



THE INSTITUTE OF  
Company Secretaries of India

भारतीय कम्पनी सचिव संस्थान

IN PURSUIT OF PROFESSIONAL EXCELLENCE

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(Under the jurisdiction of Ministry of Corporate Affairs)

# SUPPLEMENT PROFESSIONAL PROGRAMME (New Syllabus 2022)

*for*

*December, 2024 Examination*

**DRAFTING, PLEADINGS**

**&**

**APPEARANCES**

**GROUP 1**

**PAPER 2**

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## Index

<b>S. No.</b>	<b>Lesson</b>	<b>Pages</b>
1	Lesson 4: Drafting of Agreements, Deeds and Documents	2-3
2	Lesson 5: Drafting of Commercial Contracts	4-6
3	Lesson 8: Commercial Contract Management	7-22
4	Lesson 12: Applications, Petitions and Appeals under Companies Act, 2013	23-35
5	Lesson 13: Adjudications and Appeals under SEBI Laws	36-38
6	Lesson 14: Appearance before other Regulatory and Quasi-judicial Authorities	39

## Lesson 4: Drafting of Agreements, Deeds and Documents

### 1. Specimen Mediated Settlement Agreement

A specimen of Mediated Settlement Agreement is provided hereinafter:

This Mediated Settlement Agreement is executed on this \_\_\_\_\_ day of \_\_\_\_\_, 2024 at New Delhi

\_\_\_\_\_ by and between \_\_\_\_\_, maintaining its Registered Office at \_\_\_\_\_ (hereinafter referred to as the "FIRST PARTY")

\_\_\_\_\_ and \_\_\_\_\_ S/o \_\_\_\_\_ residents of \_\_\_\_\_ (hereinafter referred to as the "SECOND PARTY")

**WHEREAS** pursuant to agreement dated \_\_\_\_\_, disputes relating to \_\_\_\_\_ and \_\_\_\_\_ has arose between the parties.

**WHEREAS** by virtue of the above said agreement, the parties mutually agreed to settle their dispute through Mediation by entering into a separate Mediation agreement.

**WHEREAS** both the parties have appointed Mr. \_\_\_\_\_ as Mediator for conduct of the proceedings.

**WHEREAS** the parties have now settled the disputes in the mediation proceedings held on \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_.

#### **NOW IT IS HEREBY AGREED AS FOLLOWS:**

1. The parties to this agreement accepts and agrees to the terms, conditions and clauses, as full and final settlement of the claims made by first party against the second party pertaining to matter indicated in mediated settlement agreement dated \_\_\_\_\_. However, any clause of this agreement should not be treated as admission of facts of dispute.
2. The second party agrees to pay Rs. \_\_\_\_\_/- by \_\_\_\_\_ (date) for the 100 computers machines delivered by the first party during the duration between \_\_\_\_\_ and \_\_\_\_\_.
3. The first party agree to provide Annual Maintenance of the above said 100 computers free of cost for a period of 3 years starting from \_\_\_\_\_ to \_\_\_\_\_.
4. The first party shall made available one of its employee during the office hours of Second Party. The employee of first party shall be entitled to 2 Earned Leaves Per month application of which should be made to Second Party 24 hours in advance and 1 Casual Leave per month that may be taken in case of exigency and 24 Sick Leaves per year.

5. The payment shall be made by second party to the first part by online transfer in the Bank accounts of later of by account payee the cheque in the name of “\_\_\_\_\_”.

6. The parties agree that the obligations of First Party under the settlement agreement are fulfilled discharged on making the full and final payment under clause 2 of this Agreement to the Second Party before \_\_\_\_\_ (Cut off date for making Payment).

7. The parties agree that unpaid amount after \_\_\_\_\_ (Cut off date for making Payment) shall bear interest from the date such payment was due until paid at a rate 10% compounded quarterly from time to time.

8. The parties agree that there shall be no further penalty or claim made pertaining to this transaction between the parties.

9. It is agreed between the parties that all the liabilities of the Second Party for payment as mentioned in the letter of possession dated 27.05.2016 are inclusive in the above agreed amount of Rs.25 LACS and no other payment whatsoever would be payable by the Second Party after payment of settled amount except interest for delayed payment as detailed herein above as also the maintenance charges with effect from 1.8.2021.

10. The parties agrees that parties shall pray the Hon'ble Court for a suitable adjournment of proceedings so that the parties can ensure compliance of the terms of this agreement and thereafter jointly apply to the Hon'ble Court for disposal proceedings.

It is agreed between the parties that the parties shall pray to the Hon'ble Court for a suitable adjournment of both the appeals of the two appeals as aforesaid.

In witness whereof the Bank, through its authorised officer has set its hand and stamp on this \_\_\_\_\_ day of March, 2023 at \_\_\_\_\_.

