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PAPER 6D: ECONOMIC LAWS

CASE STUDY-1

Mr. Prem Agarwal is an Indian businessman. He is the Chairman of Courage Industries Limited, which was incorporated at Chennai on July 1984 by Mr. Prem Agarwal's father, Mr. D.D. Agarwal. After his father's death in 2004, Mr. Prem Agarwal became the Chairman of the Company. The Company is engaged in multiple businesses such as Financing, Infrastructure, Telecommunications, etc. To pay the existing debts and to make the Company work efficiently, Courage Industries Limited took bank loans from consortium of Indian Banks. The Company also decided to expand its telecommunication business and DTH services in India. In this regard, the Company approached Foreign Banks seeking loans. Being one of the pioneer Companies of India and based on its credibility, all the three foreign banks - Global Bank of X, Exim Bank of Y and Chartered Bank of Z, sanctioned the required loan amounts.

The Indian lenders of Courage Industries Limited included ABD State Bank with an exposure of over ₹ 1,245 crore followed by Apex Bank of Rajasthan (₹ 1,090 crore), P & G National Bank (810 crore) and JV National Bank (₹ 792 crore). Among overseas lenders, X Bank of America had an exposure of ₹ 700 crore, followed by Y Bank of Scotland (₹ 430 crore) and Z. Bank of London (₹ 350 crore). The loans were also personally guaranteed by Mr. Prem Agarwal. All the four Indian banks as aforesaid, sanctioned the loans in the year 2012 in a consortium agreement. Courage Industries Limited assured the bank to pay all the instalments on time. The Company as per their commitments paid the instalments on time.

Everything went well but from August 2017, due to heavy losses, the Company defaulted in paying instalments to all the Indian as well as the Foreign Banks. Due to tough competition in telecommunications market and entry of new giants in the market, the rates of voice call and data plan reduced considerably. Eventually, the Banks started sending reminders to Courage Industries Limited to clear all of their respective dues.

The JV National Bank had a warehouse in Mumbai which it had seized in the insolvency proceedings of PQR Company Limited. After many attempts, the Bank was unable to recover its loan by selling the property at the expected market price. So the bank decided to lease the premises. Courage Industries Limited had come to know about it and approached the Bank in May 2016 to take the premises on lease. After negotiations, the annual rent of the premises was fixed at ₹ 1.5 crores. As Courage Industries Limited suffered losses from the year 2017, defaulted in paying lease rentals for the last two years, which amounted to ₹ 3 crore. Due to non-payment of dues by some other companies along with Courage Industries Limited to JV National Bank, the NPA of JV National Bank rose to sixty-five percent and it has been grappling with mounting bad loans since last two years.

On the other hand, Aditya Agarwal, son of Prem Agarwal, who was inducted as a Director in Courage Industries Limited, commenced a vertical business in real estate projects across different cities of Maharashtra as part of which he announced four real estate projects in

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Mumbai, Nagpur, Pune and Nasik on 21st November, 2019. The details of the project were as follows:

- *"Courage Serene" in Vashi, Navi Mumbai, where the proposed project consists of area of five hundred square meters and the number of proposed apartments will be twelve.*
- *"Courage Codename" in Nagpur, where the proposed project consists of fifty thousand square meters and the number of proposed apartments will be eighty.*
- *"Courage Lifestyle" in Pune, where the proposed project consists of five thousand square meters and the number of proposed apartments will be eighty.*
- *"Courage Royal Serenity" in Nasik, where the proposed project area consists of five thousand square meters and the proposed apartments will be one hundred.*

The Company decided that the booking of the apartments in all the projects will start from 24th December, 2019 onwards, after obtaining all the legal permissions from the prescribed authorities. Meanwhile, a Board meeting was convened on 5th December, 2019 wherein the Board of Directors, in view of shortage of funds, unanimously resolved to reduce the budget of two projects. Accordingly, the Company reduced the number of apartments in two projects, wherein the Company will build only eight apartments in "Courage Serene" in Vashi, Navi Mumbai and in the case of "Courage Codename" in Nagpur, the construction will take place in two phases. In the first phase, twenty-five thousand square meters area will be developed with construction of forty flats and in second phase another twenty-five thousand square meters area will be developed for constructing remaining forty flats. As per the Real Estate (Regulation and Development) Act, 2016 (RERA, 2016) all the required documents were submitted by the Company for registration under the RERA, 2016. Considering the latest requirements and amendments in the policy about the environment (applicable for civil construction in the embankment areas of large rivers), certain structural changes relating to the height and common area landscape was made to the sanctioned plan of "Courage Royal Serenity" project in Nasik, which was being built on the banks of river Godavari.

From 25th December 2019, the Company started the bookings of flats in all the four projects. As a Christmas day offer, the Company gave an extra two lakh rupees discount in each project on the booking of the flat within 6 months of starting of construction work. People started booking flats in all the four projects. The cost of the flats in all the four project started from rupees three crores to seven crores. The Company started the work in all the projects in full swing after getting commencement of work certificate for each of the projects from the authorities.

Mr. Harshit Khanna, a registered real estate agent, is owner of a firm called Harshit Homez. He wanted to get associated with Courage Industries Limited for selling the flats of Mumbai as well as Nagpur projects respectively. Mr. Harshit gave an advertisement without the Company's knowledge, in the newspaper for the sale of flats along with an offer that whomsoever books any flats via his firm, will get extra one percent discount in the booking amount. The Company overall got a good response for the three projects except the Nasik project. It got only seventy percent of the total booking slots till mid of February, 2020. A Board meeting was held on 26th

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February, 2020 in which it was decided that due to losses in other businesses of the Company and being heavily in debt to the creditors, the Company will sell its Nasik project to a third party, XYZ Infrastructure Company. After taking over the project, XYZ Infrastructure Company made certain changes in the layouts of the project.

Courage Industries Limited tried to sell its assets to various companies, including its rival Tele Tones Company, to clear the debts but the deals did not crystallize as expected. Later, insolvency proceedings against Courage Industries Limited started on a plea filed by a Japanese Telecom Company after the Company failed to clear its dues.

The Committee of Creditors (CoC) final meeting was to be held on 25th March 2020, but amidst the nation-wide lockdown it got cancelled. According to the order of the National Company Law Tribunal, CoC should complete the entire process by 30th March, 2020 and the Resolution Professional 'Legal Hawk' needs to file the resolution plan with the National Company Law Tribunal (NCLT) Mumbai, by 2nd April, 2020.

The Banks have also classified the accounts of Courage Industries Ltd. as Non- Performing Assets (NPAs) and issued a demand notice to Prem Agarwal for payment of dues standing in the books of the Bank on account of the default by Courage Industries Limited and wanted to enforce the personal guarantee provided by Prem Agarwal. However, Prem Agarwal contended that the demand is not enforceable in view of the ongoing corporate insolvency resolution process.

On the basis of the above inputs given in the case study, you are required to answer the following Multiple Choice Questions (MCQs):

Provide the correct option to the following questions:

1.1 Aditya Agarwal decided to construct the Nagpur project in two phases due to shortage of funds. What shall be the impact of the decision on the project under the provisions of the RERA, 2016?

(A) Both the phases are part of one project and so no separate registration is required for each phase.

(B) Separate registration of the project is required only in case where it is developed by two different promoters:

(C) Each phase will be considered as a stand-alone project and separate registration is required for both the phases.

