## CLUSTER 6

**1. The Board of directors of M/s APCO Limited, a listed public company, for carrying out the valuation of the immovable properties standing in the name of the company as required under the provisions of the Companies Act, 2013 proposes to appoint Mr. Mehta, an individual as the valuer. Referring to the provisions of the Companies Act, 2013 read with the companies (Registered Valuers and Valuation) Rules, 2017, the audit committee is of the opinion that the Board of directors does not have the right to appoint the valuer. Decide. (CA (Final) Nov. 2018 (modified)**

**Ans.**

1. As per Section 247, the registered valuer shall be appointed by -
(a) the audit committee; or
(b) the Board, in case the audit committee is not constituted
2. As per Section 177, constitution of an audit committee is mandatory for all listed public companies.
3. In the given case. M/s. APCO Limited is a listed public company, and so it is mandatory for M/s APCO Limited to constitute the audit committee. Complying with the provisions of Section 177, M/s APCO Limited has constituted the audit committee.
4. As per Section 247, the Board is empowered to appoint the registered valuer only in a case where there is no audit committee. Since in the present case, M/s APCO Limited has constituted the audit committee, the appointment of the registered valuer shall be made by the audit committee, and not by the Board of directors.
5. Thus, the opinion of the audit committee that the Board does not have the right to appoint the registered valuer is correct.

**2. In the context of judicial rulings in the matter of merger, answer the following:
Whether transferor company is justified in excluding assets held on lease and license arrangement, from those transferred to the transferee Company? (CA (Final) Nov. 2018)**

**Ans.**

1. As per Section 232, an application may be made to the Tribunal under Section 230 for the sanctioning of a compromise or an arrangement, and it may be shown to the Tribunal-
(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction or merger or amalgamation; and
(b) that under the scheme, -
(i) the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferred company) is required to be transferred to another company (hereinafter referred to the transferee company): or
(ii) the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to the transferor company) is proposed to be divided among and transferred to two or more companies.
2. The issue raised in the given problem is same as the issue raised before the Supreme Court in Hindustan Lever Employees Union v Hindustan Lever Ltd. The detailed facts and the decision of this case are as under:
(a) A scheme of amalgamation provided for transfer of all assets, properties, undertaking and liabilities of the transferor company (viz. TOMCO) to the transferee company (viz. HLL). However, there were 3 properties which were not to be transferred to HLL under the scheme. The scheme of amalgamation was objected on various grounds including the ground that the scheme was malafide since these properties were excluded from the assets to be transferred to the transferee company.
(b) It was held by the Supreme Court that these 3 properties were being used by TOMCO purely under a gratuitous licence with no enforceable rights. TOMCO had a mere gratuitous permission to hold such properties and TOMCO had no right, power, authority or privilege

over such properties. The owner of such properties could, at any time, revoke the 'permission to use' given to TOMCO. If the owner of these properties chose to get back the possession of these properties, they could do so without any difficulty by merely revoking the gratuitous licence. TOMCO had no right to transfer such properties as such properties were not the assets of TOMCO. These properties were not included in the balance sheet of TOMCO. Thus, there were no malafide intentions in excluding these properties.
3. The facts in the given problem are similar to the facts in **Hindustan Lever Employees' Union v Hindustan Lever Ltd.** Applying the decision given by the Supreme Court in **Hindustan Lever Employees' Union v Hindustan Lever Ltd.** to the given problem, it can be said that the transferor company is justified in excluding the assets held by it on lease and licence arrangement, from those transferred to the transferee company.

3. **ABC Limited is a wholly owned subsidiary company of XYZ Limited. The company wants to make application for merger of holding and subsidiary companies under Section 232. The Company Secretary of XYZ Limited is of the opinion that company cannot apply for merger as per Section 232. Is the contention of the Company Secretary valid as per law? (ICAI, Questions for Practice)**

**Ans.** As per Section 232 and 233 of the Companies Act 2013,
A merger or amalgamation of a holding company with its wholly owned subsidiary company may be entered into by complying with the special provisions contained in Section 233 and the process is as per Section 232. Therefore, mergers as per Section 233 are generally termed as 'fast track mergers'.
Though a merger of holding company with its wholly subsidiary company is possible in accordance with the provisions of Section 233, yet these companies may instead of using the provisions of Section 233, use the provisions of Section 232 for the approval of any scheme of merger or amalgamation. This is evident by Section 233(14) which reads as under:
"A Company covered under this Section may use the provisions of Section 232 for the approval of any scheme for merger or amalgamation."
Thus, where any merger or amalgamation falls within the purview of Section 233, the companies concerned have the following two options:
(a) The companies may use the provisions of fast track merger as contained in Section 233.
(b) The companies may, instead of using the provisions of fast track merger as contained in Section 233, use the provisions contained in Section 232.
In the given case, a merger of holding company with its wholly owned subsidiary company is proposed in accordance with the provisions contained in Section 232. The Company Secretary of the holding company is of the view that such merger is not possible in accordance with the provisions of Section 232.
In view of the provisions contained in Section 233(14) as discussed above, it is evident that merger of holding company (viz. XYZ Limited) with its wholly owned subsidiary (viz. ABC Limited) is possible in accordance with the provisions of Section 232. Thus, the contention of the Company Secretary is not correct.

4. **M/s. Unicorn Rubber Sheets Limited is incorporated and registered in the United Kingdom. M/s. Artha Rubber Sheets Manufacturing and Trading Limited is an Indian Company incorporated and registered under the provisions of the Companies Act, 2013. A scheme of compromise between the above two companies provided for an amalgamation of the English Company with the Indian Company. The CFO of the Indian Company is of the opinion that the companies being amalgamated must be companies registered in India and therefore an amalgamation with a company registered outside India is not possible. Explaining the relevant provisions of the Companies Act, 2013, examine whether the contention of the CFO is correct that the companies being amalgamated must be**

**companies registered in India? (CA (Final) May 2019)**

**OR**

**With reference to the provisions of the Companies Act, 2013, state whether companies being amalgamated must be companies registered in India. (CA (Final) May 2000 (Modified)**

**OR**

**Examine with reference to the provisions of the Companies Act, 2013 the validity of a scheme providing for amalgamation of a 'foreign company' with a company registered under the Companies Act, 2013. (CA (Final) May 2004 (Modified)**

**OR**

**A scheme provides for amalgamation of PQL International Limited, a foreign company, with DHP Limited, an Indian company registered under the Companies Act, 2013. Referring to the provisions of the above Act, decide whether the scheme providing amalgamation of a foreign company as a transferor company can be sanctioned by the Tribunal. (CA (Final) May 2015 (Modified)**

**OR**

**Explaining the relevant provisions of the Companies Act, 2013, answer whether the companies being amalgamated must be companies registered under the Companies Act, 2013? (CA (Final) Nov. 2009 (Modified))**

**Ans.** As per Section 234, a merger of an Indian company and a foreign company may be effected by-

(a) complying with the provisions of Sections 230 to 232;

(b) obtaining prior approval of Reserve Bank of India; and

(c) complying with the Rules prescribed by the Central Government in this behalf.

However, a merger of an Indian company and a foreign company may be effected only if the foreign company has been incorporated in the jurisdictions of any such country as has been notified by the Central Government in this behalf.

Also, the transferee company shall-

(a) ensure that valuation is conducted by valuers who are members of a recognized professional body in the jurisdiction of the transferee company;

(b) ensure that such valuation is in accordance with internationally accepted principles on accounting and valuation; and

(c) file a declaration along with the application made to Reserve Bank of India for obtaining its approval.

The application for obtaining the approval of the Tribunal as per the provisions of Sections 230 to Section 232 shall be filed after obtaining the approval of the Reserve Bank of India.

For the purposes of Section 234, the term 'foreign company means any company or body corporate incorporated outside India whether having a place of business in India or not. Thus, where a company or body corporate has not established any place of business in India and does not conduct any business activity in India, it is not a foreign company within the meaning of Clause (42) of Section 2, but it shall be regarded as a foreign company for the purposes of Section 234. Thus, a merger or amalgamation between an Indian Company and a company incorporated outside India is possible as per the provisions of Section 234 read with Sections 230 and 232, whether or not the company incorporated outside India has a place of business in India, provided the legal requirements as discussed above are complied with.

Hence, the companies being amalgamated may or may not be companies registered in India.

**5. The Central Government in the public interest ordered for the amalgamation of ABC Limited and DEF Limited into a single company named KPN Limited through a notification in the official gazette. In this connection the prescribed authority ordered that the equity**

**shareholders of ABC Limited were to be provided with a cash compensation of Rs. 2,000/- and two equity shares in KPN Limited for every single equity share held in ABC Limited. Mr. Ganesh, an equity shareholder of ABC Limited was dissatisfied not only with the amalgamation but also with the compensation offered by the prescribed authority. Advise him whether he can challenge the above amalgamation order of the Central Government. Also advise him within how many days and before which authority he can prefer an appeal against the order of the prescribed authority. Advise him referring to the provisions of the companies Act, 2013 in this regard. (CA (Final) Nov. 2016)**

**Ans.** As per Section 237, the Central Government is empowered to make an order of amalgamation of 2 or more companies if it is satisfied that such amalgamation is in public interest. The provisions are as under

(a)Every member and creditor of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interests and rights against the transferee company as he had in the transferor company.

(b)In case the interests or rights of any member or creditor against the transferee company are less than his interests or rights against the transferor company, he shall be entitled to receive compensation from the transferee company.

(c) The compensation shall be assessed by such authority as may be prescribed.

(d) Every assessment of compensation shall be published in the Official Gazette.

(e) Any person aggrieved by any assessment of compensation made by the prescribed authority may, within a period of 30 days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

Section 237 entitles any member of the transferor company to prefer an appeal to the Tribunal against the assessment of compensation by the prescribed authority. Thus, Mr. Ganesh is entitled to prefer an appeal to the Tribunal against the assessment of compensation by the prescribed authority. Such appeal may be preferred within 30 days from the date of publication of such assessment of compensation in the Office Gazette.

However, Section 237 does not entitle any person to prefer any appeal against the order of amalgamation passed by the Central Government. Thus, Mr. Ganesh cannot prefer any appeal before any authority against the order of amalgamation passed by the Central Government. In other words, Mr. Ganesh cannot seek any order from any Court or Tribunal cancelling or nullifying the order of amalgamation passed by the Central Government. His only remedy is to prefer an appeal against the assessment of compensation, as discussed above.

6. **CPR Ltd. and TJC Ltd. are wholly owned by Government of Tamil Nadu. As a policy matter, the Government issued administrative orders for merging TJC Ltd. with CPR Ltd. in the public interest. State the authority with whom the application for merger is required to be filed under the provisions of the Companies Act, 2013. Also state the provisions governing the preservation of Books and Records of TJC Ltd. after merger under the said Act. (CA (Final) May 2018)**

**Ans.** As per Section 237, the Central Government is empowered to make an order of amalgamation of 2 or more companies if it is satisfied that such amalgamation is in public interest. The Central Government may, by an order notified in the Official Gazette, provide for the amalgamation of 2 or more companies into a single company with such constitution, property, powers, rights, interests, authorities and privileges, and such liabilities, duties and obligation, as may be specified in the order.

In the given case, the Government of Tamil Nadu is of the opinion that the amalgamation of CPR Ltd and TJC Ltd is in public interest. For the purpose of such amalgamation, an application seeking an order of amalgamation under Section 237 is required to be made to

the Central Government, and if the Central Government is satisfied that such amalgamation is in public interest, it may make an order of amalgamation in accordance with the provisions of Section 237.
As per Section 239,
1. Prior permission of the Central Government shall be required for disposal of its books and papers.
2. Before granting such permission, the Central Government may appoint a person to examine the books and papers for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with –
(a) the promotion of the transferor company; or
(b) the management of the affairs of the transferor company; or
(c) the amalgamation of the transferor company; or
(d) the acquisition of its shares.

**7. A notice was sent to Mr. Left by the registrar to furnish the information related to a business transacted during his tenure in the X Company. Mr. Left ignored the notice considering that he is no more an employee of X company. Registrar issued the summons against Mr. Left. Explain in the light of the Companies Act. 2013 about the liability of Mr. Left in the given case. (ICAI, RTP, May 2016)**

**Ans.**
**Provisions (Section 206)**
1. The Registrar is empowered to issue a written notice to a company requiring such company-
(i) to furnish in writing such information or explanation, within such reasonable time, as may be specified in the notice;
Or
(ii) to produce such documents, within such reasonable time, as may be specified in the notice.
2. Where the information or explanation required to be furnished to the Registrar relates to any past period, the officers who had been in the employment of the company for such period, it so called upon by the Registrar through a notice served on them in writing, shall also furnish such information or explanation to the best of their knowledge.
Analysis and Conclusion
The Registrar sent a notice to Mr. Left requiring Mr. Left to furnish some information relating to certain transactions of X Company. At the time when notice is sent to Mr. Left, he is not an employee of X Company. However, he was an employee of X Company during the past period to which the information relates.
Section 206 makes it evident that a past employee shall be bound to furnish information to the Registrar if the following conditions are satisfied:
(i) The Registrar has served a written notice to the past employee requiring him to furnish the information.
(ii) The information relates to such past period during which the past employee was an employee of the company.
Since the Registrar has issued a written notice to Mr. Left and the information required by the Registrar relates to the past period during which Mr. Left was an employee of x Company, Mr. Left is bound to furnish to the Registrar the information required by the Registrar.

**8. The Registrar, after inspection of the book of accounts of PQR Ltd., submitted its report with further recommendation of investigation into the affairs of the company. Explain the law as to the recommendation for further investigation by the Registrar. (ICAI, Mock Test Paper, October 2018)**

**Ans.**

**Provisions (Section 208 and Section 210)**

1. As per Section 208, after the inspection of the books of account or an inquiry under Section 206 and other books and papers of the company under Section 207, the Registrar shall submit a report in writing to the Central Government along with such documents, as he may deem fit.
2. The report of the Registrar may include a recommendation that further investigation into the affairs of the company is necessary. The Registrar shall state the reasons supporting such recommendation.
3. As per Section 210, if on the receipt of a report or the Registrar under Section 208, the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company, the Central Government may order an investigation into the affairs of the company.

**Analysis and Conclusion**

The Registrar has, in his report made to the Central Government, made a recommendation that further investigation into the affairs of PQR Ltd is required.

The words if the Central Government is of the opinion and 'may order' used in Section 210 makes it evident that where the Central Government receives a report of the Register recommending further investigation into the affairs of a company, the Central Government has the discretion whether or not to order an investigation into the affairs of such company.

**9. The Registrar of Companies, West Bengal has received a complaint from a group of creditors of a company. The complaint alleges that the directors of the company, in order to prevent the unearthing of their embezzlement of company's funds, are engaged in falsification and destruction of original accounting books and records. The complaints urged the Registrar to seize the accounting books and records of the company so that the directors may not be able to tamper the same. You are required to state the powers, if any, of the Registrar in this respect. (CA (Final) May 2004)**

**OR**

**A group of creditors of M/s XYZ Co. Ltd. makes a complaint to the registrar of companies, New Delhi, alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company. The complainants request the registrar to take immediate steps to seize the records of the company, so that the management may not be allowed to tamper with the records. Examine the powers, If any, of the registrar in such circumstances. (CA (Final) Nov. 2001)**

**Ans.**

**Provisions (Section 209)**

1. The Registrar may exercise the power to enter, search and seize the books and papers of a company, if –

(i) he has reasonable ground to believe that the books and papers of a company are likely to be destroyed, mutilated, altered, falsified or secreted;

(ii) on an application made by him to the Special Court, the Special Court makes an order for the seizure of such books and papers.

2. Before seizure, the Registrar shall allow the company to fake copies of, or extracts from, such books or papers. The cost of copies or extracts shall be borne by the company.
3. The Registrar is also entitled to seize the books and papers relating to the key managerial personnel or any director or auditor or company secretary in practice, subject to same conditions and limitations as are applicable to seizure of books and papers of the company.
4. The seized books and papers shall be returned by the Registrar, as soon as possible, but within 180 days of such seizure.
5. The books and papers may be called for by the Registrar for a further period of 180 days

by an order in writing if they are needed again.
6. The Registrar may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such other manner as he considers necessary.

**Analysis and conclusion**

In this case, the Registrar has received a complaint that the directors of the company have embezzled the funds of the Company, and the directors are engaged in falsification and destruction of the books and records.
If the Registrar has reasonable ground to believe that the allegations made in the complaint are true, he may make an application to the Special Court seeking an order to seize the books and papers of the company. If the Special Court makes such order, the Registrar shall be empowered to enter, search and seize the books and papers. The Registrar shall have to return the books and papers within 180 days of such seizure. But, he may again call the books and papers for a further period of 180 days.

10. **A group of creditors of Mac Trading Limited makes a complaint to the Registrar of Companies, Hyderabad alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company. The complainants request the Registrar to fake immediate steps to seize the records of the company so that the management may not be allowed to tamper with the records. The complaint was received at 10 A.M. on 1st July 2015 and the ROC entered the premises at 10.30 A.M. for the search. Examine the powers of the Registrar to seize the books of the company. (CA (Final) May 2016)**

**OR**

**A group of creditors of MBIND Bronze limited makes a complaint to the Registrar of Companies, Himachal Pradesh alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company The complainants request the Registrar to take immediate steps to seize the records of the company so that the management may not be allowed to tamper with the records. The complaint was received at 11 am on 6th January, 2018 and the Registrar has attempted to enter the premises of the company but has been denied by the company, due to not having order from the special court. Is the contention of company valid in terms of the Companies Act, 2013? Discuss. (ICAI, RTP, Nov. 2018)**

**Ans.** As per Section 209, the Registrar may exercise the above powers only after obtaining an order from the Special Court for the seizure of such books and papers.
In the given case, the Registrar received the complaint on 1st July, 2015 at 10 a.m., and the Registrar entered the premises of the company on the same day at 10:30 a.m., viz. within next 30 minutes. It is evident that the Registrar did not obtain any order from the Special Court to seize the books, which is a mandatory requirement as per Section 209. If the Registrar has seized the books and papers of the company, such seizure is ultra vires the provisions of Section 209, viz. the Registrar is not authorised to enter, search and seize the books and papers.

11. **Shareholders of Hide and Seek Ltd. are not satisfied about performance of the company. It is suspected that some activities being run in the name of the company are not in the interest of the company or its members. 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation and find out the true picture. With reference to the provisions of the Companies Act. 2013, mention whether the shareholders' application will be accepted? (CA (Final) Nov. 2015)**

**Ans.** As per Section 210 of the Companies Act 2013, the Central Government is empowered

to order an investigation into the affairs of the company if it is of the opinion that such investigation is necessary-
(a) on the receipt of a report of the Registrar or inspector under Section 208:
(b) on intimation of a special resolution passed by d company that the affairs of the company ought to be investigated: or
(c) in public interest.
In the given case, the application to the Central Government requesting investigation into the affairs of the company has been made by some shareholders. No general meeting of the company has been held, and no special resolution has been passed that the affairs of the company ought to be investigated. Since, the requirement of Section 210 with respect to passing of the special resolution has not been complied with, the application made by 101 shareholders is bound to be rejected.
However, Section 210 empowers the Central Government to order investigation into the affairs of the company, if the Central Government is of the opinion that such investigation is in public interest. Thus, the Central Government has discretion to order the investigation if it is of the opinion that such investigation is necessary in the public interest. Hence, upon receipt of an application from 101 shareholders, if the Central Government. after considering the allegations contained in the application, is of the opinion that an investigation into the affairs of the company is necessary in the public interest, the Central Government may order such investigation.

