shall have to file scheme/petition proposed to be filed before any Court/Tribunal under Sections 391, 394 and 101 of Companies Act, 1956, with the stock exchange, for approval, at least a month before it is presented to the Court or Tribunal.

Answer 1(a)(iii)**Statement is correct.**

The word 'amalgamation' or 'merger' is not defined anywhere in the Companies Act, 1956. However Section 2(1B) of the Income Tax Act, 1961 defines 'amalgamation'.

Answer 1(a)(iv)**Statement is partially correct.**

It applies to the acquisition of Global Depository Receipts or American Depository Receipts provided as long as they are converted into shares carrying voting rights.

Answer 1(a)(v)**Statement is incorrect.**

Filing of draft Letter of Offer with SEBI should not in any way be deemed or construed that the same has been cleared, vetted or approved by SEBI. The Letter of Offer is submitted to SEBI for a limited purpose of overseeing whether the disclosures contained therein are generally adequate and are in conformity with the Takeover Regulations.

Answer 1(a)(vi)**Statement is incorrect.**

As per Regulation 27, no public offer, once made, shall be withdrawn except when:

- (a) the statutory approval(s) required have been refused;
- (b) the sole acquirer, being a natural person, has died; and
- (c) there are such circumstances which in the opinion of SEBI merits withdrawal.

Answer 1(a)(vii)**Statement is incorrect**

Unless the copy of order is filed with ROC within 30 days from the Court's Order, the scheme can not be treated as effective.

Answer 1(b)

Management buy out – This situation occurs when the existing operating management and/or investors wish to buy the whole business, a division of the business or perhaps a product line. Specific financing is often provided by venture capitalists. In a management buy out, shareholders must be extra vigilant. The managers involved are of course looking to secure the best deal for themselves and this could lead them to withhold certain information from the shareholders. Shareholders often seek independent advice in these circumstances.

Management buy in - This is the situation when a group of managers from outside the business wish to buy into the business and run it, or buy into a division of the existing company.

Answer 1(c)

The action of the company is justified. Chapter XIII of SEBI (Disclosure and Investor Protection) Guidelines, 2000 clearly provided the rules regarding the price at which shares be issued on a preferential basis. The action of the company is in tune with those guidelines and hence correct as Chapter XIII, specially provides that where the equity shares are listed for less than six months, on completing a period of six months of being listed on a stock exchange, the company shall recompute the price of the shares in accordance with the provisions mentioned above and if the price at which shares were allotted on a preferential basis under clause was lower than the price so recomputed, the difference shall be paid by the allottees to the company.

Answer 1(d)

The salient features of strategic planning are as under:

1. It involves participation of responsible persons at different levels, either directly or indirectly (shared ownership).
2. It is a key ingredient of effective management.
3. It prepares the firm not only to face the future but also to shape the future in its favour.
4. It is based on quality data
5. It draws from both intuition and logic.
6. It accepts accountability to the community.
7. It helps to avoid hazardous response to environment.
8. It ensures optimum leveraging of firm's resources at every opportunity.

Question 2

(a) *"Section 391 is a boon to the corporate restructuring." Critically examine the statement and discuss the relevant provisions relating to corporate restructuring. (8 marks)*

(b) *Will the court sanction a scheme of amalgamation where companies to the*

scheme tend to reshuffle their objects clause in the memorandum of association? Support your answer with case law. (4 marks)

- (c) *Relax Movies Ltd. is going for takeover of another company. Your advice is sought whether the company has to go for mandatory bidding. Advise with reference to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. (3 marks)*

Answer 2(a)

Section 391 of the Companies Act, 1956 is a boon to corporate restructuring. This section along with Section 394, has proved to be a major legislative blessing for corporate restructuring in a variety of ways, such as amalgamation (merger) of two or more companies, demerger, division or partition of a company into two or more companies, hiving off a unit, as well as a compromise with the members or creditors of a company or an arrangement with respect to the share capital, assets or liabilities of the company etc.