(D) If the second phase is immediately started after completion of the first phase, then no separate registration of the phases is required. ***(2 Marks)***

1.2 Mr. Harshit has announced that any person making bookings via their agency will be given an extra discount. In the light of the provisions of the RERA, 2016, this announcement can be deemed as:

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(A) *Voidable at the option of Courage Industries Limited.*

(B) *Misleading the buyers for services that are not intended to be offered.*

(C) *Correct and to be intended to be offered by the Company.*

(D) *Reliable as made by the registered agent of the Company.* ***(2 Marks)***

1.3 *The final meeting of Committee of Creditors was to be held on 25th March, 2020. Under the Insolvency and Bankruptcy Code, 2016, is it necessary to hold the meeting in person or can it be arranged otherwise?*

(A) *Since it is a final meeting, everyone needs to be physically present in person,*

(B) *Meeting in person is not necessary and it can be held via video conferencing.*

(C) *Only the resolution plan can be discussed via video conferencing and voting needs to done in person*

(D) *With the prior permission of the Tribunal (NCLT), the Resolution Professional can hold the meeting via video conferencing.* ***(2 Marks)***

1.4 *XYZ Infrastructure Company after takeover of the project, did changes in the layouts of the project. Is it authorized to do the changes to the layouts of the ongoing project under the provisions of the RERA, 2016?*

(A) *Before doing any changes in the project, it has to take the prior approval of the RERA Authority.*

(B) *As a new promoter of the project, they are authorized to make the necessary changes.*

(C) *With the permission of two-third allottees of the flats, they can make the necessary changes.*

(D) *The new promoter is required to carry forward the project by complying with all the pending obligations of the erstwhile promoter, before making any changes.*

(2 Marks)

1.5 *In which of the four real estate projects started by Courage Industries Limited, registration of the project is not mandatory?*

(A) *Courage Codename*

(B) *Courage Royal Serenity*

(C) *Courage Serene*

(D) *Courage Lifestyle* ***(2 Marks)***

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1.6 Answer the following Questions:

(i) With respect to the constitution of Committee of Creditors under the provision of the Insolvency and Bankruptcy Code, 2016, answer the following

(a) All the four Indian banks, as a consortium, gave loans to Courage Industries Limited. How will they form part of Committee of Creditors and how would their voting shares be determined? **(3 Marks)**

(b) JV National Bank is Financial as well as an Operational Creditor of Courage Industries Limited. Can JV National Bank club both the debts and claim it as a financial debt? **(3 Marks)**

(c) The banks decided to enforce the personal guarantee provided by Mr. Prem Agarwal. But he contended that the demand is not maintainable in view of the ongoing Corporate Insolvency Resolution Process. Evaluate. **(5 Marks)**

(ii) Aditya Agarwal is of the view that since the alteration in the sanctioned plan was enforced by changes in policy matters, the approval for such changes in the sanctioned plans was not required to be obtained from the allottees. Evaluate in the context of the provisions of the RERA, 2016. ***(4 Marks)***

Answer to Case Study 1

MCQs Answer

1.1 C

1.2 B

1.3 B

1.4 C & D

1.5 C

1.6 (i) (a) According to Section 21(3) of the IBC, 2016, subject to sub- sections (6) and (6A), where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

Hence, each of the Indian bank and overseas lenders will form part of the committee of creditors and their voting shares would be determined on the basis of financial debts (loan) owed to them by Courage Industries Limited in line with section 5(28) of the Code.

Accordingly following shall be the voting shares of the lenders of Courage Industries:

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Lenders	Amount (₹ in crore)	Voting share in %
ABD State Bank	1,245	23
Apex Bank of Rajasthan	1,090	20
P&G National Bank	810	15
JV National Bank	792	15
Global Bank of X	700	13
Exim Bank of Y	430	8
Chartered Bank of Z	350	6
Total	5,417	

Hence, in the given case, all the four Indian banks along with the overseas lenders will form part of the committee of creditors and their voting shares would be determined as above.

(b) According to Section 21(4) of the IBC, 2016, where any person is a financial creditor as well as an operational creditor,—

(i) such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

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

So, in the above-mentioned scenario, JV National Bank has no right to club both the debts and claim it as financial debt, as the bank would be considered as a financial creditor only to the extent of financial debts owed by it.

(c) Enforcement of Personal Guarantee provided by Mr. Prem Agarwal by Bank:

As per section 60(1) of the Code, the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

Further as per Section 60(2), where a CIRP or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before such National Company Law Tribunal.

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Hence, the provisions of the Code provide for recourse to the personal guarantor even if the Corporate Insolvency Resolution process has been initiated against the corporate debtor in the given case. Had the intention of the legislature been to let the aggrieved creditor, Bank in the given case, kept waiting for subsequent events to happen under the Insolvency Process, the provisions for the initiation of proceedings wouldn't have been made in the first place. Therefore, it would not be right for Mr. Prem Agarwal to assume that the proceedings of insolvency have been filed with the NCLT so no action can be taken until the resolution plan has been accepted / materialized.

Accordingly in the given question, contention of Mr. Prem Agarwal that the demand of enforceability of the personal guarantee given by him is not maintainable in view of the ongoing CIRP, is not correct.

(ii) Section 14 of the RERA, 2016 requires a promoter to adhere to the sanctioned plans and the project specifications.

According to the Act, the proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities. According to the law, generally, the promoter shall not make any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, without the previous consent of that person. However, Promoter can make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorized Architect or Engineer after proper declaration and intimation to the allottee.

Since "Minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

As per the facts given in the question, considering latest requirements and amendments in the policy about the environment (applicable for civil construction in the embankment areas of large rivers), certain structural changes relating to the height and common area landscape was made in the sanctioned plan of the Courage Royal Serenity Project in Nasik, which was built on the banks of the river Godavari.

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Since these changes are, other than minor alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project, it requires previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

CASE STUDY - 2

Aawas Private Limited (APL) was engaged in the business of real estate for the last fourteen years. The Company was founded by two friends, Mr. Atanu Dey and Mr. Biswajit Mondal, who were also its directors. Mr. Devjyoti Basu, the brother-in-law of Mr. Atanu, was the Manager of the Company since its inception.

The Company had acquired 10% shares of a Company in Egypt, named Belashom LLC that was engaged in construction of commercial properties. Recently, APL received some bonus shares from the said Company. Belashom LLC was looking for a commercial property in India for opening its branch office in order to expand its business. For that purpose, Mr. Lee, an international real estate agent in Egypt was contacted by Belashom LLC and Mr. Lee told that one of his clients in India, a Private Limited Company named Prithvi Private Limited (PPL) wanted to sell, one of its commercial properties in India

After going through the details of the said property, Belashom LLC became interested in the said property and decided to send its director Mr. Andrews, to India to meet the client of Mr. Lee in India and finalize the deal for the property. Mr. Biswajit Mondal who was on a visit to meet his old friend in Nepal, came to know that Mr. Andrews was going to visit India. So, he shortened his trip and came back to India bringing with him INR 30,000 in the form of currency notes with denominations of 100 and INR 20,000 in the form of currency notes with denominations of 500 received as a gift from his friend. Mr. Andrews visited India bringing with him, some amount of Egyptian Pounds (EGP) as follows:

Particulars	*EGP*
Currency Notes	*95,000*
Bank Notes	*50,000*
Travelers Cheque	*22,500*

Mr. Biswajit Mondal accompanied him. Mr. Andrews met the representatives of Prithvi Private Limited, Mr. Devneel Dutta and after two rounds of discussions between them, the deal for the property was finalized for INR 650 lakhs. EGP 6,00,000 was remitted to Mr. Lee as a commission amount out of the EEFC account of Prithvi Private Limited.