**12. Greater DINA Investors Association made a complaint by an informal letter to the Central Government that management of Secret Limited has been indulging in fraudulent activities causing loss to the shareholders and that an investigation should be carried out to find out the whole truth. On receipt of the letter, the Central Government directed the Association to approach them formally after complying with the provisions of the Companies Act, 2013. Advise the Association. (CA (Final) Nov. 2016)**

**OR**

**Shareholders of Akash Ltd., not satisfied with the performance of the company, inferred that some activities conducted by the company are against the interest of the members of the company. Group of shareholders of the company filed an application to the Central Government to appoint an inspector to carry out investigation to look into the matter. With reference to the provisions of the Companies Act, 2013, mention whether the shareholders' application is tenable? Elaborate. (ICAI, RTP, May 2017)**

**Ans.** As per Section 210, the Central Government is empowered to order an investigation into the affairs of the company if it is of the opinion that such investigation is necessary –
(a) on the receipt of a report of the Registrar or inspector under Section 208;
(b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated: or
(c) in public interest.
As per Section 214, where the Central Government receives an intimation of a special resolution under Section 210 (that the affairs of the company ought to be investigated), the Central Government is empowered to require the applicants to give such security not exceeding Rs. 25,000 as may be prescribed, as it may think fit, for payment of the costs and expenses of the investigation.
In the given case, Greater DINA Investors Association made a complaint to the Central Government requesting an investigation into the affairs of the company. Such complaint has been made by way of an informal letter. It implies that no general meeting of the company has been held, and no special resolution has been passed that the affairs of the company ought to be investigated.

On receipt of the informal letter, the Central Government has directed Greater DINA Investors Association to make a formal application by complying with the provisions of the Companies Act, 2013.
Greater DINA Investors Association is advised to get a special resolution passed in the general meeting of Secret Limited. The special resolution may be passed at an Extraordinary General Meeting (by complying with the provisions of Section 100, viz. Calling of an Extraordinary General Meeting on requisition of members) or at an Annual General Meeting (by complying with Section 111, viz. Circulation of members resolution, i.e. proposing a resolution at the Annual General Meeting).
The formal application made by Greater DINA Investors Association to the Central Government shall state the date of passing the special resolution in the Extraordinary General Meeting or the Annual General Meeting, as the case may be. Further the application shall be accompanied by such amount, not exceeding Rs. 25,000, as has been prescribed under Rule 5 of the Companies (inspection, Investigation and Inquiry) Rules, 2014, as the security for payment of the costs and expenses of investigation, as required under Section 214. Such security deposit shall be refunded to Greater DINA Investors Association if the investigation results in prosecution.

**13. The shareholders of Kumar Ltd. passed a special resolution that the affairs of the company ought to be investigated. The company submitted the special resolution to the Central Government. Examine, explaining the relevant provision of the Companies Act, 2013, whether the power of the Central Government to order an investigation is mandatory or discretionary? (CA (Final) Nov. 2018)**

**Ans. Provisions**

1. As per Section 210(1), the Central Government is empowered to order an investigation into the affairs of the company if it is of the opinion that such investigation is necessary –
(a) on the receipt of a report of the Registrar or inspector under Section 208;
(b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
(c) in public interest.
2. As per Section 214, where the Central Government receives an intimation of a special resolution under Section 210 (that the affairs of the company ought to be investigated), the Central Government is empowered to require the application to give such security not exceeding Rs. 25,000 as may be prescribed, as it may think fit, for payment of the costs and expenses of the investigation.

**Analysis and Conclusion**

1. In the given case, a special resolution has been passed by the shareholders of Kumar Ltd. to the effect that an investigation into the affairs of the company is required.
2. A copy of the special resolution has been submitted to the Central Government seeking an order of investigation.
3. Section 210(1) has granted a discretionary power to the Central Government to order an investigation into the affairs of a company, where the Central Government receives an intimation of special resolution passed by the company. This is evident by the words "Where the Central Government is of the opinion, that it is necessary to investigate" and "it (i.e. the Central Government) may order an investigation into the affairs of the company" used in Section 210(1).
4. The power of the Central Government to order an investigation into the affairs of the company is not mandatory, but is discretionary, where it receives an intimation of special resolution passed by the company.

**14. The business of Weak Fabrication Limited is conducted fraudulently and the management**

**activities are not in the interest of the company. The paid-up capital of the company is one crore rupees. A group of shareholders numbering 110 members representing 1/9 of total voting power decided to approach Tribunal (NCLT) to carryout investigation into the company's affairs under the provision of the Companies Act, 2013. They seek your advice in the following matters stating the relevant provisions of the Companies Act, 2013.**
**(1) Whether the group can make valid application?**
**(2) Other than member, can any other person make application?**
**(3) Are the applicants required to furnish security for payment of cost and expenses of investigation? (CA (Final) May 2018)**

**Ans.**

**Provisions**

As per Section 213, the Central Government is duty-bound to make an order of investigation into the affairs of a company if the Tribunal makes an order that an investigation into the affairs of the company is required. The Tribunal may make an order that an investigation into the affairs of the company is required in the following 2 cases:

(i) Where an application is made to the Tribunal by eligible members that the members have a good reason for seeking an order of investigation into the affairs of the company. The application needs to be supported by such evidence as may be necessary to show that an investigation into the affairs of the company is necessary.

Members eligible to make an application to the Tribunal are as follows:

(a) In case of a company having a share capital, members eligible to make an application to the Tribunal are-

(i) 100 members; or

(ii) one or more members holding 10% of total voting power,

whichever is lower.

(b) In case of a company having no share capital, 1/5th of the total number of members are eligible to make an application to the Tribunal.

(ii) Where -

an application is made to the Tribunal by any person; or

otherwise (viz. suo motu)

the Tribunal is satisfied that any of the following circumstances exist:

(a) That the business of the company is being conducted-

with intent to defraud its creditors, members or any other persons; or

for a fraudulent or unlawful purpose: or

in a manner oppressive of any of its members.

(b) That the company was formed for any fraudulent or unlawful purpose.

(c)That the persons concerned in the formation or management of the company have been guilty of fraud, misfeasance or other misconduct.

(d) That the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to the managing or other director or the manager of the company.

The Tribunal may make such an order only after giving a reasonable opportunity of being heard to all the parties concerned.

As per Section 214, the Central Government is empowered to require the applicant to give such security not exceeding Rs. 25.000 as may be prescribed, as it may think fit, for payment of the costs and expenses of the investigation. The Central Government may demand such security before appointing an inspector. The Central Government may demand such security where an investigation is ordered -

(i) in pursuance of Section 210(1), viz. on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated: or

(ii) in pursuance of an order made by the Tribunal under Section 213.

**Analysis and Conclusion**

(1) The paid-up capital of weak Fabrication Limited is Rs, 1 crore. So, it is evident that the Weak Fabrication Limited is a company having share capital, In case of a company having a share capital, the application made to the Tribunal shall be valid if it satisfies even one of the following two criteria:

(i) The application is made by 100 members; or

(ii) The member(s) making the application hold 1/10th of the total voting power.

The application to the Tribunal has been made by 110 shareholders holding 1/9th of the total voting power. The application satisfies both the criteria mentioned in Section 213. Therefore, the application is valid.

(2) As per Section 213, any person may make an application to the Tribunal that the business of the company is being conducted for a fraudulent or unlawful purpose etc. Thus, any person, even though he is not a member, Can make an application to the Tribunal.

(3) As per Section 214, the Central Government is empowered to require the applicant to give security before appointing an inspector. The Central Government may demand such security where investigation is ordered in pursuance of an order made by the Tribunal under Section 213.

Thus, where member(s) or any other person makes an application to the Tribunal seeking an order for investigation of affairs of a company, the Central Government may demand security from such member(s) or any other person.

**15. A majority of the Board of directors of M/s High Value Infotech Ltd. have realised that some of the business activities carried out in the name of the company are not in the interest of either the company or its members. They want that the company should make an application to the Central Government to appoint an inspector to carry out an investigation so as to find out the whole truth. Explain the steps that should be taken to achieve the purpose. (CA (Final) Nov. 2001)**

**OR**

**A majority of the Board of Directors of M/s Bulk Drugs Ltd. have reasons to believe that some of the business activities carried on in the name of the company are prima facie against the interests of the company and its members. They want the matter to be referred to Central Government in the form of an application for appointment of an Inspector to reach to the bottom of the matter and unveil the truth. In this connection you are required to state the steps required to be taken with reference to the provisions of the Companies Act. 2013.(CA (Final) May 2007, May 2005)**

**Ans.**

1. As per Section 210, the Central Government may order an investigation into the affairs of the company if it is of the opinion that it is necessary to investigate into the affairs of a company,

(a) on the receipt of a report of the Registrar or inspector under Section 208;

(b) on intimation of a special resolution passed by a Company that the affairs of the company ought to be investigated:

Or

(c) in public interest.

2. Further, Section 210 empowers the Court or Tribunal to make an order that the affairs of a company ought to be investigated. The Court or Tribunal may make such an order during the course of any proceedings before it. When such an order is made, the Central Government shall order an investigation into the affairs of that company.

3. As per Section 213, the Central Government shall order an investigation of the affairs of a company if the Tribunal makes an order that an investigation into the affairs of he company

is required. The Tribunal may make an order that an investigation into the affairs of the company is required where an application is made to the Tribunal by eligible members that the members have a good reason for seeking an order of investigation into the affairs of the company. The application needs to be supported by such evidence as may be necessary to show that an investigation into the affairs of the company is necessary. The members eligible to make an application to the Tribunal are as follows:
(a) In case of a company having a share capital, members eligible to make an application to the Tribunal are –
(i) 100 members; or
(ii) one or more members holding 10% of total voting power.
whichever is lower.
(b) In case of a company having no share capital, 1/5$^{th}$ of the total number of members are eligible to make an application to the Tribunal.
4. Further, as per Section 213, the Central Government shall order an investigation of the affairs of a company if the Tribunal makes an order that an investigation into the affairs of the company is required. The Tribunal may make an order that an investigation into the affairs of the company where an application is made to the Tribunal by any person or otherwise (viz. suo motu) the Tribunal is satisfied that any of the following circumstances exist:
(a) That the business of the company is being conducted –
(i) with intent to defraud its creditors, members or any other persons; or
(ii) for a fraudulent or unlawful purpose, or
(iii) in a manner oppressive of any of its members.
(b) That the company was formed for any fraudulent or unlawful purpose.
(c) That the persons concerned in the formation or management of the company have been guilty of fraud, misfeasance or other misconduct.
(d) That the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to the managing or other director or the manager of the company.
The Tribunal may make such an order only after giving a reasonable opportunity of being heard to all the parties concerned.
5. In the present case, following options are open to the Board of directors of M/s High Value Infotech Ltd:
(a) The Board of directors may get a special resolution passed in a general meeting of the company, and then an application may be made to the Central Government for seeking an order of investigation into the affairs of the company. On receipt of such application, the Central Government may order an investigation of the affairs of the company (Section 210).
(b) If the directors of M/s High Value Infotech Ltd. satisfy the eligibility criterion contained in Section 213, then, they may, in the capacity of members, make an application to the Tribunal under Section 213. If the Tribunal makes an order that an investigation into the affairs of the company is required, the Central Government shall order an investigation of the affairs of a company.
(c) Even the directors of M/S High Value Infotech Ltd, do not satisfy the eligibility criterion contained in Section 213, they may make an application to the Tribunal seeking an order of investigation on any of the four grounds mentioned in Section 213, as discussed above. If the Tribunal makes an order that an investigation into the affairs of the company is required, the Central Government shall order an investigation of the affairs of a company.

**16. Some creditors of NTY Limited approached you to guide them to apply to the Tribunal for seeking an order for conducting an investigation into the affairs of the company due to the fact that the business of the company is being conducted with intention to defraud its**

**creditors. Referring to the provisions of the Companies Act, 2013, guide them regarding the circumstances under which and how a person, not being a member of the company can apply to the Tribunal to seek an order for conducting an investigation into the affairs of a company. (CA (Final( May 2018)**

**Ans.** As per Section 213, the Central Government is duty-bound to make an order of investigation into the affairs of a company if the Tribunal makes an order that an investigation into the affairs of the company is required. The Tribunal may make an order that an investigation into the affairs of the company is required where an application is made to the Tribunal by any person: or otherwise (viz. suo motu) and the Tribunal is satisfied that any of the following circumstances exist:

(a) That the business of the company is being conducted –
with intent to defraud its creditors, members or any other persons; or
for a fraudulent or unlawful purpose; or
in a manner oppressive of any of its members.

(b) That the company was formed for any fraudulent or unlawful purpose.

(c) That the persons concerned in the formation or management of the company have been guilty of fraud, misfeasance or other misconduct.

(d) That the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to the managing or other director or the manager of the company.

The Tribunal may make such an order only after giving a reasonable opportunity of being heard to all the parties concerned. Thus, Section 213 empowers any person, even though he is not a member, to make an application to the Tribunal on the ground that the business of the company is being conducted for a fraudulent or unlawful purpose etc.

Therefore, the creditors of NTY Limited are advised to make an application to the Tribunal under Section 213 of the Companies Act, 2013.

17. **The directors of a company held more than 75% shares in the company. The company was carrying on business of construction of projects. The directors acquired certain contracts in their own name in breach of trust and made profits for themselves. In the annual general meeting, they passed a resolution that the company had no interest in the contract. The minority shareholders that a case against directors asking them to account for the profits. Discuss. (CS (Final) Dec. 1995)**

**OR**

**Sky-High Ltd. is engaged in the business of construction. A, B and C, directors of the Sky-High Ltd. are holding 75% of the capital of this company. The company passed a resolution at its general meeting that it would not be interested in a particular contract for construction of a bridge. Subsequently, the same contract was obtained by A, B and C in their own names. (CS (Final) Dec. 2001).**

**Ans.** The Majority Rule governs the internal management of the company. As such if any wrong is done to the company, the proper plaintiff to institute a suit is the company itself and the Court would not interfere at the instance of the individual shareholders (Foss v Harbottle (1843) 2 Hare 461). However, if the majority misuses its powers to defraud or oppress the minority, an action can be brought by an individual member.

Three directors holding 75% of the share capital of the company used their positions as directors and obtained a contract in their own names. As it amounted to breach of duty towards the company, they called a general meeting in which a resolution was passed to the effect that the company has no interest in the contract. It was held that directors utilized the contract belonging to the company for their personal gain and it amounted to a fraud on the minority. The company could claim profits realized by the directors **(Cook v Deeks**

**(1916) 1 AC 554).**
The facts of the given case are identical to the facts specified in **Cook v Deeks** and so it can be said that the minority shareholders will succeed.

**18. ABC Private Limited is a company in which there are eight shareholders. Can a member holding less than one-tenth of the share capital of the company apply to the Tribunal for the relief against oppression and mismanagement? (CA (Final) May 2000 (Modified)**

**OR**

**There are eight shareholders in M/s. Supra Private Ltd. Mr. Shyam who is holding less than one-tenth of the share capital of the company seeks your advice whether he can apply to the Tribunal for relief against oppression and mismanagement. Advise. (CA (Final) Nov. 2002 (Modified)**

**Ans.** As per Section 244 of the Companies Act, 2013, in the case of a company having a share capital, members eligible to apply for oppression and mismanagement shall be the lowest of the following:
(a) 100 members; or
(b) 1/10th of the total number of members; or
(c) Members holding not less than 1/10th of the issued share capital of the company.
In the given case, there are only eight shareholders. Not less than '1/10th of total number of members' means 'not less than 1 member.' Accordingly, a single member satisfies the eligibility requirement of '1/10th of total number of members.' Therefore, a single member can present a petition to the Tribunal, regardless of the fact that he holds less than 1/10th of the issued share capital of the company, provided he must have paid all the calls and other sums due on his shares.

**19. Answer the following questions –**

**Case I. A group of shareholders consisting of 25 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of directors of M/s. Fly By Night Operators Ltd. The company has a total of 300 members and the group of 25 members holds one tenth of the total paid up share capital accounting for one-fifteenth of the issued share capital. The main grievance of the group is that due to mismanagement by the Board of directors, the company is incurring losses and the company has not declared any dividends even when profits were available in the past years for declaration of dividend. Advise the group of shareholders regarding the success of-**
**(i) getting the petition admitted; and**
**(ii) obtaining relief from the Tribunal.**

**Case II. A group of shareholders consisting of 30 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of directors of M/s. Aravalli Manufacturing Company Limited having a period up share capital of Rs. 1 crore. The company has a total of 500 members and the group of 30 members holds one-tenth of the total paid-up share capital accounting for one fifteenth of the issued share capital. The grievance of the group is that due to the mismanagement by the Board of directors, the company is incurring losses and has not declared any dividend for the past five years. In the light of the provisions of the Companies Act, 2013, please Incurring losses and has not declared any dividend for the past five years. In the light of the provisions of the Companies Act, 2013, please advise the group of shareholders regarding the admission of the petition and the relief thereof.**
**(i) getting the petition admitted: and**
**(ii) obtaining relief from the Tribunal. (CA (Final) May 2019)**

**Case III. The Board of directors of a company bonafide decides not to declare any dividend for the year ended 31st March, 2015. A group of shareholders complain to the Tribunal against the above decision of the Board of directors on the ground of mismanagement and wants the company to declare dividend. Examine with reference to the provisions of the Companies Act, 2013 whether the act o of the company is valid. (CA (Final) May 1997 (Modified)**

**Case IV. The profit of ABC Limited for the financial year 2014-2015 fell considerably due to recession. The Board of directors of the company, therefore, bonafide did not recommend any dividend for the year. At the Annual General Meeting of the company, a group of members objected to the Board's decision and wanted the Board to make recommendation for dividend. On refusal by the Board, the members, who feel oppressed by the Board's decision to skip the dividend, move to the Tribunal and complain against the Board on the ground of oppression and mismanagement, Examining the provisions of the Companies Act, 2013, decide:**
**(i) Whether the members' contention shall be tenable?**
**(ii) Whether the act of Board of directors not to recommend any dividend shall amount to oppression and mismanagement? (CA (Final) RTP May 2016 (Modified)**

**Ans.**

**Provisions**

1. As per Section 244 of the Companies Act, 2013, in the case of a company having a share capital, members eligible to apply for oppression and mismanagement shall be the lowest of the following.
(a) 100 members; or
(b) 1/10th of the total number of members: or
(c) Members holding not less than 1/10th of the issued share capital of the company.
2. To decide as to whether there is oppression or mismanagement or not, following points are to be noted
(a) The conduct can be said to be oppression only when it is burdensome, harsh and wrongful. Oppression involves an element of lack of probity and fair dealings to a member.
(b) The relief is available only when the acts complained of are shown to be continued acts of oppression.
(c) The relief is available only if it is established that oppression is so severe that there is just and equitable ground for winding up of the company.
(d) Where a company is continuously incurring losses, it cannot be regarded as an act of oppression [Ashoka Betelnut Co. P. Lid. v M.K. Chandrakantha]. Also, incurring of losses by a company does not in itself amount to mismanagement. However, if it is proved that due to mismanagement by the Board of directors, the company has been incurring losses, it would amount to mismanagement.
(e) Non-declaration of dividend is not an act of oppression [Chander Krishna Gupta v Pannalal Girdharilal P. Ltd.]
(f) A bonafide decision of the Board not to recommend dividend and to accumulate profits does not amount to mismanagement [Thomas Vettom (VJ) v Kuttanad Rubber Co. Ltd.].
(g) Mere dissatisfaction of minority does not result in oppression or mismanagement [Thomas Vettom v Kuttanad Rubber Co. Ltd.]