It has been held in several cases that Section 391 is a 'complete code' or 'single window clearance system', and that the Court has been given wide powers under this section, to frame a scheme for the revival of a company. Being a complete code, the Court can, under this 'section', sanction a scheme containing all the alterations required in the structure of the company for the purpose of carrying out of the scheme.

Section 391 contemplates a compromise or arrangement between a company and its creditors or any class of them, or its members or any class of them, and provides machinery whereby such a compromise or arrangement may be binding on dissentient persons by an order of the Court. [*Oceanic Steam Navigation Co. In re.* (1939) 9 Comp. Cas. 229 (Ch.D)].

Answer 2(b)

Court will sanction the scheme if alteration of the memorandum is by reshuffling of the Objects Clause by shifting Other Objects to Main Objects, if transferee company has complied with provisions of Section 149(2A) [*Re: Rangkala Investments Ltd.* (1996) 1 Comp LJ 298 (Guj)].

Answer 2(c)

Takeovers usually take place when shares are acquired or purchased from the shareholders of a company at a specified price to the extent of at least controlling interest in order to gain control of that company. A person may acquire the voting shares of a listed company. A company may acquire shares of an unlisted company through what is called the acquisition under Section 395 of the Companies Act, 1956. Where the shares of the company are closely held by a small number of persons, a takeover may be effected by agreement with the holders of those shares. However, where the shares of a company are widely held by the general public, it involves the process of mandatory bidding as set out in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 1997, require acquirers to make bids for acquisition of certain level of holdings subject to

certain conditions. Regulations 10, 11 and 12 of the said Regulations contain necessary provisions. A takeover bid is required to be introduced through a public announcement through newspapers. Such requirements arise in the following cases:

- (a) for acquisition of 15% or more of the shares or voting rights;
- (b) for acquiring additional shares or voting rights to the extent of 5% of the voting rights in any financial year ending on 31st March if such person already holds not less than 15% but not more than 55% of the shares or voting rights in a company;
- (c) for acquiring shares or voting rights, along with persons acting in concert to exercise more than 55% but less than 75% of voting rights in a company;
- (d) for acquiring control over a company.

Question 3

- (a) *Whether in a scheme of arrangement the meeting of shareholders and creditors can be dispensed with ? Supplement your answer with the help of case law.*
(4 marks)
- (b) *Whether non-compliance with the disclosure and related requirement is a violation of the SEBI Takeover Code ? Give your answer by referring to case law.*
(4 marks)
- (c) *Explain whether the transferee company is required to increase its authorised share capital by following the procedure laid down in the Companies Act, 1956 even though after amalgamation its authorised share capital is sufficient to issue shares to the shareholders of transferor company.*
(4 marks)
- (d) *Briefly state whether permission of the Reserve Bank of India is necessary for the compromise and arrangement of non-banking finance company (NBFC) with a bank.*
(3 marks)

Answer 3(a)

Members' and creditors' approval to the scheme of amalgamation is sine qua non for Court's sanction. Without that the Court cannot proceed. This approval is to be obtained at specially convened meetings held as per court's directions [Section 391(1)]. However, the court may dispense with meetings of members/creditors. Normally, creditors' meetings are dispensed with subject to certain conditions. For instance, members' meeting may be dispensed with if all the members' individual consent is obtained.

Where the written consent to the proposed scheme is granted by all the members and secured and unsecured creditors, separate meeting of members and secured and unsecured creditors can be dispensed with. – *Re Feedback Reach Consultancy Services (P) Ltd.* (2003) 52 CLA 260: (2003) CLC 498: (2003) 42 SCL 82: (2003) 115 Comp Cas 897 (Del).

Answer 3(b)

No, there is no violation of takeover Regulations, the non-filing of resolution and non-disclosure of the pre-shareholding pattern and post-shareholding pattern cannot be

considered a violation of Takeover Code, but a short-coming or a lapse on the part of company would result in a breach, if there is an intention to do so. [*Ramesh Chandra Mansukhani NIR v. Adjudication Officer, SEBI (SAT)*].