All the expenses incurred by Mr. Andrews in INR on account of his boarding, lodging and travelling in India were paid by PPL, which was going to be reimbursed later on by Belashom LLC.

Mr. Atanu Dey, being a resident individual, desires to obtain Foreign Exchange for the following purposes:

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(i) US $ 1,20,000 for his daughter's higher education abroad on the basis of the estimates given by a foreign University.

(ii) Gift remittances amounting US $ 10,000.

The personal advisor of Mr. Atanu Dey informed that to carry out the above activities, prior permission of the RBI is required.

PPL was developing a real estate project in the Mihan area of Nagpur city named "AASHIYANA It had made certain agreements with the real estate agents mainly operating in that area which required the said agents to promote and negotiate deals for the units in AASHIYANA and not for any other real estate in that area, and for entering into such agreement, a lumpsum amount was paid to such agents in cash,

Aditya Builders Private Limited's business was affected due to such arrangement of PPL and so it filed a complaint with the authority under the RERA, against such arrangement. The case was assigned to Mr. Sumit, a RERA member. Mr. Sumit in order to understand the arrangement being made by PPL with the real estate agents, contacted his friend Mr. Aman who himself was a real estate agent, and asked him to enter into an agreement with PPL as a normal agent and then provide him all the details of such arrangement.

Mr. Aman did the same and provided all the details to Mr. Sumit. Mr. Sumit discussed the matter with other members of the Authority under the RERA. In the meeting, it was decided that such agreements made by PPL affected competition in the relevant market and so the case was referred to the Competition Commission of India (CCI).

The CCI on receipt of such reference from the Authorities under the RERA, initiated an inquiry into the matter and formed an opinion on the existence of a prima facie case and directed the Director General to cause an investigation into the matter.

The Director General, during the investigation, received certain evidence on an affidavit from a few employees of PPL. Further, certain books and papers of PPL were also called for by the Director General which he kept in his custody for two months.

The Director General found that the Company Secretary of PPL, Mrs. Riya Sengupta, had assisted in drafting the impugned agreements with the real estate agents. Mr. Devjyoti Basu, the Manager, however, pleaded before the Director General, that though he knew of such agreements being entered into by PPL, he never gave his consent to such an act of the Company.

The copy of the report of the investigation was forwarded by the CCI to PPL and the authority under the RERA respectively. To get a favourable report, Mr. Atanu gave some cash and promised a flat in a posh area to Mr. Mahesh, one of the members of CCI

After making further inquiry, the CCI closed the matter and passed a cease and desist order as well as a penalty order to pay an amount equivalent to 20% of the revenue earned by PPL by making such anti-competitive agreements with the real estate brokers.

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On the basis of the above Inputs given in the case study, you are requested to answer the following Multiple Choice Questions (MCQs). Please choose the correct option:

2.1 Mr. Atanu Dey desires to obtain US $ 1,20,000 for his daughter's higher education abroad. As per the provision of the Foreign Exchange Management Act, 1999:

(A) Permission of RBI is required as the foreign exchange required is more than US$ 1,00,000.

(B) No permission of RBI is required as it is within the specified limits.

(C) Prior approval of the Central Government is required as the foreign exchange required is more than US $ 1,00,000.

(D) Only intimation to RBI is sufficient in this regard. ***(2 Marks)***

2.2 Mr. Atanu Dey desires to make gift remittances amounting to US $ 10,000. In the light of the provisions of the Foreign Exchange Management Act, 1999.

(A) Gift remittance in a current account transaction and all amounts of gift remittances exceeding US $ 5,000 needs prior approval of the RBI.

(B) Gift remittance is a capital account transaction and all amounts of gift remittance exceeding US $ 5.000 needs prior approval of the RBI.

(C) Gift remittance is a current account transaction and all amounts of gift remittances exceeding US $ 7,500 needs prior approval of the RBI.

(D) No permission of the RBI is required as the gift remittance is within the specified limits. ***(2 Marks)***

2.3 Whether Mr. Biswajit Mondal had validly brought INR currency notes into India?

(A) No, Mr. Biswajit has bought in excess INR 25,000 than the prescribed limit.

(B) Yes, as there are no restrictions of bringing any amount into India from Nepal or Bhutan.

(C) No, Mr. Biswajit Mondal has brought INR currency notes with denominations of INR 500.

(D) Yes, if Mr. Biswajit Mondal has provided a declaration in respect of the same to the Custom Authorities ***(2 Marks)***

2.4 Whether it was necessary for Mr. Andrews to provide any declaration to the Custom Authorities of India in respect of the EGP brought by him into India, if 1 USD = 18.88 EGPs?

(A) No, as Mr. Andrews is a person resident outside India.

(B) Yes, as the amount of currency notes exceeds $ 5,000 in equivalent.

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(C) *No, as the aggregate of EGPS in all forms did not exceed $ 10,000 in equivalent.*

(D) *No, as there is no restriction in bringing foreign exchange, without any limit, in any form in India.* ***(2 Marks)***

2.5 *Which of the following persons would be deemed to be guilty of contraventions committed by PPL under the provisions of the Competition Act, 2002.*

(A) *PPL, Mr. Biswajit, Mr. Atanu and Mrs. Riva, respectively.*

(B) *PPL only.*

(C) *PPL, Mr. Biswajit, Mr. Atanu, respectively.*

(D) *PPL, Mr. Biswajit, Mr. Atanu, Mr. Devjyoti and Mrs. Riya respectively.* ***(2 Marks)***

Part-B

Answer the following Questions

In the light of the provisions of the Foreign Exchange Management Act, 1999. Examine the following:

2.6 (i) *Whether PPL was permitted to make payment for meeting expenses of Mr. Andrews in India?* ***(3 Marks)***

(ii) *Whether Prithvi Private Limited was required to get any permission for remitting the amount of commission to Mr. Lee, if I USD = 18.88 EGPs and 1 USD = ₹75?*

(3 Marks)

2.7 *The role of the Competition Commission of India is vital in order to ensure healthy competition in the market. Determine the legal validity of the Government's action in terms of 'making reference to" and "refusal to consider the opinion" finished by the Competition Commission of India.* ***(4 Marks)***

2.8 *Mr. Mahesh, was one of the members of the CCL. On the basis of information that he has acquired such financial interest as was likely to affect prejudicially his functions as member of the Commission, the Central Government appointed an officer to hold an inquiry. Subsequently, reacting on the report of the said officer, the Central Government issued an order to remove Mr. Mahesh as a member of the CCI. Decide whether the action of the Central Government is in order under the provisions of the Competition Act, 2002.*

(5 Marks)

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Answer to Case Study 2

MCQs Answer

2.1 B

2.2 *D*

2.3 C

7.4 B

2.5 D

2.6 (i) As per **Master Direction No. 17 – Import of Goods and Services**, a person resident in India may make payment in rupees towards meeting expenses on account of boarding, lodging and services related thereto or travel to and from and within India of a person resident outside India who is on a visit to India.

As per Section 2(v) of the FEMA, 1999, person resident in India, inter-alia, means - any person or body corporate registered or incorporated in India.

Here in the case study, all the expenses incurred by Mr. Andrews in INR on account of his boarding, lodging and travelling in India were paid by PPL for which it was going to be reimbursed later on by Belashom LLC.

In the instant case, PPL being a person resident in India, was permitted to make payment for meeting expenses of Mr. Andrews in India.

(ii) As per Schedule III (Transactions which are prohibited) under the Foreign Exchange Management (Current Account Transactions) Rules, 2000, remittance of commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance, whichever is more, by persons other than individuals, shall require prior approval of the Reserve Bank of India, irrespective of whether it is made through EEFC account or not.