**Case I.**

1. Applying the provisions of Section 244 to the given case, the eligibility shall be as follows:
(i) 30 members (irrespective of amount or percentage of share capital held by them): or
(ii) One or more members holding 1/10th of issued share capital of the company.
whichever is lower.

2. In the instant case, a group of 25 members has made an application to the Tribunal. The applicants are less than 3O in number, and also the applicants hold (in aggregate) less than 1/10th of the issued share capital of the company. Thus, the said group of shareholders does not meet any of the above eligibility criteria. However, the Tribunal has a discretionary power to waive the eligibility requirements, i.e., the Tribunal may permit a lesser number of members to make an application. Thus, members may approach the Tribunal to permit them to make an application.
3. In the present case, the only grievance of members is that the company is incurring losses and the company had not declared any dividend in the past during the years when the profits were available for distribution of dividend. No other material has been produced before the Tribunal to prove the oppression or mismanagement.
Hence,
(i) The application made by the members does not meet the eligibility requirements contained in Section 244, and is therefore, liable to be rejected, unless the Tribunal waives the eligibility requirements,
(ii) The members are not likely to succeed in getting relief from the Tribunal, since-
(a)the allegation that the company is incurring losses, does not amount to oppression or mismanagement as was held in Ashoka Betelnut Co. P. Ltd. v M.K. Chandrakantha.
(b) the allegation that the company had not declared any dividend in the past during the years when the profits were available for distribution of dividend, does not amount to oppression or mismanagement as was held in Chander Krishna Gupta v Pannalal Girdharilal P. Ltd. and Thomas Vettom (VJ) v Kuttanad Rubber Co. Ltd.

**Case II.**
1. Applying the provisions of Section 244 to the given case, the eligibility shall be as follows:
(i) 50 members (irrespective of amount or percentage of share capital held by them); or
(ii)One or more members holding 1/10th of issued share capital of the comp whichever is lower.
2. In the instant case, a group of 30 members has made an application to the Tribunal. The applicants are less than 50 in number, and also the applicants hold (in aggregate) less than 1/10th of the issued share capital of the company. Thus, the said group of shareholders does not meet any of the above eligibility criteria. However, the Tribunal has a discretionary power to waive the eligibility requirements, i.e. the Tribunal may permit a lesser number of members to make an application. Thus, members may approach the Tribunal to permit them to make an application.
3. In the present case, the only grievance of members is that the company is incurring losses and the company had not declared any dividend for the past 5 years. No other material has been produced before the Tribunal to prove oppression or mismanagement.
Hence,
(i) The application made by the members does not meet the eligibility requirements contained in Section 244, and is therefore, liable to be rejected, unless the Tribunal waives the eligibility requirements.
(ii) The members are not likely to succeed in getting relief from the Tribunal, since-
(a) the allegation that the company is incurring losses, does not amount to oppression or mismanagement as was held in Ashoka Betelnut Co. P. Ltd. v M.K. Chandrakantha.
(b) the allegation that the company had not declared any dividend in the past during the years when the profits were available for distribution of dividend, does not amount to oppression or mismanagement as was held in Chander Krishna Gupta v Pannalal Girdharilal P. Ltd. and Thomas Vettom (VJ) v Kuttanad Rubber Co. Ltd.

**Case III.**

The only grievance of members is that the company has not declared any dividend for the year ended 31st March, 2015. No other material has been produced before the Tribunal to prove the oppression or mismanagement.
Non-declaration of dividend does not result in oppression or mismanagement as was held in Chander Krishna Gupta v Pannalal Girdharilal P. Ltd. and Thomas Vettom (VJ) v Kuttanad Rubber Co. Ltd.

**Case IV.**
1. A group of members has made a complaint to the Tribunal alleging oppression and mismanagement on the ground that the Board has not recommended any dividend for the financial year 2014-2015 due to fall in profits.
2. No other material has been produced before the Tribunal to prove the oppression or mismanagement.
Hence,
(i) The contention of the members is not tenable since there Is no oppression or mismanagement.
(ii) The decision of the Board not to recommend any dividend does not amount to oppression or mismanagement as was held in Chander Krishna Gupta v Pannalal Girdharilal P, Ltd. and Thomas Vettom (VJ) v Kuttanad Rubber Co. Ltd.

**20. Answer the following questions**

**Case 1. A group of shareholders of M/s. High Profile Engineering Company Ltd. has filed a petition before the Tribunal alleging various acts of oppression and mismanagement by the majority shareholders. The petition group holds 15% of the issued share capital of the company. During the course of hearing before the Tribunal, some of the petitioner group of shareholders holding about 6% of the issued share capital of the company have withdrawn their consent by stating that they are misled by the group to sign the petition and after coming to know of the true facts they have disassociated themselves with the petition and they along with the other majority shareholders have submitted that the petition should be dismissed on the ground of non-maintainability. Examine their contention having regard to the provisions of the Companies Act, 2013. (CA (Final) Nov. 1999, Nov, 2009 (Modified)**

**Case II. The issued, subscribed and paid-up share capital of ABC Company Limited is Rs. 10 lakhs consisting of 90,000 equity shares of Rs. 10 each fully paid up and 10,000 preference shares of Rs. 10 each fully paid up. Out of members of company, 400 members holding one Preference share each and 50 members holding 500 equity shares applied for relief under Section 241 of the Companies Act, 2013. As on the date of petition', the company had 600 equity shareholders and 5,000 preference shareholders. Examine whether the above petition under Section 241 is maintainable. Will your answer be different, if preference shareholders have subsequently withdrawn their consent? (CA (Final) June 2009, May 2004 (Modified)**

**Case III. The issued, subscribed and paid up capital of OPM Limited is Rs. 5 crores consisting of 50,00,000 equity shares, of Rs. 10 each. The company has 700 members. A petition was made to the appropriate authority duly signed by 80 members holding 2,50,000 equity shares of the company seeking relief against oppression and mismanagement. Subsequently 20 of them withdrew their consent. Examine with reference to the relevant provisions of the Companies Act, 2013 and decided case law whether the petition is maintainable. (CA (Final) Nov. 2008, May 2013, May 2015 (Modified)**

**Case IV. The issued and paid up capital of Crown Jewels Limited is Rs. 5 crore consisting of 5,00,000 equity shares of Rs. 100 each. The said company has 500 members. A petition was submitted before the Tribunal signed by 80 members holding 10,000 equity shares of the company for the purpose of relief against oppression and mismanagement by the majority shareholders. Examining the provisions of the Companies Act, 2013, decide whether the said petition is maintainable. Also explain the impact on the maintainability of the above petition, if subsequently 40 members, who had signed the petition, withdrew their consents. (ICAI, RTP, May 2018; ICAI, Mock Test Paper, April 2018)**

**Ans.** As per Section 244 of the Companies Act, 2013, in the case of a company having a share capital, members eligible to apply for oppression and mismanagement shall be the lowest of the following:

(a) 100 members; or

(b) 1/10th of the total number of members; or

(c) Members holding not less than 1/10th of the issued share capital of the Company.

It must be noted that the term 'member includes an equity shareholder as well as a preference shareholder.

An application which is valid when presented to the Tribunal does not cease to be maintainable by reason of any event subsequent to its presentation to the Tribunal. After an application is presented to the Tribunal, the withdrawal of consent by one or more members does not anyway affect the maintainability of the application. Accordingly, the right of the applicant to proceed with the application or the jurisdiction of the Tribunal to dispose of the application on its own merits is not affected by reason of withdrawal of consent by any member **(Rajahmundri Electric Supply Corporation v Nageshwara Rao AIR 1956 SC 213).**

**Case I.** In the present case, the petition has been made by the shareholders holding 15% of the issued share capital of the company and therefore, the petition meets the eligibility criterion laid down under Section 244.

However, after the petition is made, some members holding 6% of the issued share capital of the company have withdrawn their consents. The issue raised in the question is whether the petition has become non-maintainable by reason of withdrawal of such consents.

Applying the judgment given in **Rajahmundri Electric Supply Corporation v Nageshwara Rao** to the given case, the petition made by the shareholders shall remain valid despite the fact that some of the petitioners holding about 6% of the issued share capital have withdrawn their consents.

**Case II.**

In the present case, the shareholding pattern of the company is as follows:

Equity share capital is Rs. 9.00.000, which is held by 600 members.

Preference share capital is Rs. 1,00.000, which is held by 5.000 members.

Total share capital is Rs. 10,00,000, which is held by 5.600 members.

The application alleging oppression and mismanagement has been made by the members as follows:

(a) Number of members making the application:

| | |
|---|---|
| Preference shareholders | 400 |
| Equity shareholders | 50 |
| Total members | 450 |

(b) Amount of share capital held by the members making the application:

| | |
|---|---|
| Preference share capital | Rs. 4,000 (400 preference shares of Rs. 10 each) |
| Equity share capital | Rs. 5.000 (500 equity shares of Rs. 10 each) |
| Total share capital | Rs. 9,000 |

The application shall be valid if it has been made by the lowest of the following:

(a) 100 members
(b) 560 members (being 1/10th of 5,600)
(c) Members holding share capital of Rs. 1,00,000 (being 1/10th of Rs. 10.00,000)
As is evident, the application made by 450 members meets the eligibility criteria specified under Section 244, and therefore, the application is maintainable in terms of Section 244.
Applying the judgment given in **Rajahmundri Electric Supply Corporation v Nageshwara Rao** to the given case, the petition made by the shareholders shall remain valid despite the fact that some of the petitioners have withdrawn their consents.
Comment: If has been assumed that the members making the application have paid all the calls due on their shares.

**Case III.**
In the given case, the number of members is 700. Not less than 1/10th of total number of members' means 'not less than 70 members. Accordingly, the application made by 80 members satisfies the eligibility requirement of 1/10th of total number of members. Therefore, the application made by 0 members is valid regardless of the fact that these 80 members hold in aggregate less than 1/10th of the issued share capital of the company.
Such application shall remain valid despite the fact that 20 applications have subsequently withdrawn their consents **(Rajahmundri Electric Supply Corporation v Nageshwara Rao AIR 1956 SC 213).**

**Case IV.**
In the given case, the number of members is 500. Not less than 1/10th of total number of members' means 'not less than 50 members.' Accordingly, the application made by 80 members satisfies the eligibility requirement of 1/10th of total number of members. Therefore, the application made by 80 members is valid regardless of the fact that these 80 members hold in aggregate less than 1/10th of the issued share capital of the company.
Such application shall remain valid despite the fact that 40 applicants have subsequently withdrawn their consents **(Rajahmundri Electric Supply Corporation v Nageshwara Rao AIR 1956 SC 213).**

**21. M/s City Hospital Private Ltd. has two groups of directors. A dispute arose between the two groups out of which one group controlled the majority of shares. A very serious situation arose in the administration of the company's affairs when the minority group ousted the lawful Board of Directors from the possession and control of the management of the company's factory and workshop. Books of account and statutory records were held by the minority group and consequently the annual accounts could not be prepared for two years. The majority group applied to the Tribunal under Section 241 of the Companies Act, 2013. You are required to decide with reference to the provisions of the said Act, the following issues:**
**(i) Can majority of shareholders apply to the Tribunal for relief against the oppression by the minority shareholders?**
**(ii) Whether Tribunal can grant relief in such circumstances. (CA (Final) Nov. 2007)**

**OR**

**Examine the merits of the following petitions made under Sections 241 of the Companies Act, 2013:**
**Speciality Chemicals Private Limited is controlled by two groups of members. The group holding majority of shares made an application to Tribunal alleging oppression by the minority group. (CA (Final) Nov. 2013 (Modified)**

**OR**

**State whether a petition by majority shareholders complaining oppression by minority**

**shareholders will succeed? (CA (Final) Nov. 1995)**

**OR**

**Can there be a situation when majority of members may take recourse for a petition under Section 241 of the Companies Act, 2013? (CS (Final) June 1999)**

**Ans.** As per Section 244, in the case of a company having a share capital, members eligible to apply for oppression and mismanagement shall be the lowest of the following:

(a) 100 members; or

(b) 1/10th of the total number of members; or

(c) Members holding not less than 1/10th of the issued share capital of the company. However, in case of a company not having a share capital, the application shall be valid only if it is made by at least 1/5th of total number of members.

Section 244 specifies the minimum number of members who are eligible to make an application. Section 244 does not stipulate that an application shall be maintainable only if it is made by the minority.

Where the application is made by a majority of members, relief may be granted if the Tribunal is satisfied that the majority is oppressed and has been rendered completely ineffective by the wrongful acts of a minority group.

There may be oppression where a minority by physical force or other wrongful act oust the majority, so as to prevent the lawful exercise of their rights as shareholders. As such, where two different registered offices at two different addresses had been set up, that two rival Boards were holding meetings, that the company's business, property and assets had passed on to the unauthorized persons, that unauthorized persons claimed to be the shareholders and directors, it was held that majority was oppressed, and accordingly the application made by majority was held to be maintainable **[Re, Sindri Iron Foundry Pvt. Ltd. (1964) 34 Comp Cas 510]**

(i) Application to the Tribunal by majority of shareholders is valid since the right to apply to the Tribunal is not confined to minority shareholders alone; majority may also apply **(Re. Sindri Iron Foundry Pvt. Ltd.)** Since, in the given case, the majority is oppressed, the majority of shareholders may apply to the Tribunal for relief against the oppression by minority shareholders.

Whether the application made by the majority shareholders would succeed or not would depend upon the satisfaction of the Tribunal with respect to fulfilment of conditions laid down under Section 241 read with Section 242, viz. –

(a) the affairs of the company have been or are being conducted in a manner-

(i) prejudicial to public interest:

(ii) prejudicial or oppressive to the member(s) making such application or any other member(s): or

(iii) prejudicial to the interests of the company: and

(b) to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up.

(ii) The Tribunal may grant such relief as it may deem fit in the light of facts and circumstances of the case, in accordance with the provisions of Section 242 and 243, if the Tribunal is of the opinion that the conditions laid down under Section 241 and 242 are satisfied.

**22. MNC Private Ltd. is a company in which there are six shareholders. Mr. Srinath, who is a director and also the legal representative of a deceased shareholder holding less than one tenth of the share capital of the company made a petition to the Tribunal for relief against oppression and mismanagement. Examine under the provisions of the Companies Act, 2013 whether the petition made by Mr. Srinath is valid and maintainable? (CA (Final) Nov. 2018)**

**Ans.**

**Provisions**

As per Section 244, in the case of a company having a share capital, members eligible to apply for oppression and mismanagement shall be the lowest of the following:
(a) 100 members; or
(b) 1/10th of the total number of members; or
(c) Members holding not less than 1/10th of the issued share capital of the company.

**Analysis**

1. There are only 6 shareholders. Not less than 1/10th of total number of members means 'not less than 1 member. Accordingly, a single member satisfies the eligibility requirement of 1/10th of total number of members. Therefore, a single member can present a petition to the Tribunal, regardless of the fact that he holds less than 1/10th of the issued share capital of the company, provided he must have paid all the calls and other sums due on his shares.
2. The petition to the Tribunal has been made by Mr. Srinath who is a director and a legal representative of a deceased member. However, the transmission of shares of the deceased member has not been effected in the name of Mr. Srinath, and so Mr. Srinath is not himself a member of MNC Private Limited as on the date of making petition to the Tribunal.
3. The legal representative of a deceased member is entitled to file a petition under Section 241 of the Act for relief against oppression and mismanagement, even though the name of the deceased member is still recorded in the register of members **[Worldwide Agencies Pvt. Ltd. and another v Margaret T. Desor and others)**. It would be wrong to insist that the name of the legal representative be first put on the register before he can move an application under Section 241.
4. The petition made by Mr. Srinath fulfils the requirements of Section 244, and is therefore, valid and maintainable.

**23. M/s. DJ Limited, a listed company, as per the audited financial statements as at March 31, 2018 is having issued and paid-up equity share capital comprising of 10 lakhs shares of Rs. 10 each and issued and paid-up preference share capital of 5 lakhs shares of Rs. 10 each respectively. The members of the company after complying with the provisions of Section 169 of the Companies Act, 2013 removed one Mr. Satish from the directorship of the company on 1st August 2018 before the completion of his term of office. Mr. Satish is also one of the members of the company holding 110000 fully paid-up equity shares. Mr. Satish has alleged oppression on his removal and has moved the jurisdictional Honourable National Company Law Tribunal (NCLT) under Section 241 read with Section 244 of the Companies Act, 2013. The Board of directors of the company is of the opinion that the application is not maintainable as per the provisions of Section 244 of the Companies Act, 2013. Decide.**
**Also, state if any other recourse that is available with Mr. Satish under the provisions of the Companies Act, 2013. (CA (Final) Nov. 2018)**

**Ans.**

1.As per Section 244, in the case of a company having d share capital, members eligible to apply for oppression and mismanagement shall be the lowest of the following:
(a) 100 members; or
(b) 1/10th of the total number of members; or
(c) Members holding not less than 1/10th of the issued share capital of the company.
2. It must be noted that the term 'member includes an equity Shareholder as well as a preference shareholder.
3. In the present case, the shareholding pattern of the company is as follows: Equity share capital is Rs. 1 crore divided into 10 lakh shares of Rs. 10 each. Preference share capital is Rs. 50 lakh divided into 5 lakh shares of Rs. 10 each.

Total share capital is Rs. 1.5 crore divided into 15 lakh shares of Rs. 10 each.
4. An application alleging oppression or mismanagement shall be valid if it has been made by the lowest of the following:
(a) 100 members
(b) 1/10th of the total number of members
(c) Members holding issued share capital of Rs. 15 lakh (being 1/10th of Rs. 1.5 crore)
5. In the present case, the application has been made by Mr. Satish, who holds issued share capital of Rs. 11 lakh only. The application made by Mr. Satish does not meet the eligibility criteria specified under Section 244, and therefore, his application is not maintainable in terms of Section 244, and therefore, his application is not maintainable in terms of Section 244. However, the Tribunal has the discretion to waive the requirements with respect to eligibility, and thus, the Tribunal may permit Mr. Satish to make the application.
6. As per Section 241 read with Section 242, for obtaining relief from oppression or mismanagement, an application is required to be made to the Tribunal. After due inquiry, the Tribunal may make such order as it may deem fit, if it is of the opinion-
(a) that the affairs of the company have been or are being conducted in a manner-
(i) prejudicial to public interest;
(ii) prejudicial or oppressive to the member(s) making such application or any other member(s); or
(iii) prejudicial to the interests of the company; and
(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up.
7. Such acts which adversely affect a person who is not a member of the company do not amount to oppression. Further, where the affairs of a company are conducted in a manner which are prejudicial to a member, but not in his capacity of a member but in any other capacity, it does not amount to oppression.
8. Where a person who is a member as well as a director is removed from directorship, there is no oppression, since no wrong is done to any person in his capacity of a member.
9. In the present case, Mr. Satish, who is a director as well as a member, is removed from directorship. This does not amount to oppression in terms of Section 241 because of the following reasons:
(a) No harm or prejudice is caused to any person in is capacity of a member. To constitute oppression, the conduct complained of must affect a person in his capacity as a member of the company. Oppression in any other capacity, i.e. as a director of a company is outside the purview of Section 241.
(b) The election and removal of directors is the prerogative of the members and such an act cannot ipso facto be treated as oppression on minority, unless the conduct of the majority is based on malafide considerations.
(c) The conduct can be said to be oppression only when it is burdensome, harsh and wrongful. Oppression involves an element of lack of probity and fair dealings to a member. Mere removal of a director does not amount to oppression.
(d) The relief is available only when the acts complained of are shown to be continued acts of oppression.
(e) The relief is available only if it is established that oppression is so severe that there is just and equitable ground for winding up of the company.
Since the conditions specified in Section 241 have not been fulfilled, there is no oppression and therefore, relief from the Tribunal under Section 242 cannot be claimed.
10. Mr. Satish may explore recourse to the following measures:
(a) He may, along with other members, make an application to the Tribunal under Section 213 seeking an order of investigation into the affairs of the company, For this purpose, the

application shall have to be made to the Tribunal by the eligible members (i.e. lower of 100 members or one or more members holding 10% of total voting power).
(b) He may transfer the shares held by him to any person at such price as may be agreed between the parties.
(c) As per Section 169, he shall be entitled to claim compensation for loss of office of director in accordance with the terms of his appointment or contract. However, the right to compensation is subject to the restrictions imposed under Section 202 of the Companies Act, 2013.