\_\_\_\_\_  
1<sup>st</sup> Party  
(Name, Signature and Details)  
Details)

\_\_\_\_\_  
2<sup>nd</sup> Party  
(Name, Signature and  
and

\_\_\_\_\_  
Mediator  
(Name, Signature and Details)

## **Lesson 5: Drafting of Commercial Contracts**

### **FAQs on LLP Agreement**

#### **1. How the mutual rights and duties of partners inter-se and those of partners and LLPs would be governed?**

The mutual rights and duties of partners inter se and those of the LLP and its partners shall be governed by the agreement between partners or between the LLP and the partners. This Agreement would be known as “LLP Agreement”.

#### **2. Whether LLP Agreement would be mandatory for all LLPs?**

As per provisions of the LLP Act, in the absence of agreement as to any matter, the mutual rights and liabilities shall be as provided for under Schedule I to the Act. Therefore, in case any LLP proposes to exclude provisions/requirements of Schedule I to the Act, it would have to enter into an LLP Agreement, specifically excluding applicability of any or all paragraphs of Schedule I.

### **Schedule I of the LLP Act, 2008 is provided hereunder:**

#### **The First Schedule**

*[See section 23(4)]*

#### ***Provisions Regarding Matters Relating To Mutual Rights And Duties Of Partners And Limited Liability Partnership And Its Partners Applicable In The Absence Of Any Agreement On Such Matters***

1. The mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and its partners shall be determined, subject to the terms of any limited liability partnership agreement or in the absence of any such agreement on any matter, by the provisions in this Schedule.
2. All the partners of a limited liability partnership are entitled to share equally in the capital, profits and losses of the limited liability partnership.

3. The limited liability partnership shall indemnify each partner in respect of payments made and personal liabilities incurred by him
  - (a) in the ordinary and proper conduct of the business of the limited liability partnership;
  - or
  - (b) in or about anything necessarily done for the preservation of the business or property of the limited liability partnership.
4. Every partner shall indemnify the limited liability partnership for any loss caused to it by his fraud in the conduct of the business of the limited liability partnership.
5. Every partner may take part in the management of the limited liability partnership.
6. No partner shall be entitled to remuneration for acting in the business or management of the limited liability partnership.
7. No person may be introduced as a partner without the consent of all the existing partners.
8. Any matter or issue relating to the limited liability partnership shall be decided by a resolution passed by a majority in number of the partners, and for this purpose, each partner shall have one vote. However, no change may be made in the nature of business of the limited liability partnership without the consent of all the partners.
9. Every limited liability partnership shall ensure that decisions taken by it are recorded in the minutes within thirty days of taking such decisions and are kept and maintained at the registered office of the limited liability partnership.
10. Each partner shall render true accounts and full information of all things affecting the limited liability partnership to any partner or his legal representatives.
11. If a partner, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business.
12. Every partner shall account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership, or from any use by him of the property, name or any business connection of the limited liability partnership.
13. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

14. All disputes between the partners arising out of the limited liability partnership agreement which cannot be resolved in terms of such agreement shall be referred for arbitration as per the provisions of the Arbitration and Conciliation Act, 1996.

## Lesson 8: Commercial Contract Management

### 1. Negotiation of Best Commercial and Operational Terms with Vendor

Negotiation is a skill that can benefit entrepreneurs every single day, whether they're dealing with vendors or landlords, employees or clients. Negotiating with vendors is vital for overall improving vendor contract. The negotiation process can help you understand the needs of each party and determine a contract that benefits both sides of the transaction. From interest to length of contract to payment terms, a vendor contract is made of many facets that can be negotiated. One can negotiate with potential suppliers as well as existing vendor contracts, provided one follows the effective and result driven negotiation. The steps involved in negotiation of best Commercial and Operational terms with Vendor include:

- i. Prepare a Plan:** It is always beneficial to prepare a plan before starting the negotiation process. A plan *inter alia* should include *Services or products that can be offered or to be purchases or availed, Payment Terms, Time required for finalization, Cancellation clauses, Penalties including late penalties etc.*
- ii. Finalise the communication system:** Frequent communication can be said to be starting point of the trust in negotiations. Every effort should be made to observe and fulfil whatever has been committed. The response is one another important area that can enhance the trust of other party. Timely response is also beneficial. Single point of contact is one other aspect that gives an added advantage. Further, vendors sending personal communication are generally open to negotiations as against Bulk Messages.
- iii. Offer competitive Prices:** Proper research should be done before finalizing the prices of products or services. The prices of similar or competitive products should be studied before offering a price to the customers.
- iv. Respect the experience of the other Party and help them:** Treat the other party as an expert in their area. Try to learn from them. It can prove to be beneficial if you express that you are looking for long associations and you are also interested in the growth of their businesses. Further, it should be demonstrated that how you can help them in growing their businesses.