In the given case, the deal for the commercial property was finalized for ₹ 650 lakhs and Mr. Lee was remitted 6,00,000 EGPs as commission amount, out of EEFC account of PPL.

Remittance of commission amount to Mr. Lee for sale of property was exceeding USD 25,000 i.e., was **USD 31780** (6,00,000/18.88 USD)

Whereas 5% of inward remittance from sale of property was ₹ 650 lakhs*5% = ₹ 32.5 lakhs **= USD 43,333** (₹ 32,50,000/ ₹ 75).

Considering the limits for remittance of commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India (i.e. exceeding USD

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25,000 or five percent of the inward remittance, whichever is more), the commission remitted to Mr. Lee is USD 31780 which is well within the prescribed higher limit of 5% of the inward remittance as computed above.

Hence, no prior approval of RBI is required.

2.7 Chapter VII of the Competition Act, 2002, deals with provisions on Competition Advocacy given under Section 49. It reads as under-

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

(2) The opinion given by the Commission, shall not be binding upon the Central Government or the State Government, as the case may be in formulating such policy.

Hence, the Central Government is legally correct in both of the aforesaid aspects i.e. 'making reference to' & 'refusal to consider the opinion' as furnished by the Competition Commission.

2.8 Removal of Chairperson /Members by Central Government [Section 11(2) of the Competition Act, 2002]

The Central Government may, by order, remove the Chairperson or any other Member from his office if such Chairperson or Member, as the case may be,—

(a) is, or at any time has been, adjudged as an insolvent; or

(b) has engaged at any time, during his term of office, in any paid employment; or

(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(d) **has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or**

(e) has so abused his position as to render his continuance in office prejudicial to the public interest; or

(f) has become physically or mentally incapable of acting as a Member.

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Removal of Members on account of specified reasons only by the Supreme Court [Section 11(3)]

No Member shall be removed from his office on the ground specified in clause (*d*) or clause (*e*) of that sub-section unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed.

In the instant case, Mr. Mahesh was removed as a member of CCI by the Central Government. The action of the Central Government is not in order as in the case where the member of CCI has acquired such financial interest as is likely to affect prejudicially his functions as a Member, the Supreme Court must report that the member concerned on such ground ought to be removed.

CASE STUDY - 3

Mr. Rajesh and Mr. Suresh were childhood friends. They grew up together sharing everything including their passion for construction. So, upon attaining the majority, they started their own venture and formed a Public Limited Company named R.S. Constructions Limited (RSCL). Their businesses flourished and soon they became a household name. Expecting a future uptrend in land prices and better prospects for commercial development, both of them decided to build land bank across India. So, R.S. Constructions Limited hired the services of Mr. Sanjay to assist in the process of acquisition of lands. R.S. Constructions Limited issued a detailed offer letter to Mr. Sanjay for the purchase of around 100 acres of land at a maximum price of INR 10,00,000 per acre in different parts of India within a period not exceeding five years. The said offer was accepted by Mr. Sanjay by a letter of acceptance. A legally binding and valid contract came to be in force between R.S. Constructions Limited and Mr. Sanjay.

Mr. Sanjay received from R.S. Constructions Limited, a sum of INR 1,000 crore as a loan/ advance for the purchase of land as specified in the contract between the parties, Mr. Sanjay purchased various movable and immovable properties with the fund received from R.S. Constructions Limited. Since all the funds could not be invested directly in the land as required by the contract, investments were made by Mr. Sanjay by himself or through his Company in purchase of immovable property including land, built-up residential and commercial buildings, etc. both in India and abroad. Investments were also made in fixed deposits in the name of Mr. Sanjay and his associated companies. Investments were also made in the movable properties including bullions, precious stones, bank balances, and luxury cars. He also created fictitious companies out of the proceeds that he received from RSCL and made investments in smuggled items, booking false incomes on trading/use of such items.

In the meantime, the Director of Enforcement initiated a suo moto proceedings under the provisions of the Prevention of Money Laundering Act, 2002 (PMLA, 2002) and registered a complaint under Section 3 and Section 4 of the Act, and attached the properties of Mr. Sanjay

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under the PMLA, 2002. Aggrieved by the action of the Director of Enforcement. Mr. Sanjay got a stay from the High Court for any proceedings under the said Act. The stay was subsequently vacated

Mr. Rajesh, in the meantime, started entering into fictitious transactions and all the proceeds from the same were diverted to a different offshore Companies. Mr. Rajesh also arranged a credit sanction for exports to be made to a fictitious Malaysian Company. The money so received was diverted to a Malaysian based benami Company owned by Mr. Rajesh and was later on re-routed to India, Most of the transactions that took place were in between close contacts of Rajesh. As Mr. Rajesh frequently needed to travel to Malaysia, he bought a flat there. It was purchased with transmittals beyond the permissible limits under the Liberalised Remittance Scheme (LRS).

Mr. Rajesh's maternal uncle resided in London since 2005. He died in the year 2019, But in the year 2018, out of natural love and affection, he gifted his eastern London mansion worth $ 1,50,000 to Mr. Rajesh. His family felt rejoiced, to hear that, they now have a home in London too. In 2020, Mr. Rajesh's cousin residing in London, contacted him to buy a new mansion, built on the side of the river Thames. The cost of the mansion was $ 4,00,000, His cousin advised him to buy the mansion jointly with him. He sold the property for $ 2,00,000 and with that amount, he jointly bought the new mansion with his cousin. In between, Mr. Rajesh went on a vacation to Hungary. He took $ 7,000 along with him. On returning, he had $ 3,300 unspent with him. Out of this amount he gave $ 1,000 to his friend, who is going abroad next month.

Rajesh's yet another maternal uncle residing in Nagpur has been subjected to investigation under the PMLA, 2002 on account of information of bank accounts in tax haven country X which was shifted with money earned from extortions. In this regard, Mr. "Z", the Investigating Officer of this case, is of the opinion that certain information such as number of accounts and details of transactions may be available only from country "A". Hence, he made an application to the Special Court seeking permission to write a letter to the Competent Authority of Country 'A' to seek information.

In the meantime, Rajesh came to know that his childhood friend Mr. Suresh used his car for smuggling cash and the Special Court found on conclusion of trial that an offence of money laundering was committed by Mr. Suresh under the PMLA, 2002. The car was under hypothecation to a Nationalized Bank for the car loan obtained. Nevertheless, the car was confiscated by an order of the Special Court made under the provisions of the PMLA, 2002.

On the basis of the above inputs given in the case study, you are requested to answer the following Multiple Choice Questions (MCQs). Please choose the correct options:

3.1 The Investigating Officer made an application to the Special Court seeking permission to write a letter to the Competent Authority of Country "A" seeking information. In this regard:

(A) The Special Court is empowered to act on the requests of the Investigating Officer.

(B) The Special Court is not empowered to act on the requests of the Investigating Officer.