**24. Legal representative of a deceased member of a company alleged oppression and mismanagement. He made a complaint to the Tribunal for relief. The management of the company is of the opinion that the petitioner has no locus standi since he is not a member. The register still shows the name of the deceased as member. Will the representation be entertained by the Tribunal?**

**Ans.** The legal representative of a decease member is entitled to file a petition under Section 241 of the Act for relief against oppression and mismanagement, even though the ne of the deceased member is still recorded in the register of members (**Worldwide Agencies Pvt. Ltd. and another v Margaret T. Desor and others)**. It would be wrong to insist that the name of the legal representative be first put on the register before he can move an application under Section 241. Therefore, the Tribunal may entertain the complaint in the given case.

**25. Three shareholders X, Y and Z intend to file a petition before the Tribunal under Section 241 of the Companies Act, 2013. To comply with requirement of one-tenth shareholding, the shareholder X gave consent in writing for and on behalf of his daughter, also a shareholder, who had authorized her father to act on her behalf as her general power of attorney (GPA) holder. Is the consent given by her GPA holder for and on her behalf a valid consent? Will it affect the petition in any manner if, during the course of proceedings, one of the shareholders withdraws the consent? (CS (Final) Dec. 1996)**

**OR**

**A petition was made to the Tribunal under Section 244 duly signed by 120 members of the company seeking relief against oppression and mismanagement. Subsequently, 40 of the members withdrew their signatures from the petition. Explain the legal position. (CS (Final) June 1997)**

**Ans.** Consent given by a duly authorised power of attorney has been held to be a valid consent. This is an application of the normal rule of agency that expecting matters of personal nature, whatever a person can do by himself, he can get it done through another **[P. Punnaiah v Jeypore Sugar Co. Ltd.]** Thus, consent given by a shareholder on behalf of her daughter in terms of GPA is valid.
The validity of an application is to be judged as per the facts at the time of its presentation to the Tribunal. An application which is valid when presented to the Tribunal does not cease to be maintainable by reason of any event subsequent to its presentation to the Tribunal. After an application is presented to the Tribunal, the withdrawal of consent by one or more members does not anyway affect the maintainability of the application. Accordingly, the right of the applicant to proceed with the application or the jurisdiction of the Tribunal to dispose of the application on its own merits is not affected by reason of withdrawal of consent by any member **(Rajahmundri Electric Supply Corporation v Nageshwara Rao AIR 1956 SC 213).**
Thus, even if one of Shareholders withdraws his consent after the application is made to the Tribunal, it would not affect the validity of the application, and the application shall still be maintainable.

**26. Discuss the powers of the Tribunal to pass the following orders on applications seeking relief from oppression and mismanagement: (i) Termination or modification of any agreement between the company on the one hand, and the managing director or director or any other person. (ii) Alteration in the memorandum or articles of the company. (CA (Final) Nov. 1997)**

**OR**

**A group of shareholders holding 20% of the issued share capital of DEF Limited have filed a petition before the Tribunal alleging the following:**
**(i) Various acts of illegal, Invalid and irregular transactions entered into in the name of the company.**
**(ii) Losses incurred due to mismanagement by the Board of directors.**
**(iii) Non-declaration of dividend despite having sufficient profits in the past years.**
**Examine the merits of the above petitions made under Section 241 of the Companies Act, 2013 in the light of the judicial pronouncements made in this regard. (CA (Final) May 2017)**

**OR**

**A group of shareholders holding 12% of the issued share capital of Unique Products Limited have filed a petition before the Tribunal alleging various acts of illegal, invalid and irregular transactions entered into in the name of the Company. Examine the merits of the petition in the light of judicial pronouncements made in this regard. (CA (Final) Nov. 2013 (Modified)**

**OR**

**A group of shareholders holding more than 15% of the issued capital of M/s Defraud Ltd. have filed a petition before the Tribunal alleging various acts of illegal, invalid and irregular transactions entered into in the name of the company. Examine the merits of the petition in the light of the judicial pronouncements made in this regard. (CA (Final) Nov. 2009, Nov. 2001 (Modified)**

**Ans.** As per Section 244 of the Companies Act, 2013, in the case of a company having a share capital, members eligible to apply for oppression and mismanagement shall be the lowest of the following:
(a) 100 members; or
(b) 1/10th of the total number of members; or
(c) Members holding not less than 1/10th of the issued share capital of the company.
In the given case, the application has been made by members holding 20% of the issued share capital of the company. This application satisfies the requirement of 'members holding not less than 1/10th of the issued share capital of the company'. Therefore, such application satisfies the eligibility requirements of Section 244, even if the members making the application are less than 100 and even it their number is less than 1/10th of the total number of members of the company.
Here,
(i) The shareholders have alleged that the company has entered into various illegal, invalid and irregular transactions. This in itself would not constitute a ground for invoking the provisions of Section 241 unless it is proved that these acts are oppressive to the shareholders or prejudicial to the interest of the company or public interest **[Sheth Mohanlal Ganpatram v Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd. (1964) 34 Comp Cas 777]**. Therefore, the petition of the shareholders will fail
(ii) Where a company is continuously incurring losses, it cannot be regarded as an act of oppression [Ashoka Betelnut Co. P. Ltd. v M. K. Chandrakantha (1997) 88 Comp Cas 274].Also, incurring of losses by a company does not in itself amount to mismanagement. However, if it is proved that due to mismanagement by the Board of directors, the company has been incurring losses, it would amount to mismanagement.

(iii) Non-declaration of dividend is not an act of oppression **[Chander Krishna Gupta v Pannalal Girdharilal P. Ltd. (1984) 55 Comp Cas 702]**. A bonafide decision of the Board not to recommend dividend and to accumulate profits does not amount to mismanagement **[Thomas Vettom (VJ) v Kuttanad Rubber Co. Ltd. (1984) 56 Comp Cas 284]**

**27. State whether the aggrieved party would succeed in obtaining relief from the Tribunal on the ground of oppression where the majority of the Board of directors override the minority directors and the minority directors apply to the Tribunal complaining oppression by majority directors. (CA (Final) Nov. 1995]**

**Ans.** As per Section 241 read with Section 242, for obtaining relief from oppression or mismanagement, an application is required to be made to the Tribunal. After due inquiry, the Tribunal may make such order as it may deem fit, if it is of the opinion-
(a) that the affairs of the company have been or are being conducted in a manner-
(i) prejudicial to public interest;
(ii) prejudicial or oppressive to the member(s) making such application or any other member(s); or
(iii) prejudicial to the interests of the company: and
(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up.
Such acts which adversely affect a person who is not a member of the company do not amount to oppression, Further, where the affairs of a company are conducted in a manner which are prejudicial to a member., but not in his capacity of a member but in any other capacity, if does not amount to oppression. For example, where a person who is a member as well as a director is removed from directorship, there is no oppression, since no wrong is done to any person in his capacity of a member.
Where the majority directors override the minority directors, it does not amount to oppression since there was no wrong done to any person in his capacity as a member **[Re, Bellador Silk Lid. (1956) 1 A ER 667]**
In the present case, the majority directors override the minority directors. This does not amount to oppression in terms of Section 241 since no harm or prejudice is caused to any person in his capacity of a member. Accordingly, in the given case, relief under Section 241 is not available. The same decision on the same facts was given in **Re, Bellador Silk Ltd.**

**28. In an application made to the Tribunal claiming relief against oppression and mismanagement, it is alleged that the directors of the company have misused their position in making certain inter-corporate deposits which are against the interests of the company. Will the Tribunal entertain application containing such allegation in the case of private company? (CA (Final) May 2000)**

**Ans.** As per Section 241 read with Section 242, for obtaining relief from oppression or mismanagement, an application is required to be made to the Tribunal. After due inquiry, the Tribunal may make such order as it may deem fit, if it is of the opinion-
(a) that the affairs of the company have been or are being conducted in a manner-
(i) prejudicial to public interest;
(ii) prejudicial or oppressive to the member(s) making such application or any other member(s) or
(iii) prejudicial to the interests of the company: and
(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up.

As is evident from the language used in Sections 241 and 242, the acts complained of shall amount to oppression or mismanagement only if the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up.
In the given case, the applicants have alleged that the inter-corporate deposits made by the company are against the interests of the company. This in itself cannot be termed as oppression or mismanagement, since-
(a) the applicants have alleged that the inter-corporate deposits are against the interests of the company, but there is no material on record to prove the same:
(b) even if it is proved that the inter-corporate deposits made by the company were against the interests of the company, there may be no illegality and no malafide intention, since to prove oppression or mismanagement, it must be shown that the conduct of affairs was burdensome, harsh and wrongful:
(c) there is no continuity of acts, since to prove oppression or mismanagement it must be shown that there were continuous acts oppressing the minority:
(d) the act complained of (viz. the making of inter-corporate deposits which are against the interests of the company) does not justify the winding up of the company on just and equitable ground.
**[Sheth Mohanlal Ganpatram v Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd. (1964) 34 Comp Cas 777]**

29. **Whether continuation of directors in office after expiry of their tenure and where infighting continues among them amounts to mismanagement? (CA (Final) RTP May 2009)**

**Ans.** As per Section 241 read with Section 242, for obtaining relief from oppression or mismanagement, an application is required to be made to the Tribunal. After due inquiry, the Tribunal may make such order as it may deem fit, if it is of the opinion-
(a) that the affairs of the company have been or are being conducted in a manner-
(i) prejudicial to public interest; or
(ii) prejudicial or oppressive to the member(s) making such application or any other member(s): or
(iii) prejudicial to the interests of the company: and
(b) that to Wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making or a winding-up order on the ground that it was just and equitable that the company should be wound up.
The four directors or the company continued to act after the expiry of their term of office. There was complete deadlock between the two groups of shareholders who held equal shares in the company. It was held that continuation of directors after the expiry or their term of office amounted to illegality and there was no valid Board. As a result of complete deadlock in the Board, there was just and equitable ground for winding the company. Therefore, it amounted to mismanagement **[Sishu Ranjan Dutta and Another v Bhola Nath Paper House Ltd.]**
The facts of the given case are similar to the facts in **Sishu Ranjan Dutta and Another v Bhola Nath Paper House Ltd.** Therefore, it amounts to mismanagement.

30. **MRJ Company Limited, a closely held company comprised two groups of shareholders- one foreign and the other Indian. The foreign group holds 55%% and the Indian 45% of the shares of the company. The articles of association of the company provided all the matters of the mutual understanding of both the groups. The articles also contained the provisions enabling the two groups to enjoy equal amount of managerial power. The relationship between the two groups could not last for a long time and differences arose between them. The two groups could not operate, leading to a deadlock. The Indian**

**group, therefore, complained to the Tribunal for action against the foreign group for oppression. Referring to the provisions of the Companies Act, 2013, decide.**
**(i) Whether the contention of the Indian group that the foreign group is acting in a manner oppressive to the Indian group will sustain?**
**(ii) What relief can the Tribunal grant to the petitioners in this case? (CA (Final) May 1996)**

**OR**

**60% shares of Indo-French-Ltd. are held by French Group and balance by an Indian Group. As per Articles of Association of the company both groups had equal managerial powers. The relationship between the two groups soured and the operations of the company reached a deadlock. The Indian Group approached the Tribunal for action against the French Group for oppression. Based on these facts, you are required to decide, with reference to the provisions of the Companies Act, 2013 and/or the decided case laws, the following issues:**
**(i) Whether the contention of oppression against the French Group by the Indian Group is tenable?**
**(ii) What are the powers of the Tribunal in this regard? (CA (Final) May 2007, May 2005)**

**Ans.** An application seeking relief from the Tribunal must make out a prima facie case that the degree of oppression or mismanagement is so severe that there is just and equitable ground for winding up of the company. Here,
(i) Both the Indian group and foreign groups are equally strong in terms of managerial powers and shareholding, and one is unable to oppress the other. As such, there may be a deadlock, but not oppression. It is not a case for winding up of the company and so relief under Section 241 is not available **[Gnanasambandam (CP) v Tamilnad Transports (Coimbatore) Pvt. Ltd. (1971) 41 Comp Cas 26]** Thus, the contention of the Indian group that the foreign group is acting in a manner oppressive to the Indian group is not tenable.
(ii) The powers of the Tribunal under Section 241 are discretionary in character. The Tribunal may order the foreign group to buy out the minority group shareholding at the fair price with necessary permission as was held in **Yashovardhan Saboo v Groz Beckert Saboo Ltd. (1993) 1 Comp LJ 20.** However, where there was deadlock in the management of private limited company and both the parties failed to buy the other group the company was wound up under just and equitable ground **[Kishan Lal Ahuja v Suresh Kumar Ahuja]**. Thus, in the given case, if both the groups fail to exercise the option to buy the other group, the Tribunal may order the company to be wound up.

31. **Mutual Distrust Private limited has two shareholders namely A and B holding 51% and 49% respectively. Both are working as directors. Due to differences between them, A decides to hold a Board meeting on 30th April, 2014 but the same could not be held due to non-co-operation from B and lack of quorum. Advice A about the steps that can be token under the Companies Act, 2013 to resolve the matter. (CA (Final) May 2014)**

**Ans.** An application seeking relief from the Tribunal must make out a prima facie case that the degree of oppression or mismanagement is so severe that there is just and equitable ground for winding up of the company.
Both the directors are equally strong in terms of managerial powers. Both the directors hold almost equal shareholding. In the present circumstances, it appears that holding a Board meeting is impossibility due to deadlock.
The Tribunal is empowered to make an order that either A or B shall buy the shareholding of the other at a fair price **[Yashovardhan Saboo v Groz Beckert Saboo Ltd. (1993) 1 Comp LJ 20]**. In case both A and B fail to buy the shareholding of the other, the Tribunal may make an order of winding up of the company under just and equitable ground **[Kishan Lal Ahuja v Suresh Kumar Ahuja].** Thus, A is advised to make an application to the Tribunal seeking the

abovementioned orders.

**32. Messrs Ahimsa Private Limited was incorporated in the year 2016 under the Companies Act. 2013 by 3 brothers, namely, Varun, Nischal and Abhilash. All the three were Promoter-directors named in the Articles of Association and subscribed for 100 shares each in the company through Memorandum of Association. Thereafter, from time to time, further shares were allotted in proportion of one-third to each of them and in due course, the company started earning substantial profits. Due to greed of money, the two brothers, namely, Varun and Nischal, joined hands together to assume complete control of the company, leaving their brother, Abhilash in lurch. Both the brothers got further shares allotted to themselves, thereby their joint shareholding increased from 66 2/3% to 90%. While the shareholding of Abhilash got reduced from the erstwhile 331/3% to 10%. No notice of any Board Meeting was sent to Abhilash, who was sidelined and was also removed as a Director.**

**Aggrieved by the decisions taken by his two brothers at his back, Abhilash seeks your advice for taking out appropriate proceedings before the court or judicial authority of competent jurisdiction. Also suggest the nature of reliefs he may claim while filling his case. (CA (Final) Nov. 2006 (Modified)**

**OR**

**M/s Zebra Private Limited was incorporated in the year 2016 under the Companies Act, 2013 by 3 brothers, namely A, B and C. All the three were Promoter-directors named in the Articles of Association and subscribed for 100 shares each in the company through Memorandum of Association. Thereafter, from time to time, further shares were allotted in proportion of one-third to each of them and in due course the company started earning substantial profits. Due to greed of money, the two brothers, namely A and B joined hands together and assumed complete control of the company leaving their brother C in lurch. Both the brothers got further shares allotted to themselves, thereby their joint shareholding increased from 66% to 907%, while the shareholding of C got reduced from the erstwhile 33% to 10%. No notice of any Board Meeting was sent to C, who was sidelined and was also removed as a Director.**

**Aggrieved by the decisions taken by his two brothers at his back, C seeks your advice for taking out appropriate proceedings before the Court or Judicial authority of competent jurisdiction. Also suggest the nature of reliefs he may claim while filling his case. (CA (Final) Nov. 2011, Nov. 2014 (Modified)]**

**Ans.** Section 241 is applicable only if the acts complained of adversely affect a person in his capacity as a member of the company, and so no relief can be granted under Section 241 where a person is removed from directorship.

However, in case of a family company (viz. a company which is incorporated with mutual trust and confidence with a view to run it in the form of quasi partnership), it has been held in a number of cases that relief under Section is available where-

(a) a change is made in the shareholding without mutual agreement **[Pushpa Prabhudas Vora v Voras Exclusive Tools Pvt. Ltd.];**

(b) new shares are issued for the purpose of secure increase in voting strength by increasing holding of one group, when there is no need of any funds **[Smt. NVaruna Gupta v Cachar Native Joint Stock Co. Ltd.]**

(c) a director of one group is removed by the other group, even though such removal is in accordance with the provisions of the Act, viz. Section 169 **[Naresh Trehan v Hymatic Agro Equipment's].**

Issue of further shares amounts to oppression if it is proved that the idea of issuing further shares was to benefit one group to the detriment of the other **[Piercy v Mill(s) & Co. (1920) 1 Ch. 77]**

Further issue of shares must be made for the benefit of the company. If the directors use their

fiduciary power of issuing shares for an extraneous purpose like maintenance or acquisition of control over the affairs of the company, it would amount to oppression [Needle Industries Case]. It is not open to the directors to issue and allot shares in a manner by which an existing majority of shareholders is reduced to a minority. If the issue of shares disturbs the existing majority of the shareholders and if it is not bonafide, it will amount to oppression **[Re, Gluco Series (P) Ltd.]**

Here,

(a) Abhilash is advised to make an application to the Tribunal under Section 241. In such application, Abhilash should allege oppression by his two brothers, viz. Varun and Nischal. By the facts of the case (viz. the three brothers were Promoter-directors named in the Articles of Association, all three brothers had subscribed for 100 shares each in the company, from time to time, further shares were allotted in equal proportion to all the three brothers), it is clear that Ahimsa Private Limited is a family company. Further Abhilash should allege that there was no proper reason for his removal from directorship, and that purpose of issuing the further shares was to benefit the two brothers viz. Varun and Nischal to the detriment of him, viz. Abhilash, and so the decision to issue the further shares was not for the benefit of the company, but for some extraneous purpose, viz. acquisition of control over the affairs of the company. The single act of issue of further shares shall have a continuous effect, and so it amounts to oppression, especially if, the Board meeting at which the further shares were allotted was held without complying with the requirements of Section 173, and the member who was not offered further shares was also removed from directorship.

