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**TEST
SERIES**



SUGGESTED SOLUTION

CS PROFESSIONAL

Subject – Corporate Restructuring

Topic – Part-II Test-1 Chp-21 to 26

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Answer to Q1.A.

The Tribunal may, while passing an order of winding up of a company, direct that there shall be, an advisory committee to advise the Company Liquidator and to report to the Tribunal on such matters as the Tribunal may direct. [Section 287(1)]

The advisory committee appointed by the Tribunal shall consist of not more than twelve members, being creditors and contributories of the company or such other persons in such proportion as the Tribunal may, keeping in view the circumstances of the company under liquidation, direct. [Section 287(2)]

The Company Liquidator shall convene a meeting of creditors and contributories, as ascertained from the books and documents, of the company within thirty days from the date of order of winding up for enabling the Tribunal to determine the persons who may be members of the advisory committee. [Section 287(3)]

The advisory committee shall have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time. [Section 287(4)]

The provisions relating to the convening of the meetings, the procedure to be followed thereat and other matters relating to conduct of business by the advisory committee shall be such as may be prescribed. [Section 287(5)]

The meeting of advisory committee shall be chaired by the Company Liquidator. [Section 287(6)]

(5 marks)

Answer to Q1.B.

Section 92 provides for the passing of a discharge order by the adjudicating authority at the end of the moratorium period for discharge of the debtor from the qualifying debts. Further, the discharge order shall also provide for the discharge of penalties, penal interest and other sums owed under any contract, in respect of the qualifying debts, from the date of the application for fresh start to the date of the discharge order. A discharge order discharges only the debtor. Such discharge order is recorded in the financial history of the debtor.

Preparation and submission of final list of qualifying debts – The resolution professional shall prepare a final list of qualifying debts and submit such list to the Adjudicating Authority at least seven days before the moratorium period comes to an end. [Section 92(1)]

Discharge order by Adjudicating Authority – The Adjudicating Authority shall pass a discharge order at the end of the moratorium period for discharge of the debtor from the qualifying debts mentioned in the list under sub-section (1). [Section 92(2)]

Discharge of debtor from liabilities – Without prejudice to the provisions of sub-section (2), the Adjudicating Authority shall discharge the debtor from the following liabilities, namely: - (a) penalties in respect of the qualifying debts from the date of application till the date of the discharge order; (b) interest including penal interest in respect of the qualifying debts from the date of application till the date of the discharge order; and (c) any other sums owed under any contract in respect of the qualifying debts from the date of application till the date of the discharge order. [Section 92(3)]

Sub-section (4) of section 92 provides that the discharge order shall not discharge the debtor from any debt not included in sub-section (2) and from any liability not included under sub-section (3).

Entry in register – The discharge order shall be forwarded to the Board for the purpose of recording an entry in the register referred to in section 196. [Section 92(5)]

Discharge of any other person – Sub-section 6 to section 92 clarifies that a discharge order under sub-section (2) shall not discharge any other person from any liability in respect of the qualifying debts.

(5 marks)

Answer to Q1.C.

According to the Regulation 6(1) Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017, an insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director is independent of the corporate person:

Explanation : A person shall be considered independent of the corporate person, if he

(a) is eligible to be appointed as an independent director on the board of the corporate person under section 149 of the Companies Act, 2013, where the corporate person is a company;

(b) is not a related party of the corporate person; or

(c) has not been an employee or proprietor or a partner

i. of a firm of auditors or secretarial auditors or cost auditors of the corporate person; or

ii. of a legal or a consulting firm, that has or had any transaction with the corporate person contributing ten per cent or more of the gross turnover of such firm, at any time in the last three years.

(2) An insolvency professional shall not be eligible to be appointed as a liquidator if he or the insolvency professional entity of which he is a partner or director is under a restraint order of the Board.

(3) A liquidator shall disclose the existence of any pecuniary or personal relationship with the concerned corporate person or any of its stakeholders as soon as he becomes aware of it, to the Board and the Registrar.

(4) An insolvency professional shall not continue as a liquidator if the insolvency professional entity of which he is a director or partner, or any other partner or director of such insolvency professional entity represents any other stakeholder in the same liquidation.

(5 marks)

Answer to Q1.D.

In order to create and maintain harmony in regulatory aspects of insolvency mechanism across countries the United Nations Commission developed a Model Law on Cross-Border Insolvency. The Model Law is not a law in its own right and has no force. It provides a legal text for incorporation into national law. The following circumstances necessitated the harmonization of legislations across nations with reference to cross-border insolvency:

1. Continuing global expansion of trade and investment.
2. Increasing incidences of cross-border insolvency due to integration of trade across countries.
3. National insolvency laws of different countries have by and large not kept pace with the trend.
4. Inadequate and inharmonious legal approaches due to differences in regulatory platform across countries that hampers the rescue of financially troubled businesses and impede the protection of the assets of the insolvent debtor against dissipation.

(5 marks)

Answer to Q2.A.