Answer 3(c)

No. Since the authorized capital of the transferor company stands merged from the appointed date and transferred to and re-organised and re-classified as the authorized share capital of the transferee company and the combined share capital (authorized by articles) is sufficient to allot shares of the transferee company, the transferee company need not increase its authorized share capital. [*Motorola India (P) Ltd., in re 73 CLA 1*].

Answer 3(d)

Section 44A of Banking Regulation Act, 1949 does not apply where NBFC is proposed to be merged with a Banking company. In case of *IndusInd Enterprises and Finance Ltd. v. IndusInd Bank Ltd. and (ICICI Ltd.)* Reported in 2002(3) COMP. L.J. 111, the contention that prior permission of RBI is necessary for the proposed amalgamation was rejected. However as per the recent RBI Notification, prior approval of RBI is necessary in cases of acquisition transfer of control of NBFCs' accepting deposits.

Question 4

- (a) Discuss 'funding through rehabilitation finance' as a source of funds for mergers/ takeovers. (6 marks)
- (b) Draft a suitable Board resolution with respect to takeover for the following :
 - (i) Appointment of a merchant banker,
 - (ii) Opening of an Escrow account. (3 marks each)
- (c) Can shareholders seek an amendment to the swap ratio in the scheme of merger? Supplement your answer by referring to case law. (3 marks)

Answer 4(a)

BIFR has been arranging such takeover from time to time in which creditor financial institutions and banks have been providing consortium financial packages in promoting mergers.

Merger or takeover may be provided for in a scheme of rehabilitation under the Sick Industrial Companies (Special Provisions) Act, 1985.

The Sick Industrial Companies (Special Provisions) Act, 1985 provides for reference to the Board for Industrial and Financial Reconstruction (BIFR) of a sick industrial company. Once a reference is made, BIFR will cause an enquiry, appoint an operating agency for determination of measures necessary for rehabilitation of the sick company, direct the preparation of a rehabilitation scheme, which may provide, inter alia, for

- (i) rehabilitation finance for the sick company;
- (ii) merger of the sick company with a healthy company or merger of a healthy company with the sick company;
- (iii) takeover of the sick company by a healthy company;
- (iv) such other preventive, ameliorative and remedial measures as may be appropriate.

The scheme is prepared by the operating agency, and after the same is sanctioned becomes operative and binding on all the concerned parties including the sick company and other companies – amalgamating, merging, the amalgamated or the merged companies.

Answer 4(b)(i)

Appointment of Merchant Banker

“RESOLVED THAT M/s being Category-I Merchant Banker be and is hereby appointed as Merchant Banker for aforesaid public offer, on the terms and conditions as contained in the draft letter of appointment placed before the meeting duly initialed by the Chairman for the purpose of identification, for making the public announcement of the takeover offer in the newspapers, forward the same to the Securities and Exchange Board of India, Stock Exchange(s) and to the target company and to draft the Letter of Offer to be sent to the shareholders of, target company in accordance with the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997”.

Answer 4(b)(ii)

Opening of Escrow Account

“RESOLVED THAT an Escrow Account be opened with Bank and Rs.....be deposited in the said account.

RESOLVED FURTHER THAT M/s....., Merchant Banker, be and is hereby authorised to operate the above said account and the Bank be and is hereby authorised to act on the instructions given by M/s , Merchant Banker, in relation to operation of bank account.”

RESOLVED FURTHER THAT Mr., Director of the company, be and is hereby authorised to collect and communicate the same to.....Bank, the names and specimen signatures of the person authorised by M/s., Merchant Banker, to operate the above said bank account.”

Answer 4(c)

The exchange ratio is a matter of expert determination. It is the major ground on which the foundation of scheme of amalgamation is based and any change in the exchange ratio may vitiate the scheme. In this regard, a reference can be made to the decision of the Bombay High Court wherein it was held that swap ratio forms integral part of a scheme of amalgamation, and no shareholder can seek amendment to the swap ratio in a scheme of amalgamation. [*Dinesh Veajlal Lakhani v. Parke Davis (India) Ltd.* (2005) 66 CLA (Bombay)].