In Bhagirath Agarwala v Tara properties P. Ltd., on the similar facts it was held to be oppression.

Therefore, Abhilash should file an application with the Tribunal for claiming relief from oppression.

(b) Abhilash may seek following reliefs from the Tribunal (as contained in Section 242):

(i) That the allotment of further shares to Varun and Nischal should be declared as null and void, and should be set aside.

(ii) The removal of Abhilash from directorship should be declared as null and void, and should be set aside.

(iii) The Tribunal should make an order for reconstitution of the Board of directors in such manner as the Tribunal may deem fit, e.g. some independent person be appointed on the Board of Ahimsa Private Limited as a director or appointed as the Chairman of the Board.

(iv) Abhilash should be appointed as the managing director of the company having such substantial powers of management as may be specified by the Tribunal.

**33. Referring to the provisions of the Companies Act, 2013, as contained in Section 241 of the Act, examine whether the following acts of the company amount to oppression?**

**(i) Allotment of shares by the directors of the company by which the existing majority is reduced to minority.**

**(i) Allotment of shares by the directors by which the existing minority shareholders are made to majority.**

**(iii) A share sale agreement was executed by VC, an NRI. The shares and transfer deed were handed over to an escrow agent. The sale was subject to RBI permission. The shares were not transferred for 6 years since RBI permission was not received. VC, after waiting for a long period of time raises the issue and complains of oppression in the capacity of a member. As per the agreement the sale was unconditional. During the above period VC did not exercise any right as shareholder nor did the company treat him as a member. [CA (Final) May 2006]**

**Ans.**

Issue of further shares amounts to oppression if it is proved that the idea of issuing further

shares was to benefit one group to the detriment of the other **[Piercy v Mill(s) & Co. (1920) 1 Ch 77]**. Further issue of shares must be made for the benefit of the company. If the directors use their fiduciary power of issuing shares for an extraneous purpose like maintenance or acquisition of control over the affairs of the company, it would amount to oppression **[Needle Industries Case]**. It is not open to the directors to issue and allot shares in a manner by which an existing majority of shareholders is reduced to a minority. If the issue of shares disturbs the existing majority of the shareholders and if it is not bonafide, it will amount to oppression **[Re, Gluco Series (P) Ltd.]**

Thus,-

(i) allotment of shares by the directors of the company by which the existing majority is reduced to minority shall amount to oppression, it the directors have acted malafide.

(ii) allotment of shares by the directors by which the existing minority shareholders are made to majority shall amount to oppression, if the directors have acted malafide.

(iii) When a share sale agreement was executed by an NRI and the scrips and Transfer deed were handed over to an escrow agent as such sale was subject to RBI permission and full consideration money was received, then such a person after lapse of about 5 years, cannot raise an issue of oppression in the capacity of a member, as the transfer remained in abeyance awaiting RBI permission. As per facts, the sale of shares was unconditional and unrestricted, and there was no clause to render the sale agreement infructuous after lapse of any stipulated time. Also, during the long intervening period neither the NRI exercised any right as shareholder nor the company treated him as a member **[Rajiv Mehta v Group 4 Securities Hindustan (P) Ltd. (1998), 118 SCL 89 [CLB].**

The facts in the given case are similar to the abovementioned case, and therefore, it can be said that there is no oppression.

**34. M/s Continuous Conflicts Ltd. is a company controlled by two family groups. The first family group has four directors, namely, Mr. A, Mr. B, Mr. C and Mr. D on the Board of directors. The second family group has two representatives Mr. X and Mr. Y on the Board. Because of internal family troubles, the first group, by virtue of its majority shareholding removed both Mr. X and Mr. Y as the directors of the company. Aggrieved by this action the second group is planning to move an application before the Tribunal. You have been approached for advice. Advise as to the eligibility restrictions regarding filling the application and the chances of getting the relief from the Tribunal, assuming that there is no other material on record in support of oppression on the minority group. [CA (Final) May 2002, Nov. 2008]**

**Ans.** The management of the company is based on the Majority Rule. The Tribunal and the Courts do not usually intervene in the matters of internal management of the company. However, where the exercise of voting power by the majority results in oppression on the members or results in mismanagement or prejudice to public interest, the Tribunal may grant the relief to the minority.

As per Section 244, the eligibility criterion to file an application with the Tribunal for claiming relief from oppression or mismanagement is as follows:

(i) In the case of a company having a share capital. Members eligible to apply shall be the lowest of the following:

(a) 100 members; or

(b) 1/10th of the total number of members: or

c) Members holding not less than 1/10th of the issued share capital of the company.

(ii) In the case of a company having no share capital. The application shall be made by at least 1/5th of total number of members.

The applicants must have paid all the calls and other sums due on their shares. The applicants must hold the requisite number of shares at the time of filing the application.

In the present case the removal of two directors cannot, ipso facto, amount to an act of oppression or mismanagement or an act prejudicial to public interest because of the following reasons:
(i) The election and removal of directors is the prerogative of the members and such an act cannot ipso facto be treated as oppression on minority, unless the conduct of the majority is based on malafide considerations.
(ii) The conduct can be said to be oppression only when it is burdensome, harsh and wrongful. Oppression involves an element of lack of probity and fair dealings to a member. Mere removal of two directors does not amount to oppression.
(iii) To constitute oppression, the conduct complained of must affect a person in his capacity as a member of the company. Oppression in any other capacity, i.e. as a director of a company is outside the purview of Section 241.
(iv) The relief is available only when the acts complained of are shown to be continued acts of oppression.
(v) The relief is available only if it is established that oppression is so severe that there is just and equitable ground for winding up of the company.
In the given case, it has been made clear that there is no other material on record in support of oppression on the minority. Since the conditions specified in Section 241 have not been fulfilled, there is no oppression on the second family group and therefore, relief from the Tribunal cannot be claimed.

**35. Mr. B. Dutt is the Managing Director of Food Plaza Restaurants Limited. FPRPL was incorporated in furtherance of a Joint Venture Agreement ("JVA") between Mr. B. Dutt and Jack India Pvt. Limited (JIPL) in 2017, both having 50% of equal share in the said company. FPRPL was to be governed by the terms and conditions set out in its Memorandum of Association and its Articles of Association. JIPL held the Board meeting, without giving prior notice of such meeting to M. B. Dutt, took decision mismanagement of funds in FPRPL. JIPL pressurized him to sell his shares at Rs. 5 crore, against Rs. 15 crore which was the fair market price of Mr. B. Dutt's shares. Advise whether M. B. Dutt has right to claim any relief and would he succeed in obtaining relief from Tribunal on the ground of oppression by JIPL? [ICAI, Mock Test Paper, August, 2018]**

**Ans.**

**Provision**

Generally, relief under Section 24 is available only if the acts complained of adversely affect a person in his capacity as a member of the company, and so no relief can be granted under Section 241 where a person is removed from directorship or managing directorship. However, in case of a family company (viz. a company which is incorporated with mutual trust and confidence with a view to run it in the form of quasi partnership), it has been held in a number of cases that relief under Section is available where-
(a) a change is made in the shareholding without mutual agreement **[Pushpa Prabhudas Vora v Voras Exclusive Tools Pvt. Ltd.]**
(b) a director of one group is removed by the other group, even though such removal is in accordance with the provisions of the Act, i.e. Section 169 **[Naresh Trehan v Hymatic Agro Equipments]**

**Analysis and conclusion**

The facts of the given case are similar to the facts in Vikram Bakshi and Others v Connaught Plaza Restaurants Limited and Others. The detailed facts of **Vikram Bakshi and Others v Connaught Plaza Restaurants Limited** and Others were as follows:

1. Vikram Bakshi and McDonalds India Private Limited (hereinafter referred to as 'MIPL') entered into a Joint Venture Agreement (hereinafter referred to as 'JVA') by which they each held 50% of equity shares in Connaught Plaza Restaurants Private Limited

(hereinafter referred to as 'CPRPL').
2. CPRPL was appointed as the primary franchisee for McDonalds for a period of 25 years.
3. The JVA Specified that there shall be 4 directors on the Board of CPRPL, and each party (viz. Vikram Bakshi and MIPL) shall have a right to nominate 2 directors each on the Board of CPRPL.
4. The JVA also contained a condition that if Mr. Vikram Bakshi is not continued as the managing director, then, MIPL shall purchase the shares held by Mr. Vikram Bakshi as per the fair market value determined by the formula specified in the JVA.
5. In 2007-2008, MIPL offered to buy the shares held by Mr. Vikram Bakshi for $ 5 million. However, on the basis of fair market value, Mr. Bakshi demanded $ 100 million. This led dispute between Mr. Vikram Bakshi and MIPL with the result that Mr. Vikram Bakshi was terminated from the post of managing director in 2013 as MIPL alleged diversion of funds and mismanagement by Mr. Vikram Bakshi.
6. Mr. Vikram Bakshi made an application to the Tribunal seeking relief from oppression and mismanagement. He alleged that there was a history of prejudices and oppression shown against him by MIPL.
7. It was submitted before the Tribunal that JVA provided for determination of disputes between Mr. Vikram Bakshi and MIPL by way of arbitration and so the Tribunal had no jurisdiction to entertain the application for oppression and mismanagement. The Tribunal held that it had the jurisdiction to entertain the application made to it under Section 241, since the JVA was incorporated in the articles of association of CPRPL.
8. The Tribunal noticed that the financial position of CPRPL was very healthy and there was no case of diversion of funds or mismanagement by Mr. Vikram Bakshi.
9. The Tribunal held that the acts of the nominee directors of MIPL to block the reappointment of Mr. Vikram Bakshi as the managing director was an act of oppression and was done with the malafide and pre-meditated intention of availing the benefits of their right to purchase the shares held by Mr. Vikram Bakshi upon his termination.
10. The Tribunal relied on the fact that the actions of MIPL were detrimental to public interest as several employees of the franchisee suffered due to the decision of MIPL to terminate the franchisee agreement.
11. The Tribunal held that there was a continuing trend of MIPL's prejudice and oppression towards Mr. Vikram Bakshi. Therefore, the Tribunal held that this was a fit case of oppression and mismanagement.
12. The Tribunal made an order reinstating Mr. Vikram Bakshi as the managing director of CPRPL.
13. The order made by the Tribunal makes it evident that where a clear malafide intent is established, the relief from oppression must be provided.

**Hence,**

1. The affairs of Food Plaza Restaurants Private Limited have been conducted in a manner oppressive to Mr. B Dutt, since-
(a) Mr. B Dutt was removed from the position of managing director without giving to him prior notice of Board meeting:
(b) Mr. B Dutt was not given an opportunity to disprove the false allegations levelled against him:
(c) Mr. B Dutt was pressurized to sell his shares in Food Plaze Restaurants Private Limited at a price which was much below the fair market price;
(d) there were continued acts constituting oppression against Mr. B. Dutt.
2. The Tribunal may pass such orders as it may think fit so as to bring to an end the matters complained of, including-
(a) reinstatement of Mr. B. Dutt as the managing director of Food Plaza Restaurants Private Limited.

(b) appointment of an Administrator with a right to vote in Board meeting so as to regulate in future the conduct of affairs of the company.

**36. ABC limited used the business resources of the company in favour of the majority shareholders and completely excluded the minorities from the affairs of the company. As of consequences, minority members filed an application to Tribunal to look into the matter on the regulation of conduct of affairs of the company in future. State in the light of the Companies Act, 2013, the action to be taken by the Tribunal in the given situation.**

**Ans.** If it is established before the Tribunal that the affairs of the company have been or are being conducted in a manner prejudicial to public interest or prejudicial or oppressive to any member(s) or prejudicial to the interests of the company, there is just and equitable ground for winding up of the company, the conduct of affairs of the company is burdensome, harsh and wrongful and there is lack of probity and fair dealings towards the members, the Tribunal shall be empowered to make such orders as it may think fit, so as to bring to an end the matters complained of. The Tribunal shall also be empowered to make an interim order for regulating the company's affairs, if an application seeking such order is made to the Tribunal by any party to the application. Such interim may order may include the appointment of an administrator to supervise the conduct of affairs of the company.

**37. M/s Sunshine oils Limited, a listed company as at 31st March 2018 as per the audited financial statements is having 200 depositors with Rs. 50 crores of deposit in the company. Out of the total 200 depositors 20 depositors of the company have formed a group and have appointed Mr. Ram (a practicing advocate who is not one of the depositors) as their representative to file an application in the National Company Law Tribunal (NCLT) to bring a class action suit against the management of the company as they are of the opinion that the management and conduct of affairs of the company are being conducted in a manner which is prejudicial to the interest of the depositors being oppressive. Will the application of Mr. Ram be admitted by the Honourable Tribunal? Discuss with reference to the provisions of the Companies Act, 2013? (CA (Final) May 2018)**

**OR**

**A group of depositors in M/s. Bright Limited, a listed company, appointed Mr. Fair, an advocate as a representative to file an application in the National Company Law Tribunal (NCLT) on behalf of the depositors to bring a class action suit against the management of the company as they are of the opinion that the management and conduct of affairs of the company are being conducted in a manner which is prejudicial to the interest of the depositors being oppressive.**

**Examine in the given situation, whether the appointment of Mr. Fair is valid as regards to the filling of the application before the Tribunal in the light of the provisions of the Companies Act, 2013? (ICAI, RTP, Nov. 2018)**

**Ans.**

1. Section 245 empowers the members or depositors (if such members or depositors are eligible as per Section 245) to make a class action application to the Tribunal on the ground that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors.
2. The number of depositors eligible to make the class action application shall be the lowest of the following:

(i) 100 depositors; or

(ii) Such percentage of the total number of depositors as may be prescribed (No such percentage has been prescribed by the Rules); or

(iii) One or more depositors to whom the company owes such percentage of total deposits of the company as may be prescribed (No such percentage has been prescribed by the

Rules).
Until Rules are prescribed by the Central Government, a class application shall be valid only if it is made by 100 depositors.

**Analysis and conclusion**

1. M/s Sunshine Oils Limited is a listed company having 200 depositors and deposits of Rs. 50 crores. Out of total 200 depositors, 20 depositors of the company have filed a class action application against M/s Sunshine Oils Limited by appointing Mr. Ram as their representative to file an application to the Tribunal. Mr. Ram is a practicing advocate, but he is not a depositor of the company.
2. In the class action application, it has been alleged that the management and conduct of affairs of the company are being conducted in a manner which is prejudicial to the interest of the depositors being oppressive.
3. Section 245 does not require that the person authorized by the depositors to make a class action application to the Tribunal has to be a depositor himself. Instead, Section 432 states that a party to any proceeding or appeal before the Tribunal may appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person.
4. Since the application has not been made by 100 depositors, it is liable to be rejected by the Tribunal.
5. Had the number of depositors been 100 or more, the class action application would have been valid, and in that case, it would have been valid for the depositors to authorize Mr. Ram to make such application to the Tribunal.

**38. Examine with reference to the relevant provision of the Companies Act, 2013 whether the scheme is approved by the required majority in the following cases:**

**Case I. A meeting of members or a company was convened under the orders of the Tribunal to consider a scheme of compromise and arrangement. The meeting was attended by 200 members holding 5,00,000 shares in aggregate. 70 members holding 4,00,000 shares voted for the scheme. The remaining members voted against the scheme. (CA (Final) May 2006)**

**Case II. A meeting of members of Jaora Agricultural Equipments Limited was convened under the orders of the Tribunal for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 200 members holding 5,00,000 shares. 70 members holding 4,00,000 shares in the aggregate voted for the scheme. 120 members holding 90,000 shares in aggregate voted against the scheme. 10 members holding 10,000 shares abstained from voting. (CA (Final) Nov. 2012)**

**Case III. A meeting of members of ABC Limited was convened as per the orders of the Court to consider a scheme of compromise and arrangement. Notice of the meeting was sent to 1000 members holding in aggregate 500000 equity shares. The meeting was attended by 800 members holding 350000 shares. 450 members holding 240000 shares voted in favour of the scheme; 200 members holding 60000 shares voted against the scheme. The remaining 150 members abstained from voting. Explain with reference to the provisions of the Companies Act, 2013, whether the scheme is approved by the requisite majority. (CA (Final) May 2019)**

**Case IV. A meeting of members of DEF Limited was convened under the orders of the Tribunal for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 300 members holding 9,00,000 shares. 120 members holding**

**7,00,000 shares in the aggregate voted for the scheme. 140 members holding 2,00,000 shares in aggregate voted against the scheme. 40 members holding 1,00,000 shares abstained from voting. Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme was approved by the requisite majority? (ICAI, RTP, Nov. 2017)**

**Case V. A meeting of members of ABC Limited was convened under the orders of the Tribunal to consider a scheme of compromise and arrangement. Notice of the meeting was sent in the prescribed manner to all the 600 members holding in the aggregate 25,00,000 shares. The meeting was attended by 450 members holding 15,00,000 shares. 210 members holding 11,00,000 shares voted in favour of the scheme. 180 members holding 3,00,000 shares voted against the scheme. The remaining members abstained from voting.**
**Examine with reference to the relevant provisions of the Companies Act, 2013 whether the scheme is approved by the requisite majority. (ICAI, Questions for Practice)**

**Ans.**

**Provisions**

As per Section 230, a scheme of arrangement between the company and members must be approved by more than 50% of the number of members who hold at least 3/4th of the value shares. It is to be noted that members or creditors not present in the meeting or present in the meeting but abstaining from voting (viz. remaining neutral) are not to be considered.
Voting by proxy shall be permitted, provided a proxy in the prescribed form duly signed by the person entitled to attend and Vote at the meeting is filed with the company at its registered office not later than 48 hours before the meeting. However, a minor shall not be appointed as a proxy.

**Case I.**

| | |
|---|---|
| Members who attended the meeting | 200 members |
| Shares held by the members who attended the meeting | 5,00,000 shares |
| Members who voted in favour of the scheme | 70 members |
| Shares held by the members who voted in favour of the scheme | 4,00,000 |
| Members who voted against the scheme | 130 members |
| Shares held by the members who voted against the scheme | 1,00,000 |
| Number of members who have voted, whether in favour of, against the scheme | 200 |
| Number of shares held by the members who have voted, whether in favour of, or against, the scheme | 5,00,000 |
| Number of members who should have voted in favour, for the purpose of Approving the scheme | 101 or more |
| Number of shares that should have been held by the members who have voted in favour, for the purpose of approving the scheme | 3,75,000 |

**Conclusion**

The scheme has been approved by members holding 4,00,000 shares. Thus, the requirement of approval of the scheme by the members representing 3/4th in the value of members present and voting at the meeting (i.e. members holding 3, 75,000 or more shares, in this case) has been satisfied.
The scheme has been approved by 70 members only. Thus, the requirement of approval of scheme by the majority of number of members, present and voting at the meeting (i.e. 101 or more members, in this case) has not been satisfied.
The approval by members in terms of 'majority of number of members' and 3/4th in the value

of members' are cumulative, i.e. these are two separate compliances. Accordingly, the scheme has not been approved by the requisite majority, and therefore, this scheme shall not be sanctioned by the Tribunal.