As per Section 31 the provisions of this Act shall not apply to –

- (a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force;
- (b) a pledge of movables within the meaning of section 172 of the Indian Contract Act,
- (c) creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934;
- (d) creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958;
- (e) [omitted]
- (f) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930;
- (g) any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act) or sale under the first proviso to sub-section (1) of section 60 of the Code of Civil Procedure, 1908;
- (h) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;
- (i) any security interest created in agricultural land;

(j) any case in which the amount due is less than twenty per cent of the principal amount and interest thereon.

(3 marks)

Answer to Q2.B.

Section 45(2) provides that a transaction shall be considered undervalued where the corporate debtor—

- (a) makes a gift to a person; or
- (b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

(3 marks)

Answer to Q2.C.

Decision to recognize a foreign proceeding (Article 17 of the UNCITRAL Model Law) Subject to Article 6, a foreign proceeding shall be recognized under UNCITRAL Model Law if:

- (a) The foreign proceeding is a proceeding within the meaning as defined under Article 2;
- (b) The foreign representative applying for recognition is a person or body within the meaning as defined under Article 2;
- (c) The application meets the requirements of Article 15; and
- (d) The application has been submitted to the court referred to in Article 4.

The foreign proceeding shall be recognized as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests (COMI); or as a foreign non-main proceeding if the debtor has an establishment. The purpose of Article 17 is to indicate that, if recognition is not contrary to the public policy of the enacting State and if the application meets the above said requirements, recognition will be granted as a matter of course. A decision to recognize a foreign proceeding would normally be subject to review or rescission, as decision of any other court.

(3 marks)

Answer to Q2.D.

Section 25 of the Recovery of Debts and Bankruptcy Act, 1993 provide the modes of recovery of debts by the Recovery Officer.

These are

- (a) attachment and sale of the movable or immovable property of the defendant;
- (b) taking possession of property over which security interest is over created or any other property of the defendant and appointing receiver for such property and to sell the same
- (c) arrest of the defendant and his detention in prison;
- (d) appointing a receiver for the management of the movable or immovable properties of the defendant;
- (e) Any other mode of recovery as may be prescribed by the Central Government.

(3 marks)

Answer to Q2.E.

Section 51 prescribes the orders that may be passed by the adjudicating authority setting aside extortionate credit transactions.

Section 51 provides that where the Adjudicating Authority after examining the application made under subsection (1) of section 50 is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, it shall, by an order –

- (a) restore the position as it existed prior to such transaction;
- (b) set aside the whole or part of the debt created on account of the extortionate credit transaction;
- (c) modify the terms of the transaction;
- (d) require any person who is, or was, a party to the transaction to repay any amount received by such person; or
- (e) require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.

(3 marks)

Answer to Q3.A.**Steps involved in Voluntary Liquidation:**

- a) Submission of declaration(s) to ROC, stating that the company will be able to pay its dues and is not being liquidated to defraud any person;
- b) Passing of special resolution for approving the proposal of voluntary liquidation and appointment of liquidator, within four weeks of the aforesaid declaration(s). If a corporate person owes debts, approval of two-third majority creditors would also be required;
- c) Public announcement inviting claims of all stakeholders, within five days of such approval, in newspaper as well as on website of the corporate person;
- d) Intimation to the ROC and the Board about the Approval, within seven days of such Approval;
- e) Preparation of preliminary report about the capital structure, estimates of assets and liabilities, proposed plan of action etc., and submission of the same to a corporate person within forty-five days of such Approval;
- f) Verification of claims, within thirty days from the last date for receipt of claims and preparation of list of stakeholders, within forty-five days from the last date for receipt of claims;
- g) Opening of a bank account in the name of the corporate person followed by the words 'in voluntary liquidation', in a scheduled bank, for the receipt of all moneys due to the corporate person;
- h) Sale of assets, recovery of monies due to corporate person, realization of uncalled capital or unpaid capital contribution;
- i) Distribution of the proceeds from realization within six months from the receipt of the amount to the stakeholders;

- j) Submission of final report by the liquidator to the corporate person, ROC and the Board and application to the National Company Law Tribunal (NCLT) for the dissolution;
- k) Submission of NCLT order regarding the dissolution, to the concerned ROC within fourteen days of the receipt of order.

(5 marks)

Answer to Q3.B.

(a) According to Section 2(1)(z) of the SARFAESI Act, 2002, Securitisation means acquisition of financial assets by any asset reconstruction company from any originator, whether by raising of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise

(b) According to Section 2(1)(zd) of the SARFAESI Act, 2002, Secured Creditor means :

(i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (1)

(ii) debenture trustee appointed by any bank or financial institution; or

(iii) an asset reconstruction company whether acting as such or managing a trust setup by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or

(iv) debenture trustee registered with the Board appointed by any company for secured debt securities; or

(v) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance.

(c) According to Section 2(1)(zg) of the SARFAESI Act, 2002, Security Receipt means a receipt or other security, issued by a asset reconstruction company to any qualified buyer pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitization.

(5 marks)

Answer to Q3.C.

Section 36(3) provides that subject to subsection (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

- (d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;
- (e) assets subject to the determination of ownership by the court or authority;
- (f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;
- (g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;
- (h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
- (i) all proceeds of liquidation as and when they are realised.

(5 marks)