Question 5

- (a) *What are the safeguards incorporated in takeover process so as to ensure that shareholders get their payments under the offer or receive back their share certificates ?* (4 marks)
- (b) *Gopal has acquired shares in Aadil Ltd., but he is yet to be registered as a member. He has made an application to the court for modification in the scheme*

proposed under section 391. Is he entitled under the Companies Act, 1956 to move such an application ? (4 marks)

(c) *The capital structure of Johar Ltd. is as follows :*

- 5 lakh equity shares of Rs.10 each fully paid-up.
- 10 lakh equity shares of Rs.10 each on which Rs.5 is paid-up.
- Free reserves of Rs.3 crore.

The Board of directors of the company has passed a resolution authorising the buy-back of shares worth Rs.40 lakh for the financial year 2009-10. Is the Board of directors empowered to do so ? Give reasons. (4 marks)

(d) *Abhay Ltd. has filed a petition before the High Court of Bombay for sanction of a scheme of amalgamation with Gel Well Ltd., and the petition is posted for hearing, to Monday, the 8th March, 2010. The court has ordered to serve notice of the hearing of the petition on the creditors. As the Company Secretary of Abhay Ltd., draft the notice.* (3 marks)

Answer 5(a)

Safeguards provided to shareholders in Takeover process:

- (i) Acquirer, before making public announcement has to open an Escrow Account with a Commercial Bank or deposit a bank guarantee in favour of merchant banker.
- (ii) Merchant banker to confirm adequate financial arrangements.
- (iii) In case of failure of acquirer to make payment, merchant banker to distribute proceeds as under:
 - 1/3 of amount to target company.
 - 1/3 to regional SEs for investor fund.
 - 1/3 to be distributed on prorata basis among shareholders.

Answer 5(b)

Yes. Under Section 392(2), the court may on its own motion or on application of any person interested in the affairs can make an order for modification. Application can be made by any person interested, which included a person who has obtained a transfer of shares but yet to be registered as a member. It is not restricted to a creditor or liquidator of the company. [*K.K. Gupta v. K P Jain* (1979) 49 Company Cases 342: AIR 1979 SC 734].

Answer 5(c)

Board by passing a resolution can authorize the buy-back of securities not exceeding 10% of the total paid-up equity capital and free reserves of the company [Proviso to section 77A(2)].

But the buy-back of equity shares in any financial year should not exceed 25% of the total paid-up equity capital of the company [Proviso to section 77A(2)(c)].

In this case

10% of paid-up equity share capital and free reserves = Rs.40,00,000 i.e. 10% of (Rs.50,00,000+Rs.50,00,000+Rs.300,00,000)

25% of paid-up equity capital + Rs.25,00,000 i.e. 25% of (Rs.50,00,000 + Rs.50,00,000).

So the Board is not empowered to buy-back shares worth Rs.40,00,000.

Answer 5(d)

IN THE HIGH COURT OF JUDICATURE AT MUMBAI

Ordinary Civil Jurisdiction

Company Petition No. _____ of _____

Company Application No. _____ of _____

In the matter of Sections 391 and 394 of the Companies Act, 1956

And

In the matter of Scheme of Amalgamation between ABC Ltd. and XYZ Ltd.

ABC Ltd. a company incorporated under the Companies Act, 1956, having its registered office at _____, Mumbai.

ABC Ltd. _____ Petitioner

Notice to Creditors

Please take notice that a petition under sections 391 and 394 of the Companies Act, 1956, for sanction of the Scheme of Amalgamation of the Petitioner Company with XYZ Ltd. was presented by the Petitioner Company on the _____ was admitted on the _____ day of _____, and the said Petition is fixed for hearing before the Learned Judge taking company matters on Wednesday the 8th day of March 2010 at _____ AM/ PM.

PART B

(Answer ANY TWO questions from this part.)