**Case II**

| | |
|---|---|
| Members who attended the meeting | 200 members |
| Shares held by the members who attended the meeting | 5,00,000 shares |
| Members who voted in favour of the scheme | 70 members |
| Shares held by the members who voted in favour of the scheme | 4,00,000 |
| Members who voted against the scheme | 120 members |
| Shares held by the members who voted against the scheme | 90,000 |
| Members who abstained from voting | 10 members |
| Shares held by the members who abstained from voting | 10,000 |
| Number of members who have voted, whether in favour of, or against, the scheme | 190 |
| Number of shares held by the members who have voted. whether in favour of. or against, the scheme | 4,90,000 |
| Number of members who should have voted in favour, for the purpose of approving the scheme | 96 or more |
| Number of shares that should have been held by the members who have voted in favour, for the purpose of approving the scheme | 3,67,500 or more |

**Conclusion**

The scheme has been approved by members holding 4,00,000 shares. Thus, the requirement of approval of the scheme by the members representing 3/4$^{th}$ in the value of members present and voting at the meeting (i.e. members holding 3,67,500 or more shares, in this case) has been satisfied.

The scheme has been approved by 70 members only. Thus, the requirement of approval of scheme by the majority of number of members, present and voting at the meeting (i.e. 96 or more members, in this case) has not been Satisfied.

The requirements or approval by members in terms of 'majority of number of members' and 3/4th in the value of members' are cumulative, i.e. these are two separate compliances Accordingly, the scheme has not been approved by the requisite majority, and therefore, this Scheme shall not be sanctioned by the Tribunal.

**Case III.**

| | |
|---|---|
| Members who attended the meeting | 800 members |
| Shares held by the members who attended the meeting | 3,50,000 shares |
| Members who voted in favour of the scheme | 450 members |
| Shares held by the members who voted in favour of the scheme | 2,40,000 |
| Members who voted against the scheme | 200 members |
| Shares held by the members who voted against the scheme | 60,000 |
| Members who abstained from voting | 150 members |
| Shares held by the members who abstained from voting | 50,000 |
| Number of members who have voted, whether in favour of, or against the scheme | 650 |
| Number of shares held by the members who have voted, | |

| | |
|---|---|
| whether in favour of, or against the scheme | 3,00,000 |
| Number of members who should have voted in favour, for the purpose of approving the scheme | 326 or more |
| Number of shares that should have been held by the members who have voted in favour, for the purpose of approving the scheme | 2,25,000 or more |

**Conclusion**

The scheme has been approved by members holding 2,40,000 shares. Thus, the requirement of approval of the scheme by the members representing 3/4th in the value of member present and voting at the meeting i.e. members holding 2,25,000 or more shares, in this case) has been satisfied.

The scheme has been approved by 450 members. Thus, the requirement of approval of scheme by the majority of number of members, present and voting at the meeting (i.e. 326 or more members, in this case) has also been satisfied.

The requirements or approval by members in terms of 'majority of number of members' as well as '3/4$^{th}$ in the value of members' have been satisfied, the scheme has been approved by the requisite majority, and therefore, the Tribunal may exercise its discretionary power to sanction the scheme.

**Case IV.**

| | |
|---|---|
| Members who attended the meeting | 300 members |
| Shares held by the members who attended the meeting | 9,00,000 shares |
| Members who voted in favour of the scheme | 120 members |
| Shares held by the members who voted in favour of the scheme | 7,00,000 |
| Members who voted against the scheme | 140 members |
| Shares held by the members who voted against the scheme | 2,00,000 |
| Members who abstained from voting | 40 members |
| Shares held by the members who abstained from voting | 1,00,000 |
| Number of members who have voted, whether in favour of, or against, the scheme | 260 |
| Number of shares held by the members who have voted, whether in favour of, or against, the scheme | 9,00,000 |
| Number of members who should have voted in favour, for the purpose of approving the scheme | 131 or more |
| Number of shares that should have been held by the members who have voted in favour, for the purpose of approving the scheme | 6,75,000 or more |

**Conclusion**

The scheme has been approved by members holding 7,00.000 shares. Thus, the requirement of approval of the scheme by the members representing 3/4th in the value of members present and voting at the meeting (i.e. members holding 6,75,000 or more shares, in this case) has been satisfied.

The scheme has been approved by 120 members only. Thus, the requirement of approval of scheme by the majority of number of members, present and voting at the meeting (i.e. 131 or more members, in this case) has not been satisfied.

The requirements of approval by members in terms of 'majority of number of members' and 3/4th in the value of members' are cumulative, i.e. these are two separate compliances.

Accordingly, the scheme has not been approved by the requisite majority, and therefore, this scheme shall not be sanctioned by the Tribunal.

**Case V.**

| | |
|---|---|
| Members who attended the meeting | 450 members |
| Shares held by the members who attended the meeting | 15,00,000 shares |
| Members who voted in favour of the scheme | 210 members |
| Shares held by the members who voted in favour of the scheme | 11,00,000 |
| Members who voted against the scheme | 180 members |
| Shares held by the members who voted against the scheme | 3,00,000 |
| Members who abstained from voting | 60 members |
| Shares held by the members who abstained from voting | 1,00,000 |
| Number of members who have voted, whether in favour of, or against. the scheme | 390 |
| Number of shares held by the members who have voted, whether in favour of, or against, the scheme | 14,00,000 |
| Number of members who should have voted in favour, for the purpose of approving the scheme | 196 or more |
| Number of shares that should have been held by the members who have voted in favour, for the purpose of approving the scheme | 10,50,000 or more |

**Conclusion**

The scheme has been approved by members holding 11,00,000 shares. Thus, the requirement of approval of the scheme by the members representing 3/4th in the value of members present and voting at the meeting (i.e. members holding 10,50,000 or more shares, in this case) has been satisfied.

The scheme has been approved by 210 members. Thus, the requirement of approval of scheme by the majority of number of members, present and voting at the meeting (i.e. 196 or more members, in this case) has also been satisfied.

The requirements of approval by members in terms of 'majority of number of members' as well as '3/4th in the value of members' have been satisfied, the scheme has been approved by the requisite majority, and therefore, the Tribunal may exercise its discretionary power to sanction the scheme.

**39. The shareholders and creditors of Superfine Limited, in a meeting convened for approval of a scheme of reconstruction of the company, passed resolutions. The scheme of reconstruction provided for the following:**

**(i) Sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan.**

**(ii) Unsecured creditors to forego 60% of their claims against the company and receive debentures for the balance amount. A few shareholders and creditors raised objections against the said arrangements.**

**Advise the directors about the steps to be taken to give effect to the proposed scheme under the Companies Act, 2013. (CA (Final) May 2017)**

**OR**

**Overambitious Limited became sick. The shareholders and creditors of the company passed resolutions in meetings convened by the company approving a scheme of reconstruction of the company. The scheme provides for sale of**

**Vacant land and utilization of the sale proceeds for payment of outstanding wages, sales tax dues and repayment of part of the loan taken from the bank. The unsecured creditors will have to forego 50% of their claims the company and received debentures for the balance amount. Advise the directors about the steps to be taken to give effect to the**

**proposed scheme in spite of objections raised by a few shareholders and creditors. (CA (Final) May 2003)**

**OR**

**What procedure must a company adopt to give effect to a compromise, when such a company is a going concern? (CA (Final) Nov. 1986: May 1991)**

**OR**

**M/s. Eternal Health Ltd. was facing acute financial difficulty as operations were continuously disrupted due to (a) non-availability of raw material (b) successive drought in its marketing areas and loss of demand and (c) frequent breakdown due to non-replacement of old plant and machinery. On the verge of liquidation, the Management proposes one last arrangement between creditors and the company, whereby the creditors have to forego 50% of their dues to the company. This has evoked strong protest from some of the creditors who may block the arrangement. You are requested to examine the arrangement in the light of the Companies Act, 2013 and advise the course of action/procedure to be adopted by the company to implement the same. (CA (Final) Nov. 2014)**

**Ans.** As per Section 230, the steps to be taken by the directors/ company for giving effect to the proposed scheme of compromise or arrangement are as under:

1. An application proposing a compromise or arrangement shall be made to the Tribunal. Such application may be made by-
(a) the company: or
(b) any creditor of the company:
(c) any member of the company:
(d) the liquidator.
2. All material facts relating to the company shall be disclosed to the Tribunal by way of an affidavit.
3. On receipt of an application proposing a compromise or arrangement the Tribunal may order a meeting of the creditors and members. The Tribunal may also order that the meeting shall be called, held and conducted in such manner as may be directed by the Tribunal. However, the Tribunal may dispense with calling of a meeting of creditors, if the creditors having at least 90% in value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.
4. The notice of the meeting called by the Tribunal shall be sent to all the creditor and members. The notice shall be accompanied by –
(a) a statement disclosing the details of the compromise or arrangement:
(b) a copy of the valuation report, if any:
(c) a Statement explaining the effect of the compromise or arrangement on the creditors, key managerial personnel, promoters and non-promoter members, debenture-holders, directors, debenture trustees; and
(d) a Statement containing such other matters as may be prescribed.
5. The notice of the meeting shall also be issued by way of an advertisement.
6. The notice of the meeting and other documents shall be placed on the website of the company, if any.
7. The notice of the meeting shall be sent to the Securities and Exchange Board and stock exchange, in case of a listed company. Such notice shall be placed on the website of the Securities and Exchange Board of India and stock exchange.
8. The notice of meeting shall disclose that the members and creditors may vote on the compromise or arrangement-
(a) either themselves; or
(b) through proxies; or
(c) by postal ballot, within 1 month of receipt of such notice.

9. Any objection to the compromise or arrangement may be made only by-
(a) persons holding not less than 10% of the shareholding: or
(b) persons having outstanding debt amounting to not less than 5% of the total outstanding debt as per the latest audited financial statement.
10. The notice of meeting along with all the documents shall also be sent to-
(i) the Central Government;
(ii) the income-tax authorities;
(iii) the Reserve Bank of India;
(iv) the Securities and Exchange Board;
(v) the Registrar;
(vi) the respective stock exchanges:
(vii) the Official Liquidator;
(viii) the Competition Commission of India, if necessary; and
(ix) Such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement.
11. All the above authorities shall have a right to make their representations within a period of 30 days from the date of receipt of such notice.
12. Where any representation is made by any of the above authorities, the Tribunal shall consider such representation, but the Tribunal shall not be bound to accept such representation.
13. The meeting shall be held and conducted as per the directions of the Tribunal, If, at a meeting held in pursuance of order of the Tribunal, majority of persons representing 3/4th in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement, the Tribunal may, by an order, sanction the compromise or arrangement.
14. If a compromise or arrangement is sanctioned by the Tribunal, the same shall be binding on the company, all the creditors and members.
15. The order made by the Tribunal shall contain provisions with respect to variation of shareholders' rights.
16. The order of the Tribunal shall be filed with the Registrar by the company within 30 of the receipt of the order.

**40. Answer the following with reference to a scheme of amalgamation of companies explaining the relevant provisions of the Companies Act, 2013.**
**(i) What is the majority required for approving the scheme o amalgamation in a meeting of members of a company called as per directions of the Tribunal? Is the scheme to be approved by preference shareholders?**
**(ii) When will the Tribunal order dissolution of the transferor company? (CA (Final) May 2000 (Modified)**

**OR**

**What is the majority required for approving the scheme of amalgamation in a meeting of members of a company called as per the directions of the Tribunal? Is the scheme required to be approved by the preference shareholders? (CA (Final) May 2019)**

**Ans.**
(i) As per Section 232, for the amalgamation or reconstruction of two or more companies, an application shall be made to the Tribunal under Section 230, and the scheme for amalgamation or reconstruction shall be approved as per the provisions contained in Section 230. As per Section 230, the scheme is required to be approved by a majority of the members, who are present and voting, and such majority of members must also be the members representing 3/4$^{th}$ in the value of members present and voting of the meeting. It is to be noted that members not present in the meeting or present in the meeting but abstaining from voting

(viz. remaining neutral) are not to be counted.
Voting by proxy shall be permitted, provided a proxy in the prescribed form duly signed by the person entitled to attend and vote at the meeting is filed with the company at its0020registered office not later than 48 hours before the meeting.
However, a minor shall not be appointed as a proxy.
Section 230 uses the expression 'member' which includes a preference shareholder also. As such, the scheme requires the approval of equity shareholders as well as preference shareholders. If a separate meeting of preference shareholders and equity shareholders is ordered, then the scheme shall be approved by preference shareholders and equity shareholders in their separate meetings.
(ii) As per Section 232, the order of the Tribunal may provide for of dissolution, without winding up, of any transferor company. However, the Tribunal shall not make such on order unless it is satisfied that the procedure and legal requirements as contained in Section 232 have been complied with.

**41. At the time of filing of the petition for amalgamation, the object clause of both the transferor and transferee companies does not contain power to amalgamate. With reference to the provisions of the Companies Act, 2013, examine the validity of the scheme of amalgamation. (CA (Final) May 2004 (Modified)**

**OR**

**Explaining the relevant provisions of the Companies Act, 2013, answer whether the companies seeking sanction of the Tribunal for a scheme of amalgamation must have specific power to amalgamate in the object clause of their Memorandum of Association? (CA (Final) Nov. 2009 (Modified)**

**Ans.** The memorandum of association lays out the scope of operations of a company beyond which the company cannot go. Anything done by the company outside the objects clause of memorandum is ultra-vires the company.
However, to amalgamate with another company is a power of the company, and not an object of the company. Therefore, no power to amalgamate is required in the memorandum of a company before making an application to the Tribunal for effecting amalgamation. Also, the power to amalgamate has been given by the statute under Section 232. Since there is a statutory provision dealing with amalgamation of companies, no special power in the objects clause of the memorandum is necessary for its amalgamation with another company. Section 232 is a complete code which gives full jurisdiction to the Tribunal to sanction amalgamation of companies, even though there may be no power in the objects clause of memorandum. (Re. EITA India Ltd., AIR 1997 Cal 208; United Bank of India v United India Credit & Development Co. Ltd. (1977) 47 Comp Cas 689, 730 (Cal).

**42. ABC Co. Ltd. was amalgamated with, and merged in XYZ Co. Ltd. Some workers of ABC Co. Ltd. Refuse to join as workers of XYZ Co. Ltd. and claim compensation for premature termination of services. XYZ Co. Ltd. Resists the claim on the ground that their services are transferred to XYZ Co. Ltd. by the order of amalgamation and merger and, therefore, the workers must join s vice of XYZ Co. Ltd. and cannot claim any compensation. Who will succeed the workers of ABC Co. Ltd. or the XYZ Co. Ltd.? Give reasons. (CA (Final) Nov. 2003, Nov. 1998 (Modified)**

**OR**

**Sunrise Company Limited was merged with Moonlight Company Limited on account of amalgamation. Some workers of Sunrise Company Limited refused to join as workers of Moonlight Company Limited and claimed compensation on the ground of premature termination of their services. Moonlight Company Limited resists the claim of the workers on the ground that their services have been transferred to Moonlight Company Limited in**

**view of the order of amalgamation and merger and hence the workers must join the service of Moonlight Company Limited and cannot claim any compensation.**
**State the powers of the Tribunal about the matters that would be considered while sanctioning the scheme of amalgamation under the provisions of the Companies Act, 2013. Decide whether the contention of the workers is justified. (CA (Final) Nov. 2008 (Modified)**

**OR**

**ABC Limited was amalgamated and merged in XYZ Limited. Some workers of ABC Limited refuse to join as workers of XYZ Limited and claim compensation for premature termination of service. XYZ Limited resists the claim on the ground that their services are transferred to XYZ Limited by the order of amalgamation and merger and, therefore, the workers must join service of XYZ Limited and cannot claim any compensation. According to the provisions of the Companies Act, 2013, examine whether the workers' contention is correct. (ICAI, Mock Test Paper, October 2018)**

**Ans.** Where a company (viz. transferor company) is amalgamated with another company, its property, rights, undertaking and liabilities are transferred to the amalgamated company (viz. transferee company). As per Section 232, the order of the Tribunal sanctioning the reconstruction or amalgamation shall be sufficient to vest all the properties or liabilities in the transferee company without execution of any further document.

But, the workers of the transferor company are not 'property, rights, undertakings or liabilities'. Therefore, a question arises as to whether the services of the workers are automatically transferred to the transferee company in case of amalgamation or reconstruction. This issue was raised in **Nokes v Doncaster Amalgamated Collieries Ltd. (1940) 3 All ER 549**. It was held that the order of the Tribunal sanctioning the amalgamation or reconstruction does not result in automatic transfer of contracts of personal service, and in the absence of the consent of the workers, no contract of service is created between the workers and the transferee company, and so the services of the workers cannot be transferred to the transferee company. Accordingly, where the workers refused to join the services of the transferee company, they were entitled to compensation. The decision in **Nokes v Doncaster Amalgamated Collieries Lid.** was given as per the provisions contained in Section 394 of the Companies Act, 1956.

As per Section 232(3)(e) of the Companies Act, 2013, where the Tribunal sanctions a compromise or arrangement, it may also make an order for the transfer of the employees of the transfer company to the transferee company. Under Section 232 of the Companies Act, 2013, where the Tribunal makes an order that the services of workers of the transferor company shall be transferred to the transferee company, such transfer of services is binding on all the parties, viz. the transferor company, the transferee company and the workers. Such transfer of services is the result of operation of law, and so no agreement or contract is required for this purpose. Here, the decision given in **Nokes v Doncaster Amalgamated Collieries Ltd.,** shall not apply, and so, the workers shall not be entitled to claim any compensation.

Therefore, in the given case, the workers of ABC Co. Ltd./Sunrise Company Limited shall not succeed against XYZ Co. Ltd., Moonlight Company Limited, and they shall not be entitled to receive any compensation, if the Tribunal has made an order transferring the services of workers to the transferee company, viz., XYZ Co. Ltd.,/Moonlight Company Limited.

**43. HPC Ltd. for a number of years was in various types of business. In order to exit from its non-core business, its management decided to hive off the business of Food Processing by demerging the said business with an associate company. Namely, BCD Ltd. You are required to advise briefly, with reference to the provisions of the Companies Act, 2013, the steps the management should take a give effect to the proposed demerger. (CA**

**(Final) May 2008, Nov. 2005 (Modified)**

**OR**

**M/s Over-ambitious Consultants Ltd. had, in the course of its operations over the years acquired various other ventures like plantations and tourism businesses. With a view to consolidate its core business activities, the management decided to hive off its non-core activities by deterging them with an associate company. Advise briefly the steps the management should take to achieve the purpose of demerger. (CA (Final) Nov. 2001 (Modified)**

**OR**

**Hi-tech Engineering Limited engaged in the business of engineering construction and cement manufacturing, decided to concentrate on its core business of engineering construction and hive off (demerge) its cement business in favour of Premier Cement Limited. State the steps to be taken by Hi-tech Engineering Limited to give effect to the proposed demerger under the provisions of the Companies Act, 2013.**

**Ans.** Section 232 is required to be complied with where whole or any part of the undertaking, property or liabilities of any company is proposed to be divided among and transferred to two or more companies. Accordingly, HPC Ltd may demerge Food Processing business by complying with the provisions of Section 232. Section 232 requires that an application shall be made to the Tribunal under Section 230 for the sanctioning of a compromise or arrangement, and the application shall be accompanied by a scheme which shall provide that the undertaking, property or liabilities of a company shall be transferred to another company or shall be divided among and transferred to 2 or more companies.