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(C) *The Special Court needs the prior approval of the Central Government in this regard.*

(D) *The Special Court can recommend the request of the Investigating Officer to the Police Officers.* ***(2 Marks)***

3.2 *The Director of Enforcement provisionally attached the properties of Mr. Sanjay Such provisionally attached properties can be attached for a:*

(A) *Period not exceeding 120 days from the date of the order including the period of stay granted by the High Court.*

(B) *Period not exceeding 180 days from the date of the order including the period of stay granted by the High Court.*

(C) *Period not exceeding 180 days from the date of the order excluding the in period of stay granted by the High Court.*

(D) *Period not exceeding 120 days from the date of the order excluding the period of stay granted by the High Court* ***(2 Marks)***

3.3 *Mr. Suresh's car was confiscated by an order of the Special Court. In this regard:*

(A) *The Special Court cannot order to confiscate the car when it is encumbered to a Nationalized Bank.*

(B) *The Special Court can order to confiscate the car and declare such an encumbrance to be void.*

(C) *The Special Court can confiscate the car despite the existence of an encumbrance provided, it gets the consent of the Central Government.*

(D) *The Special Court will leave the matter to be handled by the Police Officers.*

(2 Marks)

3.4 *On returning from London, Mr. Rajesh had unspent $ 3,300. He gave $ 1,000 to his friend, who was leaving abroad next month. Is he permitted to do so?*

(A) *Rajesh needs to give a declaration to the authorised agent that he gave $1,000 of the amount remaining with him to his friend.*

(B) *Rajesh cannot do so, as he needs to deposit the amount exceeding beyond $ 2,000 to the Authorised Dealer (AD) within specified days.*

(C) *Rajesh needs to surrender the remaining $ 3,300 to the AD within specified days.*

(D) *Rajesh can do so, as he bought this amount from AD.* ***(2 Marks)***

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3.5 Mr. Rajesh's residential flat in Malaysia was bought in contravention of the FEMA, 1999 regulations. Fearing legal action against him, he wants to gift the same to his nephew, Mr. Udav, who is residing in Malaysia for the last 15 months with him. Can he do so?

(A) Since, Mr. Udav is a resident of India, so, Mr. Rajesh can gift him the flat.

(B) Mr. Rajesh can only transfer it to Udav via inheritance.

(C) Mr. Rajesh cannot gift it to Udav as it was bought in contravention of the FEMA, 1999 provisions.

(D) Mr. Rajesh can gift it to Udav as the FEMA, 1999 provisions are not applicable to a property located in Malaysia. ***(2 Marks)***

Part-B

Answer the following questions:

3.6 Properties confiscated under the provisions of the Prevention of Money Laundering Act, 2002, shall be available for disposal by the Ministry of Finance as and when necessary. Examine the correctness of the above statement. ***(3 Marks)***

3.7 One of the employees of R.S. Constructions Limited was given an offer by a Company vendor to disclose him the bid quoted by the Company. The employee accessed the computer of Mr. Rajesh and passed on the information to the vendor and thus helped him to grab the said plot of land. Will the employee be liable under the Prevention of Money Laundering Act, 2002? ***(2 Marks)***

3.8. Whether a statement made before Enforcement Directorate (PMLA, 2002) is binding on the accused without proof as admission? ***(4 Marks)***

3.9. Mr. Rajesh jointly bought a mansion with his cousin in London, Evaluate on the validity of the acquisition of the said immoveable property outside India by Mr. Rajesh and is there any legal consequences according to the provisions of the FEMA, 1999? ***(6 Marks)***

Answer to Case study 3

3.1 A

3.2 C

3.3 B

3.4 B

3.5 C

3.6 As per the provision given under Section 9 of the Prevention of Money Laundering Act, 2002, where an order of confiscation has been made in respect of any property of a person,

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all the rights and title in such property shall vest absolutely in the **Central Government free from all encumbrances**.

Further section 10 of the Prevention of Money Laundering provides of management of confiscated properties -

(1) The Central Government may, by order published in the Official Gazette, appoint as many of its officers (not below the rank of a Joint Secretary to the Government of India) as it think fit to perform the functions of an Administrator.

(2) The Administrator appointed by Central Government, shall manage the property in relation to which an order has been made in such manner and subject to such conditions as may be prescribed.

(3) The Administrator shall also take such measures, as the Central Government may direct, to dispose of the property, which is vested in the Central Government under Section 9**.**

Thus, the statement "Properties confiscated under the provisions of the Prevention of Money Laundering Act, 2002, shall be available for disposal by the Ministry of Finance (i.e. Central Government) as and when necessary", is correct.

Note: As per section 10 of the PMLA, 2002 stating that **"**The Central Government may, by order published in the Official Gazette, appoint as many of its **officers** (not below the rank of a Joint Secretary to the Government of India) as it think fit to perform the functions of an Administrator." Nowhere section talks about "officers" means the Ministry of Finance". Answer based on this assumption concluded as below was taken into consideration:

"Thus, the statement "Properties confiscated under the provisions of the Prevention of Money Laundering Act, 2002, shall be available for disposal by the Ministry of Finance as and when necessary", is not correct."

3.7 According to the scheduled offence given under the Prevention of Money Laundering Act, 2002 (PMLA), under the Paragraph 22 of Part A which deals with the offences related to breach of confidentiality and privacy under the Information Technology Act, 2000, the employee is liable.

The employee in the given case, without the consent of Mr. Rajesh, accessed the electronic records and passed on the official information to the vendor without permission.

This information can produce large profits and legitimize the ill-gotten gains through money laundering. It is punishable under Section 72 of the Information Technology Act, 2000 and hence, as mentioned above, the employee is liable under PMLA.

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Note: Answer based on the reference of being a scheduled offence, was also taken as a correct answer.

3.8 As per the judgment given in *Dalmia Cement Bharat Ltd. Vs State of AP, Hyderabad, u*nder the PMLA, a person is required to give truthful statement if such person is summoned by the Director. This power to the director is given under section 50(2) of PMLA which provides that Director (or additional director, joint director, deputy director or assistant director) has the power to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding. All such summoned persons are bound to state the truth or make statements, and produce such documents as may be required [Section 50(3) of PMLA].

Furthermore, the court held that "The protection under Article 20(3) of the Constitution of India is available at the stage of investigation, the court held that the provisions of Section 50 of PMLA are required to be read down so as to ensure that petitioners are not prejudiced in the CBI case as well as under PMLA."

In line with said judgement, a statement made before ED, is binding on the accused without proof as admission.

3.9 According to Section 6 (4) of the FEMA, 1999 read with the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015, a person resident in India **may hold, own, transfer or invest in foreign currency, foreign security or any immovable property** situated outside India **if such currency, security or property was acquired, held or owned by such person** when he was resident outside India or inherited from a person who was resident outside India.

Further, Regulation 5 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property Outside India) Regulations, 2015 specifies that-

A person resident in India may acquire immovable property outside India, jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India;

For the purposes of these regulations, '**relative'** in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

In the instance, Mr. Rajesh jointly bought a mansion with his cousin in London. Though there were no outflow of fund from India, but jointly purchasing of mansion with the cousin is not included in the scope of relative as provided for the purpose of this section.

So the acquisition of the immovable property outside India (Mansion in **London), jointly with Mr. Rajesh is not valid.**

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Legal Consequences: As per Section 13 (1A) and (1C) of the FEMA, if any person is found to have acquired any immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to Section 37A(1)-

- he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India from the immovable property.
- also punishable with imprisonment for a term which may extend to five years and with fine.

CASE STUDY - 4

The Central Government of India proposed that by the year 2028, all new vehicles on roads in India shall be zero-emission vehicles Motivated by the thought process of the Central Government, a young dynamic student, named Sri Krishna, who had just passed Plus two examinations from India, got an admission in the year 2016 in Mechatronics Engineering at an University in the USA. He passed out his undergraduate Degree in Mechatronics in the year 2019.

Sri Krishna then came back to India in July 2020 to see the future of Electric Vehicles in India but was disappointed to see the slow progress. He decided to start a Company in Ukraine as well as in India too, which will manufacture Electric Vehicles in Ukraine and export invertors for electric vehicles from India to Ukraine, being a big demand in the international market.