Question 6

- (a) *Laxmi Bank Ltd. has approached you for your professional advice about the rights available to it for enforcing the security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. Highlight the rights and the advantages to the bank by resorting to that mode of recovery citing the relevant provisions of the said Act. (5 marks)*
- (b) *Kuber Bank Ltd. has obtained a decree from a civil court to recover an amount of Rs.20 lakh with 12% interest and the court has allowed it to proceed against the commercial building given as security for the loan. Can the decree be treated as a debt under the SARFAESI Act, 2002 ? Cite the relevant provisions of law in support of your answer. (5 marks)*

- (c) *Amir Bank has issued a bank guarantee for and on behalf of Madhuri Ltd., an industrial company in connection with loans granted to the company. The company became sick. While the proceedings before Board for Financial and Industrial Reconstruction (BIFR) is going on, the beneficiary of the bank guarantee invoked it and demanded payment from Amir Bank. The bank has sought your expert opinion in the matter. Give your opinion based on legal provisions and judicial decisions.* (5 marks)

Answer 6(a)**Enforcement of Security interest by a Creditors**

Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 provides for the enforcement of security interest by a secured creditor straight away without intervention of the court, on default in repayment of instalments, and non compliance with the notice of 60 days after the declaration of the loan as a non-performing asset. It must, however, be remembered that the classification of assets as non performing is not on the mere whims and fancies of the financial institutions. The Reserve Bank of India has a detailed policy providing guidelines or prudential norms in that regard.

The Secured Creditor has been defined to mean any bank or financial institution or any consortium or group of banks or financial institutions and includes debenture trustee appointed by any bank or financial institution or securitisation company or reconstruction company or any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance.

The secured creditor has two options. It can either transfer the assets to a securitisation or reconstruction company or exercise the powers under the Act.

Section 13(4) of the Act empowers the recourse to one more of the following measures, after giving proper notice, for the recovery of the secured debts, namely:

- Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;
- Take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realize the secured asset;
- Appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
- Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Advantages

Bank can take possession of the security and sell it without the intervention of court.

As per section 15 of the Act –

On publication of the notice of taking over the management of the business of the borrower the directors of the company or administrators of the business deemed to have vacated their office.

Shareholders cannot pass resolutions or appoint directors without the consent of the bank.

No proceeding for winding up of the borrower company or the appointment of receiver shall lie in any court without the consent of the bank.

If any reference is pending, it shall abate if 75% of the secured creditors have taken measures to recover their secured debts.

Answer 6(b)

Section 2(1)(ha) of the SARFAESI Act defines that “debt” shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. As per Section 2(g) of the Act, “Debt” means any liability (inclusive of interest) which is claimed alleged as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgagee and subsisting on, and legally recoverable on, the date of the application.

So the decree can be treated as a debt.

Answer 6(c)

Section 22 of SICA, 1985 grants several immunities to a sick industrial company. One such immunity is that no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or proceed with further except with the consent of BIFR or its Appellate Authority.

The above protection is available in respect of an industrial company when an inquiry under Section 16 is pending in relation to the said industrial company or when any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending.

The protection under section 22 of SICA is a superior protection and has an overriding effect on any other law or any other instrument having effect under other laws.

So the beneficiary is not entitled to invoke the guarantee without the permission of the BIFR [*Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd. (SC)*, *Patheja Bros. Forgings and Stamping v. ICICI Ltd. (SC)*].

Question 7

- (a) *Explain the role of BIFR and the concerned High Court in winding-up of a sick industrial company mentioning the relevant provisions of the law and judicial decision(s).* (5 marks)
- (b) *There was an agreement between a company having its registered office at Delhi with its creditors having their office at Mumbai. It contained a clause that in case of dispute between them, only the courts in Mumbai will have the jurisdiction. On the basis of the clause, the creditors filed a winding-up petition before High Court of Bombay. The company has asked your professional opinion in the matter. How will you advise the company ?* (5 marks)
- (c) *Recovery Officer under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 has issued an order and the defendant wants to challenge the order. What will be your advice to the defendant based on the relevant provisions in the Act ?* (5 marks)