The procedure for demerger shall be as under -

1. HPC Ltd. (termed as 'transferor company') shall prepare a draft scheme under which the assets and liabilities of HPC Ltd. as comprised in the Food Processing business shall be transferred to the associate company (termed as transferee company'). The scheme shall specify the necessary details like-

(a) agreed values for transfer of assets and liabilities;

(b) the consideration for the transfer;

(c)where the transferee company issues shares to the shareholders of HPC Ltd., the exchange ratio of the shares;

(d) other terms and conditions.

2 An application shall be made to the Tribunal by HPC Lid., jointly with the transferee company.

3. All material facts relating to the company shall be disclosed to the Tribunal by way of an affidavit.

4. The Tribunal may order a meeting of the creditors and members. The Tribunal may also order that the meeting shall be called, held and conducted in such manner as may be directed by the Tribunal. However, the Tribunal may dispense with calling of a meeting of creditors, if the creditors having at least 90% in value, agree and confirm, by way of affidavit, to the scheme of demerger.

5. The notice of the meeting called by the Tribunal shall be sent to all the creditor and members. The notice shall be accompanied by-

(a) a statement disclosing the details of the demerger;

(b) a copy of the valuation report, if any;

(c) a Statement explaining the effect of the demerger on the creditors, key managerial personnel, promoters and non-promoter members, debenture-holders, directors, debenture trustees; and

(d) a Statement containing such other matters as may be prescribed.

6. The notice of the meeting shall also be issued by way of an advertisement.

7. The notice of the meeting and other documents shall be placed on the website of the

company, if any.
8. The notice of the meeting shall be sent to the Securities and Exchange Board and stock exchange, in case of a listed company. Such notice shall be placed on the website of the Securities and Exchange Board of India and stock exchange.
9 The notice of meeting shall disclose that the members and creditors may vote on the scheme for demerger –
(a) either themselves; or
(b) through proxies; or
(c by postal ballot, within 1 month of receipt of such notice.
10. Any objection to the scheme for demerger may be made only by-
(a) persons holding not less than 10% of the shareholding: or
(b) persons having outstanding debt amounting to not less than 5% of the total outstanding debt as per the latest audited financial statement.
11. The notice of meeting along with all the documents shall also be sent to-
(i) the Central Government;
(ii) the income-tax authorities;
(i) the Reserve Bank of India;
(iv) the Securities and Exchange Board:
(v) the Registrar;
(vi the respective stock exchanges:
(vii) the Official Liquidator
(viii) The Competition Commission of India, if necessary: and
(ix) Such other sectoral regulators or authorities which are likely to be affected by the scheme for demerger.
12. All the above authorities shall have a right to make their representations within a period of 30 days from the date of receipt of such notice.
13. Where any representation is made by any of the above authorities, the Tribunal shall consider such representation, but the Tribunal shall not be bound to accept such representation.
14. The meeting shall be held and conducted as per the directions of the Tribunal. If, at a meeting held in pursuance of order of the Tribunal, majority of persons representing 3/4$^{th}$ in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any scheme for demerger, the Tribunal may, by an order, sanction the scheme for demerger.
15. If the scheme for demerger is sanctioned by the Tribunal, the same shall be binding on l the company, all the creditors and members.
15. The order made by the Tribunal shall contain provisions with respect to variation of shareholders rights.
16. The order of the Tribunal shall be filed with the Registrar by the company within 30 of the receipt of the order.

**44. The scheme of amalgamation was approved by overwhelming majority of the members of the merging companies, namely, ABC Ltd and XYZ Ltd. at meetings called as per directions of the Tribunal. When the scheme of amalgamation was awaiting sanction of the Tribunal, the exchange ratio was questioned by a small group of dissenting shareholders of ABC Ltd. The exchange ratio was fixed by a firm of reputed Chartered Accountants. Examine with reference to the Tribunal rulings, whether the dissenting shareholders will succeed.**
**Would your answer be different, if the exchange ratio was objected to by the Central Government and not by the members of the merging companies? (CA (Final) Nov. 2006 (Modified)**

**OR**

**A scheme of amalgamation was approved by overwhelming majority of members of both the merging companies. The exchange ratio was fixed by a firm of reputed Chartered Accountants. When the scheme of amalgamation was awaiting sanction of the Tribunal, a small group of members of one of the merging companies raised objection on the ground that the exchange ratio was unfair. Examine with reference to decided case law whether the objection is likely to be sustained. What would be your answer in case similar objection was raised by the Central Government? (CA (Final) Nov. 2008 (Modified)**

**OR**

**The members of both Sugam Synthetix Limited and Gaurav Textiles Limited approved the scheme of amalgamation by overwhelming majority. A reputed firm of Chartered Accountants fixed the exchange ratio. The scheme of amalgamation was submitted, as per procedure, for the sanction of the Tribunal. During pendency of the matter a small group of members of one of the merging companies objected to the amalgamation on the ground that the exchange ratio was unfair.**
**Decide whether the said objection is likely to be sustained. Would your answer be different if similar objection was raised by the Central Government? (CA (Final) May 2011 (Modified)**

**OR**

**A scheme of amalgamation was approved by overwhelming majority of members of both the merging companies at meetings called as per directions of the Tribunal. When the scheme of amalgamation was awaiting sanction of the Tribunal, the exchange ratio was questioned by a small group of members of one of the merging companies. The exchange ratio was fixed by a reputed firm of Chartered Accountants.**
**Examine with reference to the decided case law under the Companies Act, 2013 whether the dissenting shareholders will succeed. Would your answer be different if the exchange ratio was objected to by the central Government? (CA (Final) May 2016 (Modified)**

**OR**

**In the context of judicial rulings in the matter of merger, answer the following:**
**Whether exchange ratio approved by shareholders of merging companies can be questioned by a small group of dissenting shareholders? (CA (Final) Nov. 2018)**

**Ans.**

As per Section 232, where an application made to the Tribunal under Section 230 states that the compromise or arrangement has been proposed for the purposes of merger or the amalgamation of two or more companies, the Tribunal has the discretion to make an order sanctioning it.

Once statutory formalities are complied with, the onus lies on those opposing the scheme to satisfy the Tribunal that the scheme is unfair or unreasonable or fraudulent **(Re. Hindustan General Electric Corporation Ltd. (1959) 29 Comp Cas 46; Re, Sussex Brick Co. Ltd. (1960) 30 Comp Cas 536).**

Where the valuation is confirmed to be fair by eminent firm of Chartered Accountants and is also approved by overwhelming majority, the Tribunal will not find fault with the exchange ratio **[Re, Tata Oil Mills Co. Ltd., Re, Hindustan Lever Ltd.,]**

Where the exchange ratio was fixed by two reputed firms of chartered accountants who had examined the accounts, annual reports, working results and financial positions of the two companies and certified on that basis that the share exchange ratio of 5:2 was fair and reasonable, and the scheme was widely advertised, unanimously approved and no objection was raised by any of the affected parties, and the Central Government had not affirmatively established that the valuation of assets was unfair or inequitable, the Tribunal refused to interfere. It was held that the role played by the Central Government is that of an

impartial observer who acts in public interest and advises the Tribunal as to whether it is feasible or not for the two companies to merge or amalgamate. Thus, in case of objection by the Central Government, the Tribunal shall not reject the scheme unless the Central Government establishes that the exchange ratio is unfair or that such scheme of merger or amalgamation is not in public interest **[M.G. Investment & industrial Co. Ltd. v New Shorrock Spg. & Mfg. Co. Ltd.]**

Thus, if, on overall consideration the Tribunal is satisfied as to feasibility of the scheme, it should not hesitate to grant sanction **[Re, Ucal Fuel Systems Lid.]**

Applying the above rulings, we can analyse the following:

(a) The Tribunal would not generally find faults in the exchange ratio fixed by reputed firms of chartered accountants. Therefore, the dissenting shareholders shall not succeed unless they satisfy the Tribunal that the valuation is grossly unfair **[Re, Piramal Spg. & Wvg. Mills Ltd.]**

(b) Section 230(5) requires that the notice of the meeting and all the prescribed documents shall be given to the Central Government, and the Central Government shall have a right to make its representation within 30 days. The Tribunal shall take into account such representation while passing any order in respect of the scheme of merger or amalgamation. However, the Tribunal is not bound to accept the opinion expressed by the Central Government.

Thus, even where the exchange ratio is objected by the Central Government, the Tribunal may sanction the scheme, since the representation or opinion made by the Central Government to the Tribunal is not binding on the Tribunal. However, if the Central Government establishes that the exchange ratio is unfair or that such scheme of merger or amalgamation is not in public interest, the Tribunal may reject the scheme **[M.G. investment & Industrial Co. Ltd. v New Shorrock Spg. & Mfg. Co. Ltd.].**

**45. Pioneer Textiles Limited desired to amalgamate its enterprise with Latex Textiles Limited. A scheme of amalgamation for this purpose was approved by an overwhelming majority of shareholders and all creditors of both companies at meetings held under the provisions of Section 232 of the Companies Act, 2013. Thereupon it was presented to the Company Law Tribunal for its sanction. While the scheme was pending in the Tribunal, some of the dissentient shareholders of Pioneer Textiles Limited requisitioned an extraordinary general meeting to negotiate with Latex Textiles Limited as according to the requisitionists the exchange ratio was not fair and reasonable.**
**Examine whether the directors may refuse to call the extraordinary general meeting. Also discuss the powers of the Tribunal in this respect. (CA (Final) May 2018)**

**Ans.** Section 232 of the Companies Act, 2013 read with Section 100 of the Companies Act, 2013, and as decided in **Pravin Kantilal Vakil v Mrs. Rohini Ramesh Save [1985] 57 Comp Case 31 (Bombay).**

**Can directors refuse to call the extraordinary general meeting?**

As per Section 100, where a valid requisition is made by the eligible members, the Board is bound to call an extraordinary general meeting of the company to consider and pass such matters and resolutions as have been specified in the requisition made by the one or more members holding at least 1/10$^{th}$ of the paid up share capital of the company.

In the given case, assuming that the shareholders who have requisitioned the extraordinary generally meeting hold at least 1/10$^{th}$ of the paid-up share capital, and other requirements contained in Section 100 are also satisfied, the directors are bound to call the extraordinary general meeting.

The facts in **Pravin Kantilal Vakil v Mrs. Rohini Ramesh Save** were exactly same as are in the given situation.

In **Pravin Kantilal Vakil v Mrs. Rohini Ramesh Save,** if was held as under:

It is not in the best interest of the company to call an extraordinary general meeting for the purpose of withdrawing the petition pending before the Tribunal for sanctioning of the scheme of amalgamation or to pass a resolution to examine any alternative scheme.
However, where an extraordinary general meeting is called for passing a resolution to renegotiate only a term in the scheme of amalgamation, viz. the exchange ratio, as the same was, according to the requisitionist, not fair and equitable to the shareholders of the company for the reasons mentioned in the explanatory note, if was, therefore, clear that what the shareholders were seeking to do by proposing the said resolution was to discuss only the modification to the scheme already before the Tribunal for sanction. The question was whether the Tribunal could prevent the shareholders from doing so on thee around that a scheme of amalgamation was already pending before the Tribunal for sanction.
Section 232 of the Companies Act, 2013 gives wide powers to the Tribunal to give such directions in regard to any matter or make such modification in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement, arrived at. Any modification in the scheme could be considered by the Tribunal even at the instance of any shareholder.
In that event, a mere discussion by the shareholders at a properly requisitioned meeting about the proposed modification to the scheme pending before the Tribunal for sanction and if approved, passing a resolution to that effect, would not by itself affect either the scheme or the Tribunal's powers to consider the modification and sanction the scheme with or without modification.
Therefore, the Tribunal or the directors of the company would not be justified in preventing the requisitionists from calling an extraordinary general meeting.
Since the facts in the given situation are exactly same as in **Pravin Kantilal Vakil v Mrs. Rohini Ramesh Save**, it can be concluded that the requisitions cannot be restrained from calling the extraordinary general meeting.

**Outlining the powers of the Tribunal**

1. The Tribunal is empowered to sanction the scheme of amalgamation and make provision for all such matters as are contained in Section 232, e.g. transfer of undertaking, properly or liabilities of the transferor company to the transferee company, allotment of securities by the transferee company to the shareholders of transferor company, provision to be made for dissenting shareholders, dissolution without winding up of transferor company, continuation of legal proceedings, etc. However, before sanctioning the scheme, the Tribunal shall take into account the representations made by the Central Government, the Reserve Bank of India and other Authorities who are entitled to make the representations as per Section 232.
2. Since the scheme of amalgamation has been approved by overwhelming majority, the Tribunal shall not reject the scheme unless it is established before the Tribunal that the exchange ratio is unfair or that such scheme of amalgamation is not in public interest.

**46. Mrs. Preeti, a lady aged about 32 years and Managing Director of M/s. Gowmore plantations Ltd., has been arrested for an offence covered under Section 447 of the Companies Act, 2013 on a complaint made by the Director. Serious Fraud Investigation Officer. Mrs. Preeti seeks your legal advice as to the conditions under which she can be released on bail and the role of Special Court in this regard. (CA (Final) Nov. 2017)**

**Ans.** As per Section 212(6), a person accused of an offence under Section 447 may be released on bail or on his own bond, by the Special Court only if-
(a) an opportunity is given to the public prosecutor to oppose the application for such release; and
(b) the Public Prosecutor either does not oppose such application for release, or if the Public Prosecutor opposes the application for release, the Special Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he

is not likely to commit any offence while on bail.
However, a person, who is under the age of 16 years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.
Further, Section 212(6) provides that the Special Court shall not take cognizance of any offence under Section 447 except upon a complaint in writing made by-
(i) the Director, Serious Fraud Investigation Office; or
(ii) any officer of the Central Government authorized, by a general or special order in writing in this behalf by the Central Government.
In the given case, the complaint to the Special Court has been made by the Director, Serious Fraud Investigation Office, and so the Special Court shall take cognizance of the offence committed by Mrs. Preeti.
Mrs. Preeti has been arrested for an offence covered under Section 447. So, she can be released on bail in accordance with the provisions contained in Section 212(6). Since Mrs. Preeti is a woman, she may be released on bail if the Special Court so directs, i.e., the Special Court has the discretion to grant bail to Mrs. Preeti even without providing any opportunity to the public prosecutor to oppose the bail application.

**47. Damage Ltd., the Company wanted to suspend Mr. Z., the CFO of the company during the pendency of an investigation being Conducted under the provisions of the Companies Act, 2013 on the order of Tribunal. The company approached the Tribunal on 3rd January 2017 for the proposed action. The company on 15th February 2017 passed an order of suspension without waiting for the orders from Tribunal. Comment upon the action taken by the company with reference to the relevant provisions of the Act. (CA (Final) May 2017)**

**Ans.**

1. Section 218 applies where a company intends to discharge or punish (whether by way of dismissal, suspension, reduction in rank or otherwise, or by way of change in terms of employment to his disadvantage) any employee during the pendency of any investigation under Section 210, 213, 219, 2016 or 212. Section 218 seeks to protect the interest of the employees who disclose information to the inspectors during the investigation proceedings.
2. Before taking any such action, the company is required to make an application to the Tribunal. If the company does not receive any objection of the Tribunal within 30 days, the company may proceed to take the proposed action.
3. In the given case, the company has made an application to the Tribunal on 3rd January, 2017, but the company has not received any objection of the Tribunal within 30 days (viz. 2nd February, 2017). Therefore, the company may take any action like dismissal or suspension of the employee on or after 3rd February, 2017.
4. The suspension of Mr. Z, the CFO of the company, on 15th February, 2017 is in accordance with the provisions of Section 218 of the Companies Act. 2013, and is therefore, valid.

**48. An inspector was appointed to investigate the affairs of a public company. Mr. WM, the works manager of the company, who is aware of certain misdeeds of the management, desires to know whether he is entitled to any protection against dismissal by the company, if he discloses the misdeeds during the course of examination by the inspector. Advise him explaining the relevant provisions of the Companies Act, 2013. (CA (Final) Nov. 2008)**

**OR**

**Pursuant to Section 210 of the Companies Act, 2013 an inspector was appointed to investigate the affairs of Sterling Trading Limited. Mr. Ahmed the General Manager (Operations) who is aware of certain misdeeds of the management, desires to know whether he is entitled to any protection against dismissal by the company if he discloses**

**the misdeeds during the course of examination by the Inspector. Advise him explaining the relevant provisions of the Companies Act, 2013. (CA (Final) Nov. 2017)**

**Ans.**

1. Section 218 applies where a company intends to discharge or punish (whether by way of dismissal. Suspension, reduction in rank or otherwise, or by way of change in terms of employment to his disadvantage) any employee during the pendency of any investigation under Section 210, 213, 219, 216 or 212. Section 218 seeks to protect the interest of the employees who disclose information to the inspectors during the investigation proceedings.
2. Before taking any such action, the company is required to make an application to the Tribunal. If the company does not receive any objection of the Tribunal within 30 days, the company may proceed to take the proposed action.
3. In the given case, if Mr. WM discloses to the inspector the misdeeds of the management, he shall enjoy the immunity granted under Section 218, viz. the management cannot discharge him or punish him without first making an application to the Tribunal. In other words, if the management wishes to discharge him or punish him, the company shall have to first make an application to the Tribunal, and if the company does not receive any objection of the Tribunal within 30 days of making application to the Tribunal, only then the company can discharge or punish Mr. WM.
4. Hence, before discharging or punishing Mr. WM, the company shall have to satisfy the Tribunal that there are reasonable grounds for such action, so that Tribunal does not object to such action of the company.
5. Mr. WM is entitled to protection against dismissal or punishment as per the above stated provisions contained in Section 218.

**49. Mr. Atul is an employee of the company ABC Limited and investigation is going on him under the provisions of Companies Act, 2013. The company wants to terminate the employee on the ground of Investigation is going against him. They have filed the application to Tribunal for approval of termination. Company has not received any reply from the Tribunal within 30 days of filling the application. The company considered it as a deemed approval and terminated Mr. Atul.**
**(i) Is the contention of company valid at law?**
**(ii) What is remedy available to Mr. Atul?**
**(iii) What is remedy available to Mr. Atul, if reply of Tribunal has been received within 30 days of application? (ICAI, Questions for Practice)**

**Ans. Provisions**

1. Section 218 applies where a company intends to discharge or punish (whether by way of dismissal, suspension, reduction in rank or otherwise, or by way of change in term of employment to his disadvantage) any employee during the pendency of any investigation under Section 210, 213, 219, 216 or 212. Section 218 seeks to protect the interest of the employees who disclose information to the inspectors during the investigation proceedings.
2. Before taking any such action, the company is required to make an application to the Tribunal. If the company does not receive any objection of the Tribunal within 30 days, the company may proceed to take the proposed action.

Analysis and conclusion of the case

ABC Ltd. intends to terminate an employee during the pendency of an investigation. The company has made an application to the Tribunal seeking the approval of the Tribunal with respect to such termination. However, the company has not received any objection from the Tribunal within 30 days of filing of application.