He ventured out for establishing a Company along with his graduated friends for producing heavy-duty battery powered drive systems for underground mining in East Ukraine. As planned, a Company was incorporated in September,2020. under the name SPV Inc. and he was one of the Directors in that Company. The Company started operations in Kyiv, Ukraine SPV Inc. got funds inducted in the Company from various other partners and soon diversified into various other segments like designing diesel-to-battery conversion kits and rebuild mining machines to electric versions

SPV Inc. got orders for the next 2 years to convert Diesel mining trucks into Electric trucks and the Government of Ukraine also funded the Company with 5 bn US Dollars, to speed up its operations for better and emission free environment. The Company's business was flourishing.

In January 2021, Sri Krishna's parents visited him in Ukraine and returned within 30 days to India. Sri Krishna gifted his mother gold necklace of 40 grams and his father a gold chain of 20 grams. He also gave US Dollars 30,000 to his father for their use in India. While coming back in March 2021, their parents never declared gold and foreign currency with the Customs Authorities at the Bengaluru Airport.

On 7th August 2021, Sri Krishna came to India and opened an NRE account and transferred funds from his profits from Ukraine. He bought a residential villa for his stay, while in India and for his parents measuring 8000 square feet in Kolar district for ₹ 7 crore from a Real Estate Agent. He transferred ₹ 2 crore from his NRE account, part of the money was financed from a

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Bank which gave him a loan of ₹ 4.50 crore after mortgaging his ancestral property in Koramangala in Bengaluru having market value of ₹ 5 crore and the balance of ₹ 50 lakhs paid by him in US Dollars which he brought in cash from Ukraine and his father gave 30,000 USD (USD = ₹ 80), which was earlier given by Sri Krishna and the money having been kept at home for the last 7 months. The property was registered in his father's name and his father submitted his KYC documents to the bank. Sri Krishna was made a guarantor/co-applicant in the loan.

During his stay, Sri Krishna visited many companies which were interested in setting up electric vehicle plants in India and he signed MoUs with them. His father, along with Sri Krishna's local friends and relatives, opened a 100% Export Oriented Unit, named Greenage India Private Limited, in Kolar District, Karnataka in November 2021 for manufacturing invertors, a major part used in electric vehicles. His father was appointed as a Director in this Company. Entire production was meant for exporting to SPV Inc. For this purpose, Company took a loan of ₹ 120 crores from PNR Bank and ₹ 10 crore from Karna Bank. The operation started in full swing under the supervision of other Directors. The Company sent 2 shipments of invertors worth ₹ 24 crore (equal to USD 3 Million) to SPV Inc. on 31.01.2022 but the shipment was held up on the way due to war in Ukraine.

In the 3rd week of February 2022, when Sri Krishna was to travel back to Ukraine, Russia invaded Ukraine in a major escalation. The entire Ukraine was declared a No-Fly Zone and all international financial transactions were halted by the Ukrainian Government. In view of this, Sri Krishna was forced to stay in India for the next 6 months. Hearing the situation in Ukraine and destruction of many commercial plants / buildings by Russian bombing and seeing the defaults in monthly instalments of the Company and Sri Krishna himself, the Bank sent overdue notices to his father, to him and to Greenage India Private Limited and classified the bank accounts as Non-Performing Asset (NPA). As Sri Krishna was unable to submit any amount to clear his outstanding, PNR Bank sent Greenage India Private Limited, his father and Sri Krishna final notices under Section 13(2) of the SARFAESI Act, 2002 and asked for clearance of principal and interest to the tune of ₹109 crore. The notices given above expired on 30th September 2022.

Subsequently, PNR Bank took possession of the mortgaged ancestral property, his newly bought Villa and took over the Company. Greenage India Private Limited. The PNR Bank, then, transferred the entire loan bucket to an Asset Reconstruction Company (ARC) named Suraksha Limited, which was registered with RBI and regulated under the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act, 2002). ARC, Suraksha Limited advertised for sale of properties in local newspaper Kolar Express and invited bids for all the properties. All the properties fetched ₹130 crores and excess money was sent to Sri Krishna and to the Company respectively.

On seeing the credit of this money in the Company's bank account, as well as his personal bank account, Sri Krishna (a co-owner of villa) alongwith his father, on behalf of his Company, filed a legal case against the bank and the ARC stating the following reasons:

(i) The said ARC, namely Suraksha Limited is not a valid ARC as they had failed to comply with the conditions prescribed for an establishment of an ARC;

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(ii) They never started their businesses, and

(iii) The bank has favoured them.

In view of the above submission, their certificate of registration needs to be cancelled and the properties taken over and sold is legally invalid and nevertheless should be returned to him and to Greenage India Private Limited. On an another transaction, Sri Krishna took ₹5 crores by cash from various prospective customers which was not disclosed anywhere. Out of this proceeds, he bought a property as a joint owner with his mother. The Initiating Officer, issued a Notice to Sri Krishna to show cause as to why the above property should not be considered as a benami property and subsequently, he passed an order provisionally attaching the property with the prior approval of the Adjudicating Authority: The Adjudicating Authority, after giving Sri Krishna an opportunity of being heard made an order confiscating the benami property.

Part-A

On the basis of the above inputs given in the case study, you are requested to answer the following Multiple Choice Questions (MCQs). Please choose the correct options:

4.1 In the given case study, Sri Krishna's parents brought gold ornaments of 60 grams along with USD 30,000 for their use in India. While coming back in March 2021, his parents never declared gold and foreign currency with the Customs Authorities at the Bengaluru Airport. Whether this act will constitute an offence under the provisions of the Prevention of Money Laundering Act, 2002?

(A) Yes, because the gold and US dollar brought is beyond the permissible limit.

(B) Yes, because of an evasion of duty chargeable on goods on and above the permissible limit and they need to deposit US dollars within 180 days of their return.

(C) No, because they are carrying the original bills of the purchased gold which was gifted by their son and US dollars are within permissible limits.

(D) No, because gold and US dollars bought is within the permissible limits. ***(2 Marks)***

4.2 In the case of PNR Bank and Karna Bank acting as secured creditors, what percentage of amount outstanding on a record date, is required to either of them for exercising all the rights conferred on any of them under the relevant provisions of the Insolvency and Bankruptcy Code, 2016 which is binding on all secured creditors.

(A) Not less than 51% in value of the amount outstanding

(B) Not less than 33% in value of the amount outstanding.

(C) Not less than 75% in value of the amount outstanding

(D) Not less than 66% in value of the amount outstanding ***(2 Marks)***

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4.3 Every reporting entity shall within how many days after the commencement of an account based relationship with a client, file the electronic copy of the client's KYC records with the Central KYC Records Registry under the provisions of the Prevention of Money Laundering Act, 2002

(A) Within 30 days

(B) Within 60 days

(C) Within 10 days

(D) Within 90 days ***(2 Marks)***

4.4 The permissible limits of bringing gold to India by Sri Krishna's parents is:

(A) 40 grams and 20 grams having value? 1 lakh and 50,000 to female and male respectively.

(B) 50 grams and 30 grams to a female and a male irrespective of the value

(C) Gold worth 3 lakhs and 1,00,000 to a female and a male respectively.

(D) Cannot bring any gold as duty free allowance as his parents stayed only for 30 days in Ukraine. ***(2 Marks)***

4.5 Under the Foreign Exchange Management Act, 1999, the maximum amount of money that can be transferred by Sri Krishna to his NRE account in India in a financial year is limited to:

(A) USD 2,50,000.

(B) USD 1,00,000.