Answer 7(a)**Role of BIFR and concerned High Court**

- After making necessary inquiry under Section 16 and after giving an opportunity to all concerned parties, if BIFR is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time and it is not likely to become viable in future and as such it is just and equitable to wind up the company, BIFR may record and forward its opinion to the concerned High Court.
- The High Court shall, on the basis of the opinion of the Board, order winding up of the sick industrial company and may proceed and cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956.
- For the purpose of winding up, the High Court may, with the consent of the operating agency, appoint any officer of the operating agency, as the liquidator and such officer, if appointed shall be deemed to be, and have all the powers of, the official liquidator under the Companies Act, 1956.
- When BIFR recommends the winding up of a sick industrial company pursuant to Section 20(1) of the SICA, 1985 and forwards its opinion to the connected High Court, the High Court is bound to order the winding up of the company on the basis of the opinion of BIFR.
- Once BIFR forwards its opinion to the connected High Court, the role of BIFR comes to an end in respect of the said sick industrial company.

Answer 7(b)

Only Delhi High Court where the registered office of the company is situated has jurisdiction in winding up, even if there is an agreement between the company and its

creditors that Mumbai courts will have jurisdiction in case of dispute between them and the company. Cases – *GTC Industries Ltd. v. Parasrampur Trading (All HC)*, *LKP Merchant Financing v. Arwin Liquid Gases (Guj)*.

Answer 7(c)

The defendant has to challenge the order of the Recovery Officer by way of appeal to the Debt Recovery Tribunal within 30 days on which a copy of the order is issued to him. The Tribunal may, after giving an opportunity to the appellant to be heard and after making such inquiry as it deems fit, confirm, modify or set aside the order of the Recovery Officer in exercise of his powers under section 25 to 28 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Question 8

- (a) *The trade union of workers of a company has filed a winding-up petition of their company. State the legal position citing relevant case law. (5 marks)*
- (b) *Debt Recovery Tribunal (DRT) has passed an interim order attaching the property of the defendant. The defendant wants to challenge this order on the ground that DRT has no power to pass interim orders. Explain the legal provisions in this regard. (5 marks)*
- (c) *As the Company Secretary of a company, mention your duties in respect of compulsory winding-up. (5 marks)*

Answer 8(a)

Section 439 of the Companies Act, 1956 confers right upon certain persons to file a winding up petition. The said section does not authorize the workers to make a winding up petition. So the workers cannot make a winding up petition. (no locus standi)

But workers are entitled to be heard as interveners but not as parties. After the winding up order is made the workers may appeal against it. But once the order becomes final, the workers shall not participate in further proceedings [*National Textile Workers' Union v. P.R. Ramakrishnan (SC)*].

Answer 8(b)

The Debt Recovery Tribunals are empowered to pass interim orders whether by way of injunction or stay or attachment against the defendant to debar him from transferring, alienating or otherwise dealing with, or disposing of, any property and assets belonging to him without the prior permission of the tribunal. However, there are judgments of Supreme Court and the High Courts which have laid down the conditions which must be followed by the Tribunals before passing such orders.

Generally, they have to first hear the defendants before the orders are passed. The Tribunal should be satisfied by affidavit or otherwise that the defendant with the intent to obstruct or delay or frustrate the execution of any order for recovery of the debt that may be passed against him is about to dispose of the property, to remove it from the local jurisdiction of the Tribunal, likely to cause any damage to the property or create third party interest before passing the orders.

Answer 8(c)**Duties of the Secretary in respect of Compulsory Winding Up**

The duties of the Secretary in respect of compulsory winding up of the company may be enumerated as follows:

- (i) If the company itself makes the petition for compulsory winding up, the Secretary should help the directors in drawing up the petition.
 - (ii) He should see that a copy of winding up order, when passed by the Court is filed with the Registrar within 30 days of the making of the order.
 - (iii) He should help in preparation of the statement of affairs of the company in the prescribed form for submission to the Official Liquidator. He should see that it is properly verified by an affidavit.
 - (iv) He should give all necessary information to the Court, when called upon by it during the course of the winding up.
 - (v) He should see that all documents, correspondence etc., issued by the company during the period of winding up contain a statement that the company is being wound up.
-