(i) As per Section 218, the company shall not terminate an employee if, within 30 days of application mode to the Tribunal by the company, the company receives any objection from the Tribunal. Hence, it is evident that where the Tribunal neither makes any objection nor

grants its approval within 30 days of application made to it by the company, the company is not required to wait for any reply or order of the Tribunal after the said period of 30 days.
Since the Tribunal has neither made any objection nor granted its approval within 30 days of application made to it by ABC Ltd., ABC Ltd. is entitled to terminate Mr. Atul, Thus, non-receipt of any reply from the Tribunal within 30 days of filing application can be considered as deemed approval for terminating Mr. Atul. Therefore, the contention of the company is valid.
(ii) If the Tribunal does not make any objection within 30 days of application made to it, Section 218 does not grant any remedy to Mr. Atul. Thus, in such a case, ABC Ltd. shall be entitled to terminate Mr. Atul, and Mr. Atul shall have no remedy under the Companies Act, 2013. However, Mr. Atul may claim damages from ABC Ltd. under the provisions of the Contract Act, 1872, if his termination amounts to breach of contract entered into between him and ABC Ltd.
(iii) In case the Tribunal makes on order granting its approval for termination of Mr. Atul, Section 218 does not grant any remedy to Mr. Atul since as per Section 218, only the company is entitled to prefer an appeal to the Appellate Tribunal against the order of the Tribunal (i.e. where the Tribunal objects to termination). However, Mr. Atul shall be entitled to prefer an appeal to Appellate Tribunal against the order of the Tribunal, in accordance with the provisions of Section 421. Any person aggrieved by an order of the Tribunal may, within 45 days, prefer an appeal to the Appellate Tribunal. However, the Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days but within a further period not exceeding 45 days. If it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

**50. During investigations conducted on the affairs of d company in the public interest, the inspector observed that the directors of the company had been acting on the instructions of the holding company and he proceeded to investigate the holding company. Is inspector permitted to do under the provisions of the Companies Act, 2013? (CA (Final) May. 2017)**

**Ans.**
1. As per Section 219, an inspector is entitled to investigate info the affairs of 'related companies etc.' as specified under Section 219, if the inspector considers that the results or investigation of 'related companies etc.' would be relevant to the investigation of the affairs of the company for which he has been appointed.
2. The holding company is also covered under 'related companies etc.' for the purpose of Section 219.
3. Before conducting investigation of any 'related companies etc. the inspector is required to obtain the prior approval of the Central Government.
4. Therefore, the inspector shall subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the Managing Director or Manager, in so for as he considers that the results of his investigation are relevant to the investigation of the affairs of the Company for which he is appointed.
5. In view of above, the Inspector is permitted to investigate the holding company Difference in answer as compared to the answer given by ICAI

**51. Members of Sarat Solutions Ltd. are concerned about the performance of the company as they suspect gross negligence and mismanagement of the affairs of the company that may be detrimental to the interests of the company and therefore filed an application to the Central Government to appoint an inspector to carry on the investigation. Mr. X, who was appointed as inspector, is of the view that to find out the true picture it is necessary to investigate into the affairs of M/s. Hemant Softech Solutions Ltd., which is a subsidiary of Sarat solution Ltd Referring to and analysing the provisions of the Companies Act, 2013**

**decide, whether the inspector has powers to investigate into the affairs of M/s. Hemant softech Solutions Ltd. (CA (Final) May 2019)**

**Ans.**

1. As per Section 219, an inspector is entitled to investigate into the affairs of related companies etc.' as specified under Section 219, if the inspector considers that the results of investigation of 'related companies etc.' would be relevant to the investigation of the affairs of the company for which he has been appointed.
2. The subsidiary company is also covered under 'related companies etc.' for the purpose of Section 219.
3. Before conducting investigation of any 'related companies etc., the inspector is required to obtain the prior approval of the Central Government.
4. In the given case, the inspector is conducting the investigation of Sarat Solutions Ltd. and intends to conduct the investigation of its subsidiary company, VIZ. M/S Hemant Softech Solutions Ltd.
5. The inspector shall be empowered to conduct the investigation of M/s Hemant Softech Solutions Ltd., but only after obtaining the prior approval of the Central Government.

**52. The members of a company having no share capital filed a complaint against change in management of the company due to which it was likely that the affairs of the company will be conducted in a manner that it will be prejudicial to the interest of is 25 members. Total number of members of company was 100. On inquiry and Investigation on the complaint, having a reasonable ground to believe that the transfer or disposal of assets of the company may be against the interests of its shareholders, the Tribunal passed an order that such transfer or disposal of assets shall not be made for one year from the date of such order.**

**Evaluate on the basis of the given facts, the following situations according to the Companies Act, 2013:**

**(a) Eligibility of the members to file a complaint.**

**(b) What shall be the consequences if the management disposes of certain assets in contravention of the order of the Tribunal? (ICAI, Mock Test Paper, March 2018)**

**Ans.**

1. The Tribunal is empowered to make an order that the removal, transfer or disposal of funds, assets, properties of the company shall not take place or may take place subject to such conditions and restrictions as the Tribunal may deem fit.
2. The period during which the assets shall be subject to freeze shall be specified in the order of the Tribunal. Such period shall not exceed 3 years.
3. The Tribunal may make an order under Section 221 if it has a reasonable ground to believe that the removal, transfer or disposal of funds, assets or properties of the company is likely to take place in a manner that is prejudicial to the interests of the company or its shareholders or creditors or in public interest.
4. The Tribunal may make such an order-

(a) on a reference made to it by the Central Government; or
(b) in connection with any inquiry or investigation into the affairs of a company; or
(c) on receipt of any complaint made by such number of members as are specified under Section 244(1): or
(d) on receipt of any complaint made by a creditor having an outstanding amount of Rs. 1 lakh against the Company, or
(e) on receipt of any complaint made by any other person.

5. As per Section 244(1), the members eligible to make an application are as follows:

(a) In case of a company having a share capital, the eligible members shall be lowest of the following:

(i) 100 members; or
(ii) 1/10th of the total number of members; or
(iii) One or more members holding not less than 1/10th of the issued share capital of the company.
(b) In case of a company having no share capital, the eligible members shall be l/5th of total number of members.
(c) The Tribunal has the discretion to waive the requirements as to eligibility (in the case of a company having a share Capital and also in the case of a company having no share capital). Thus, the Tribunal may permit a lesser number of members to make an application.
The answers to the given questions are as under:
(i) The application to the Tribunal has been made by 25 members. The company has a total of 100 members. The application made by 25 members satisfies the criterion of '1/5th of total number of members' (i.e. 1/5th of 100, i.e. 20). and so the application satisfies the eligibility criterion.
(ii) In case of any removal, transfer or disposal of funds, assets, or properties of the company in contravention of the order of the Tribunal, the punishment shall be as follows:
(a) The company shall be punishable with fine which shall not be less than Rs. 1 lakh but which may extend to Rs. 25 lakh.
(b) Every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 3 years or with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 5 lakh, or with both.

**53. Remedial Pharma Limited, over the years, enjoys a high reputation in the market and its general reserves are ten times more than the paid-up capital of the company. There is a serious apprehension of cornering the share of the company by a group of unscrupulous persons likely to result in change in the Board of directors which may be prejudicial to the public interest. The company seeks your advice as to how it can block the transfer of shares of the company under the provisions of the Companies Act, 2013. (CA (Final) Nov. 2017)**

**OR**

**ABC Limited, over years, enjoys high reputation and its general reserve is many times more than the paid-up capital of the company. There is apprehension of cornering the shares of the company by some persons likely to result in change in the Board of directors which may be prejudicial to the public interest. Advise, as to how can ABC Limited block the transfer of shares of the company under the provisions of the Companies Act, 2013. (CA (Final) May 2010)**

**OR**

**Big Ball Ltd., a reputed public company, over the years, has performed excellently and its general reserve is many times more than the paid up capital of the company. The chairman of the company came to know that a group of unscrupulous persons is cornering the shares of the company and may lodge them for transfer in their names. It is apprehended that such transfer may lead to change in the composition of Board of directors which may be prejudicial to the public interest. You are required to state with reference to the provisions of the Companies Act, 2013 as to how Big Ball Ltd. can block the above stated transfer of shares. (CA (Final) May 2008)**

**Ans.** As per Section 222, the Tribunal is empowered to make an order imposing restrictions upon securities of a company. The relevant provisions of Section 222 are explained as under:
1. The Tribunal may make an order imposing such restrictions upon securities as it may deem fit.
2. The Tribunal may make such an order on receipt of a complaint from any person.
3. The Tribunal may make such an order if it is satisfied that-

(a) it is necessary to find out the relevant facts about any securities of a company, and
(b) it is not possible to find out such facts unless certain restrictions are imposed upon securities.
4. The period of restrictions shall not exceed 3 years.
In the given case, there is a serious apprehension of cornering of shares of Remedial Pharma Limited. So, the company or any director of the company or any other person may make a complaint to the Tribunal that if is necessary to find out the relevant facts about the shares of the company which cannot be found out unless restrictions are imposed upon shares. If on receipt of such complaint, the Tribunal is satisfied as to the genuineness of the complaint (e.g. that certain unscrupulous persons might acquire the shares of Remedial Pharma Ltd. which may result in change in the composition of the Board of directors, which may consequently result in prejudice to public interest), the Tribunal may make an order imposing restrictions on transfer of the shares.

**54. An investigation was ordered by the Central Government under Section 216 of the Companies Act, 2016, against PKR Limited for determining the true membership of the company. In connection with this investigation, it appears to the Tribunal that there is good reason to find out the relevant facts about 9% Redeemable Cumulative Preference Shares (RCPS) issued by the company on 15.10.2017 and the Tribunal is of the opinion that unless restriction is imposed on further issue of such shares, the purpose cannot be solved. Accordingly, the Tribunal, by an order dated 15.08.2018, directed the company that the further issue of RCPS shall be subject to restrictions for a period of four years. Despite the order of the Tribunal as above, PKR Limited proceeded with further issue of RCPS on 20.08.2018 in order to fund the working capital requirements for its expansion project.**
**Referring to the provisions of the Companies Act, 2013, examine the following:**
**(i) Can the Tribunal restrict further issue of RCPS? If yes, then to what period?**
**(ii) What are the penal provisions in case of contravention to the above order? (CA (Final) Nov. 2018)**

**Ans. Provisions**
1. The Tribunal is empowered to make an order imposing such restrictions upon securities of a company, as it may deem fit.
2. The Tribunal may make such an order-
(a) where, in connection with any investigation into the membership of a company under Section 216, it appears to the Tribunal, that such an order is required.
(b)where any person makes a complaint to the Tribunal.
3. The Tribunal may make such an order if it is satisfied that-
(a) it is necessary to find out the relevant facts about any securities of a company: and
(b) it is not possible to find out such facts unless certain restrictions are imposed upon securities.
4. The period of restrictions shall not exceed 3 years.

**Analysis and conclusion**
1. The Tribunal is satisfied that there is a good reason to find out the relevant facts about 9% Redeemable Cumulative Preference Shares (RCPS) issued by PKR Ltd. and that it is not possible to find out such facts unless certain restrictions are
imposed on further issue of RCPS.
2. The Tribunal has made an order imposing restrictions on further issue of RCPS by PKR Ltd.
3. The Tribunal has made such an order in connection with an investigation into the membership of PKR Ltd. under Section 216.
4. The Tribunal has imposed restrictions on further issue of RCPS by PKR Ltd. for a period of 4 years.

**The answers are as under:**

(i) Yes, the Tribunal is empowered to restrict further issue of RCPS by PKR Ltd, in accordance with the above-stated provisions of Section 222. The period of restrictions on further issue of RCPS shall be such as may be ordered by the Tribunal, but such period shall not exceed 3 years.
Thus, the order of the Tribunal is not in order in so far as further issue of RCPS has been restricted for a period of 4 years.
(ii) As per Section 222, if the securities of company are issued or transferred or acted upon in contravention of the order of the tribunal, the punishment shall be as follows:
(a) The company shall be punishable with fine which shall not be less than Rs. 1 lakh but which may extend to Rs. 25 lakh.
(b) Every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 5 lakh, or with both.

**55. The Central Government ordered an investigation under Section 216 of the companies Act, 2013 against M/s Green Wood Limited for determining the true membership of the company. In connection with this investigation a reference was made to the Tribunal, It appears to the Tribunal that there is a good reason to find out the relevant facts about the equity shares with Differential Voting Rights (DVRs) issued by the company and the Tribunal is of the opinion that unless restrictions are imposed on further issue of such equity shares for two years, the purpose cannot be solved.**
**Referring to the provisions of the companies Act, 2013 and Rules framed in this regard, answer:**
**(i) Can the Tribunal put such a restriction on further issue of shares?**
**(ii) Period for which such a restriction can be imposed by the Tribunal? (CA (Final) Nov. 2018)**

**Ans.**
**Provisions**
1. The Tribunal is empowered to make an order imposing such restrictions upon securities of a company, as it may deem fit.
2. The Tribunal may make such an order –
(a) where, in connection with any investigation into the membership of a company under Section 216, it appears to the Tribunal, that such an order is required.
(b)where any person makes a complaint to the Tribunal.
3. The Tribunal may make such an order if it is satisfied that-
(a) it is necessary to find out the relevant facts about any securities of a company; and
(b) it is not possible to find out such facts unless certain restrictions are imposed upon securities.
4. The period of restrictions shall not exceed 3 years.
**Analysis and conclusion**
1. The Tribunal is of the opinion that there is good reason to find out the relevant facts about the equity shares with Differential Voting Rights (DVRs) issued by M/s Green Wood Ltd. and that it is not possible to find out such facts unless certain restrictions are imposed on further issue of such shares.
2. The Tribunal has made an order imposing restrictions on further issue of equity shares with Differential Voting Rights by M/s Green Wood Ltd.
3. The Tribunal has made such an order in connection with an investigation into the membership of M/s Green Wood Ltd. under Section 216.
4. The order of the Tribunal has imposed restrictions on further issue of equity shares with Differential Voting Rights by M/s Green Wood Ltd, for a period of 2 years.
(i) Yes, the Tribunal is empowered to restrict further issue of equity shares with Differential

Voting Rights by M/s Green Wood Ltd. for a period of 2 years. Such an order of the Tribunal is in accordance with the above-stated provisions of Section 222.
(ii) As per Section 222, the period of restrictions on further issue of equity shares with Differential Voting Rights shall be such as may be ordered by the Tribunal, but such period shall not exceed 3 years.

**56. The report submitted by the inspector appointed under Section 210/ 213 of the Companies Act, 2013 to investigate the affairs of a Company revealed that substantial funds of the Company nave been misappropriated by the Managing Director of the Company. The Central Government is of the opinion that effective action may not be taken the company for recovery of the funds misappropriated by the Managing Director. Examine with reference to the provisions of the Companies Act, 2013 the action that can be taken by the Central Government for recovery of damages or funds misappropriated by the Managing Director. (CA (Final) Nov. 2009)**

**Ans.** The given problem relates to Section 224 of the Companies Act, 2013. Section 224 contains the provisions with respect to action that may be taken by the Central Government after receiving the report of the inspector.

**Provisions**

As per Section 224, the Central Government may take any of the following actions
1. If any person appears to be guilty of an offence for which he is criminally liable, the Central Government may prosecute such person.
2. The Central Government may cause to be presented to the Tribunal, a petition for the winding up of the company.
3. The Central Government may cause to be presented to the Tribunal, an application under Section 241 (viz. an application for claiming relief from oppression or mismanagement.
4. If it appears to the Central Government that proceedings ought, in the public interest, to be brought by the company or any body corporate whose affairs have been investigated-
(a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in Connection with the promotion or formation, or the management of the affairs, of such company or body corporate or
(b) for the recovery of any property of such company or body corporate which has been misapplied or wrongfully retained
the Central Government may itself bring proceedings for that purpose in the name of such company or body corporate.
The Central Government shall be indemnified by such company or body corporate against any costs or expenses incurred by it in, or in connection with any proceedings for recovery of damages or recovery of any property.
5. Where the report made by the inspector states that any fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement, and also for holding such person personally liable without any limitation of liability.

**Analysis and conclusion**

From the inspector's report, it appears that managing director of the company has misappropriated substantial funds.
However, it is likely that no effective action may be taken against the managing director for recovery of such funds.
Since it is unlikely that any action would be taken by the company against the managing director for recovery of funds, and it is in the public interest that the proceedings for recovery of funds should be brought against the managing director, so, the Central Government

should itself bring proceedings for the recovery of damages in the name of such company. The Central Government shall be indemnified by the company against any costs or expenses incurred by it in connection with any such proceedings.
Further, the Central Government may file an application before the Tribunal seeking an order of disgorgement, i.e. an order that the managing director shall be personally liable for taking any undue advantage or benefit.
The Central Government may itself bring proceedings in the name of the company for recovery of damages and file an application before the Tribunal seeking an order of disgorgement.

**57. M/s Genesis paper Ltd. has been incurring business losses for past couple of years. The company, therefore, passed a special resolution for voluntary winding up. Meanwhile, complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public. In this situation advise whether investigation may be initiated against the company under the provisions of the Companies Act, 2013. (CA (Final) Nov. 2017)**

**Ans.** As per Section 210, the Central Government is empowered to order an investigation into the affairs of a company where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company-
(a) on the receipt of a report of the Registrar or inspector under Section 208;
(b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
(c) in public interest.
As per Section 226, an investigation may be initiated shall not be stopped or suspended because of the mere fact that-
(a) an application has been made u/s 241 (viz. an application for claiming relief from oppression or mismanagement); or
(b) the company has passed a special resolution for voluntary winding up; or
(c)any other proceeding for the winding up of the company is pending before the Tribunal.
In the given case, the Central Government may, as per Section 210, order an investigation into the affairs of M/s Genesis Paper Ltd. if it is of the opinion that such an investigation is in public interest. As per Section 226, the Central Government may make such an order of investigation notwithstanding that the M/s Genesis Paper Ltd. has passed a special resolution for voluntary winding up.

**58. Mr. Sharma is a legal advisor of M/s ABC Ltd. and in that capacity, he has rendered legal advice by way of a written communication to the company. The registrar of companies, Mumbai, issues and order to Mr. Sharma to disclose and furnish a copy of the communication made by him. Examine the power of the registrar to call for the said document from Mr. Sharma. (CA (Final) Nov. 2002)**

**Ans.** As per Section 227, a legal adviser shall not be bound to disclose to the Tribunal, Central Government, Registrar or inspector, any privileged communication made to him except the name and address of his client.
Section 227 constitutes professional communication incorporated in the Indian Evidence Act, 1872, according to which no advocate or legal advisor shall be compelled to disclose as to what communication was made to him by the client. The rule of professional communication is based on public policy and protects the interest of the client.
As per Section 206, the Registrar is empowered to issue a written notice and demand information or explanation and require production of documents from –
(a) the company

(b) any officer or employee of the company
(c) any past officer or employee of the company.
As is evident from a study of Section 206, the Registrar has no power to demand any information or explanation or require production of books from the legal adviser of the company.
In the given case, Mr. Sharma is a legal adviser of M/s ABC Ltd., and the Registrar issued an order to Mr. Sharma requiring him to disclose the Communication made by him to ABC Ltd. The Registrar has also demanded a copy of the communication made by Mr. Sharma to M/s ABC Ltd.
Section 227 expressly restricts the Registrar from issuing any order to any legal adviser of the company, requiring him to disclose any communication between him and the company.
The Registrar is not empowered to call for the said document from Mr. Sharma.