(C) USD 1 Million

(D) No Limitation. ***(2 Marks)***

Part-B

Answer the following questions:

4.6 Whether the purchase of villa in Kolar by Mr. Sri Krishna in the name of his father is barred by the provisions of the Prohibition of Benami PropertyTransactions Act, 1988? Whether the payment made in cash in the form of USD by Mr. Sri Krishna is legal in India under the provisions of the Foreign Exchange Management Act, 1999? ***(6 Marks)***

4.7 What is the option available with Sri Krishna against the confiscating order of the property passed by the Adjudicating Authority under the provisions of the Prohibition of Benami Property Transaction Act, 1988? ***(4 Marks)***

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4.8. Sri Krishna, along with his father filed a legal case against the Bank and the ARC on certain grounds and prayed for cancellation of certificate of registration. Explain on what grounds can it be done legally and by whom such powers can be exercised? What shall be the remedy to the aggrieved ARC? ***(5 Marks)***

Answer to Case study 4

MCQs Answer

4.1 B

4.2 None of the options are correct.

4.3 D

4.4 D

4.5 D

4.6 Purchase of villa:

Under Section 2(9) of the Prohibition of Benami Property Transactions (PBT) Act, 1988, "Benami transaction" means (inter alia) – a transaction or an arrangement –

(a) where a property is **transferred to**, or is **held by**, a person, and the **consideration** for such property has been provided, or paid by, **another person**; and

(b) the property is held for the **immediate or future benefit**, direct or indirect, of the **person** who has provided the **consideration**. **except** when the property is, (inter alia) held by—

any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual.

Further, as per Section 2(8) of the PBT Act, 1988, “Benami Property” means any property which is the subject matter of a benami transaction and includes the proceeds from such property.

Here, in the case study, Sri Krishna bought the Villa in the name of his father. As per Section 2(9) of the PBT Act, 1988, **the transaction is a benami transaction because he did not hold the property in the joint name with his father.**

Legality of payment in cash:

As per Regulation 3 of the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, an NRI or an OCI may -(a) acquire

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immovable property in India other than an agricultural land, plantation property or a farm house:

Provided that in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of

(i) funds received in India through normal banking channels by way of inward remittance from any place outside India; or

(ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder.

Provided further that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by foreign currency notes or by any other mode other than those specifically permitted by this clause.

Hence, USD brought by Sri Krishna in cash and used for payment of residential property is not legal.

4.7 Mr. Sri Krishna shall have right to appeal against confiscating order of the property passed by the Adjudicating Authority under the provisions of the Prohibition of Benami Property Transaction Act, 1988 as per section 46 of the said Act.

As per section 27 of the Prohibition of Benami Property Transaction Act, 1988, where an order is passed in respect of any property under section 26(3) holding such property to be a benami property, the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating the property held to be a benami property.

Provided that where an appeal has been filed against the order of the Adjudicating Authority, the confiscation of property shall be made subject to the order passed by the **Appellate Tribunal under section 46.**

Appeal by aggrieved person / officer -Any person, including the Initiating Officer, aggrieved by an order of the Adjudicating Authority may prefer an appeal, to the Appellate Tribunal against the order passed by the Adjudicating Authority under Section 26(3), within a period of **forty-five days** from the date of the order.

Power of Appellate Tribunal to entertain appeal even after expiry of 45 days -The Appellate Tribunal may entertain any appeal after the said period of forty-five days, if it is satisfied that the appellant was prevented, by sufficient cause, from filing the appeal in time.

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Hearing of parties to appeal -On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

4.8 Section 4 of the SARFAESI Act, 2002 specifies the circumstances under which Certificate of Registration of ARC, may be cancelled. The RBI may cancel a certificate of registration granted to an ARC, if such company—

(a) **ceases to carry on the business** of securitisation or asset reconstruction; or

(b) **ceases to receive or hold any investment from a qualified buyer**; or

(c) has **failed to comply with any conditions** subject to which the certificate of registration has been granted to it; or

(d) at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of section 3(3); or

(e) fails to—

(i) comply with any direction issued by the RBI under the provisions of this Act; or

(ii) maintain accounts in accordance with the requirements of any law or any direction or order issued by the RBI under the provisions of this Act; or

(iii) submit or offer for inspection its books of account or other relevant documents when so demanded by the RBI; or

(iv) obtain prior approval of the RBI required under section 3(6) :

Before cancelling a certificate of registration on the ground that the ARC has failed to comply with the provisions of clause (c) or has failed to fulfil any of the conditions referred to in clause (d) or sub-clause (iv) of clause (e), the RBI, unless it is of the opinion that the delay in cancelling the certificate of registration granted under section 3(4) shall be prejudicial to the public interest or the interests of the investors or the ARC, shall give an opportunity to such company on such terms as the RBI may specify for taking necessary steps to comply with such provisions or fulfilment of such conditions.

Remedy to the aggrieved ARC-An ARC aggrieved by the order of cancellation of certificate of registration may prefer an appeal, within a period of 30 days from the date on which such order of cancellation is communicated to it, to the Central Government. However, before rejecting an appeal such company shall be given a reasonable opportunity of being heard.

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Accordingly, on the basis of the above grounds, RBI can cancel the certificate of registration granted to an ARC. If ARC is aggrieved with the order of RBI, it may file appeal to the Central Government.

CASE STUDY - 5

Back Ground

Mr. Krishna Kumar (KK) built a multi-billion dollar diverse business empire with the holding Company KK Holdings Private Limited (KKHPL). He made his money by working in the United States of America for more than 15 years and then came back to his hometown, Mangaluru, India and established his business empire. He incorporated two companies as subsidiaries of KKHPL, namely (i) KK Electric Vehicles Private Limited (KKEVPL) and (ii) KK Infrastructure Private Limited (KKIPL). With India opening itself to technological advancements, KKEVPL entered into a strategic tie-up with a foreign automobile Company to start manufacturing e-scooters and e-three wheelers. (Electric Vehicles - EV).

Formation of a Third Subsidiary

Both KKEVPL and KKIPL did wonderful business and therefore KKHPL incorporated a third subsidiary, KK Decors Private Limited (KKDPL) for providing interior business and furnishing for homes and offices. While KKDPL started business on a sound note, the performance was not upto the expectations and KKHPL sold the shares of KKDPL to a consortium, who acquired KKDPL, but failed to manage its operations and finally, KKDPL went into Corporate Insolvency Resolution Process (CIRP). Another interior manufacturer, Wonder Decors Private Limited (WDPL) submitted the resolution plan for the same under the Insolvency and Bankruptcy Code, 2016 (IBC, 2016). One of the customers of KKDPL owed ₹10 lakhs of operational debts to KKDPL. Such debt was overdue for quite a long period. KKDPL sent a demand notice to the customer, which was not responded to at all.

Entering into Real Estate Business

KKIPL, through its commitment to quality and timely deliveries made a good name for themselves in the Mangaluru real estate market involved in Infrastructure projects and captured a share of 35% in the market, KKIPL commenced a large real estate project for which it obtained ₹950 lakhs as advance payments from the house owners during the period of construction.

However, KKIPI came to know that the project land was situated in a environmentally strategic zone and after 60% of the construction, the project had to be suspended, resulting in significant delay in handing over of the property to the customers.

The Allottees then formed a registered association themselves and they immediately moved the National Company Law Tribunal (NCLT) seeking their money back from KKIPL along with interest and also the closure of KKIPL under the IBC, 2016. In the opinion of KK, the act of allottees association would not be entertained by NCLT. But, NCLT consented to the initiation of the Corporate Insolvency Resolution Process against KKIPL. However, NCLT in its order, did not award interest to allottees.

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KKIPL purchases cement from Number One Cement Limited (NOCL) for the construction of its projects and has an amount of ₹ 200 lakhs pending to be paid. Further, NOCL had also lent an inter corporate loan to KKIPL of ₹ 400 lakhs at an interest of 9% pa.

KK was informed by the legal team of KKEVPL, that someone had furnished a complaint to the Competition Commission of India (CCI) that another EV manufacturer is not selling spare parts of its vehicles in the open market, causing a denial of market access for independent mechanics and repairers apart from charging high prices at its own service station. While disposing of the complaint, CCI conducted an inquiry against 7 other electric vehicle manufacturers. The CCI discovered that KKEVPL also sells spare parts at its own service station only, which may be considered as anti-competitive. KKEVPL feels that CCI is not authorized to impose a penalty say at 39% of the average turnover of the last three preceding financial years like a Tribunal and extending the scope by conducting inquiry is also not allowed to CCI and hence he is consulting the legal team to decide how they shall proceed and what the legal remedy available is. In the meantime, his legal team also cautioned him that the business of KKIPL, could also come into the purview of the CCI since they are holding more than 35% of the market share. KK could not believe this since, as part of his CA course, he studied that the Competition Act, 2002 dealt with sale of goods or service and real estate activity (i.e. sale of an apartment) is neither a sale of good nor a service.

Mr. Raju has recently been appointed as one of the members of Competition Commission of India (CCI) by the Central Government for 5 years. Since a case is pending against KKEVPL, of which he is investigating, Mr. Raju decided to resign from CCI.

Part - A

On the basis of the above inputs given in the case study, you are requested to answer the following Multiple Choice Questions (MCQs). Please choose the correct options:

5.1. For the purpose of IBC 2016, what would be the status of NOCL?

(A) An Operational Creditor.

(B) A Financial Creditor.

(C) Partly an Operational and partly a Financial Creditor.

(D) NOCL has option to choose on whether to get classified as an Operational Creditor or a Financial Creditor. ***(2 Marks)***

5.2 If the resolution plan as received from WDPL by the insolvency professional contained a provision for combination, under the provisions of the Competition Act, 2002, then who is required to seek approval and from which authority is required if the resolution plan is to be considered for approval by Committee of Creditors (CoC)?

(A) Insolvency Professional to seek prior approval from CCI and Adjudicating Authority.

(B) KKDPL to seek prior approval from the Adjudicating Authority

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(C) *The Consortium managers to seek prior approval from CCL*

(D) *WDPL to seek the prior approval from the CCI.* **(2 Marks)**

5.3 *Can KKDPL apply for Corporate Insolvency Resolution Plan (CIRP) against the customers who have overdue amounts?*

(A) *No, because the claim is not yet denied by the specified customer.*

(B) *Yes, KKDPL can apply for initiation of CIRP against the customer.*

(C) *No, because the requisite years have not been elapsed yet, from the conclusion of its own CIRP.*

(D) *No, the Corporate Debtor who underwent CIRP itself, cannot apply for initiation of CIRP against other Corporate Debtors.* **(2 Marks)**

5.4 *Assume that there are no legal proceedings going on between allottees and KKIPL and NCLT admitted the application filed by the allottees for initiation of the Corporate Insolvency Resolution Process against KKIPL but immediately thereafter KKIPL and the Allottees came to a satisfactory settlement. In such a case, the application for CIRP:*

(A) *May be allowed to be withdrawn by the NCLT on an application by the Allottees subject to the approval of the Committee of Creditors with a 90% voting share.*

(B) *May be allowed to be withdrawn by the NCLT on an application by the Allottees.*

(C) *May be allowed to be withdrawn by the NCLT on an application by the Resolution professional.*

(D) *Cannot be withdrawn.* **(2 Marks)**

5.5 *Mr. Raju decided to resign from CCI and therefore, he has to submit notice of his resignation to:*

(A) *Chairman of CCI.*

(B) *All the other members of CCI.*

(C) *Chairman and all the other members of CCL.*

(D) *Central Government.* **(2 Marks)**

Part-B

Answer the following questions:

5.6 *Examine critically, whether the belief of KK that CCI has no jurisdiction over KKIPL case is valid?* **(4 Marks)**

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5.7 KK would like your advice on whether the quantum of penalty of 5% of the average turnover of the last three preceding financial years of KKEVPL if leviable is within the purview of CCI? ***(3 Marks)***

5.8 Does CCI have the authority to expand the scope of its inquiry to cover other electric vehicle manufacturers other than the Company against whom the complaint was made?

(3 Marks)

5.9. (i) How would the advance payment made by the house owners be considered under the provisions of the IBC, 2016? ***(2 Marks)***

(ii) How advance given by home buyers against the allotment is distinct from the debt of the operational creditor? Explain, in the light of decided case law, if any,

(3 Marks)

Answer to Case study 5

MCQs Answer

5.1 C

5.2 D

5.3 D

5.4 A & B

5.5 D

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

It is clear that the meaning of 'service' as envisaged under the Act, is of very wide magnitude and is not exhaustive in the application. It is not disputed that KKIPL undertakes to construct an apartment intended for sale to potential consumers after developing the land. Therefore, it is explicit that this kind of activity is a provision of service in connection with the business of commercial matters such as real estate or construction.

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Moreover, as KKEVPL is the holding company to KKIPL with 35% of market share, so the business of KKIPL will also come under the purview of the CCI.

Hence, the belief of KK that CCI has no jurisdiction over KKIPL case, is invalid.

5.7 As per section 27 of the Competition Act, 2002, where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders-

(i) Commission may direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be.

(ii) Impose penalty as it may deem fit which **shall be not more than ten percent of the average of the turnover for the last three preceding financial years**, upon each of such person or enterprises which are parties to such agreements or abuse.

Yes, in the light of the stated provisions, the quantum of penalty of 3% of the average turnover of the last three preceding financial years of KKEVPL, leviable in this case study, is within the purview of CCI.

5.8 Section 19 of the Competition Act, 2002, gives power to the Commission that it may make inquiry into certain agreement and dominant position of enterprise. Its sub-section (1) provides that the Commission is empowered to inquire into any alleged contravention of the provisions contained in Section 3(1) or Section 4(1) either on its own motion or on:—

(a) receipt of any information in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

Case Laws:

As per the decision of the Hon'ble SC in *Excel Crop Care Limited v. Competition Commission of India*, it was held that the CCI is well within its power to expand the scope of inquiry to include other issues and parties. This is because at the prima facie stage, the CCI may not have all information in respect of the parties' conduct.

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Delhi High Court in a matter of Mahindra Electric Mobility Limited & Ors. Against CCI & another, relied upon the above Supreme Court's decision.

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

5.9 (i) As per Section 5 (8) of the Insolvency and Bankruptcy Code, 2016, Financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and it inter – alia includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing; and any amount even raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and "allottee" and "real estate project" shall have the meanings respectively assigned to them in Section 2 of the Real Estate (Regulation and Development) Act, 2016.

Hence advance payment against allotment by allottees shall be regarded as 'financial lending'. Hence, Home buyers / allottees are Financial Creditors under the IBC.

(ii) In the leading judgement *Pioneer Urban Land and Infrastructure Ltd and Anr vs Union of India,* distinction is marked between "advance given by home buyers against allotment" from the "debt of the operational creditor".

In operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor in as much as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found.

Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor.

One other important distinction is that in an operational debt, there is no consideration for the time value of money – the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services.

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