**v. Be open for the competition:** You may be sure which vendor you prefer but it is better to obtain the quotes from various vendors also. This activity can keep the prices in control. When you are taking the quotes, try to take the quotations for different quantities for the purpose of evaluation and finalization of quantities to be ordered. So that you will be able to purchase the quantity which is most beneficial to you.

**vi. Different aspects may be explored:** In certain situation, you may find a vendor who is not ready to negotiate the prices of the product or services. It does not mean that there is no scope of negotiation. Other aspects such as Payment terms, Interest, discounts etc. may still be negotiated.

**vii. Deposits:** Vendors are providing their product and services to you in anticipation of the payments within time. However, there may be doubt about the timely payments in their minds. Therefore, deposits can build trust and confidence for you amongst the Vendors.

**viii. Win-Win solution:** While negotiating try to suggest the option which is beneficial for both the parties. Working on a Win-Win situation can make you a preferred party.

## **2. Compliance with Laws**

It is a well settled principle of law that no contract between the parties can oust the application of law. In short, every contract is subject to applicable laws and parties to the contract are bound to comply with the laws applicable on them as well as on transaction. In almost all the contracts, there is a clause confirming compliance with laws.

The laws which are generally required to be complied includes the following:

- i. Indian Contract Act, 1872
- ii. Indian Stamp Act, 1899
- iii. Registration Act, 1908

However, in specific case the following laws *inter alia* are also required to be complied with:

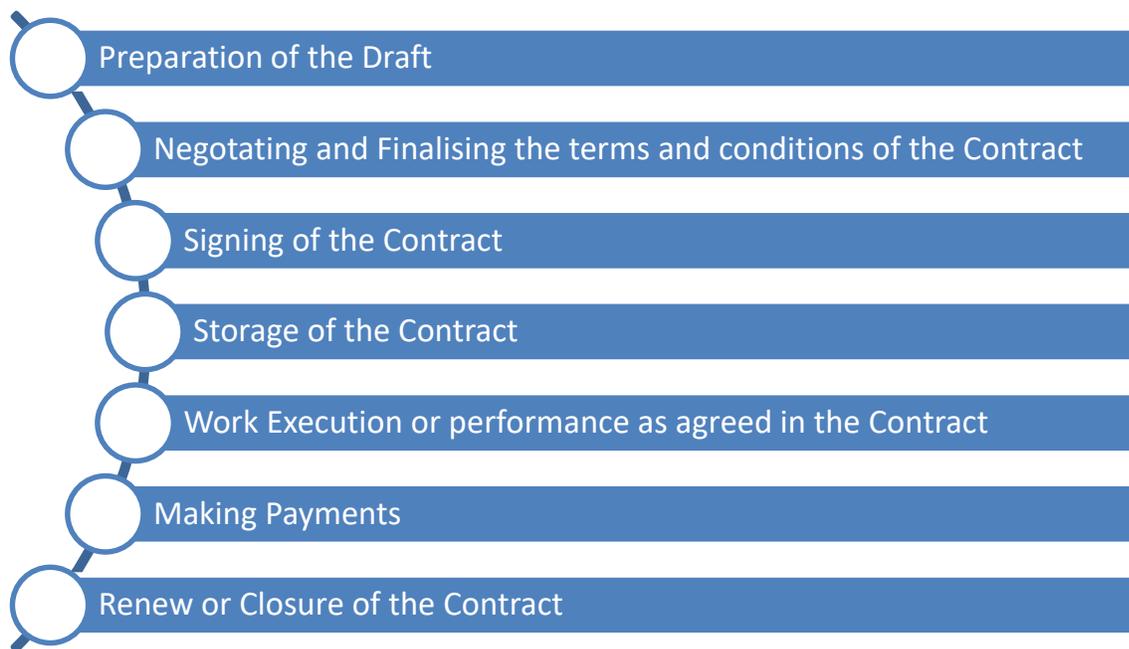
- i. Powers-of Attorney Act, 1882
- ii. Sale of Goods Act, 1930
- iii. Transfer of Property Act, 1882
- iv. Arbitration and Conciliation Act, 1996
- v. Specific Relief Act, 1973

However, this list is not exhaustive. Many other laws may also be applicable along with the Law of Contracts.

### 3. Tracking of Contracts and Extend, Renew and Close

Contract tracking is the process whereby stakeholders in the contract lifecycle (particularly in legal or compliance) are able to know where a contract is alive or not, without having to investigate across multiple systems.

There are various stages of the Contract. These stages starts from preparing the draft documents to Performance, renewal, termination and closure of the Contract. The stages of the contacts can be summarized as below:



Each stage requires different actions therefore it is necessary to keep a track of the contract documents. For example: Stamp duty should be paid before signing and registration after the signing of the contract, Awarding of Purchase Order during active life of the Contract, Renewal (if required), etc. Therefore, tracking at every stage is required. This tracking can be done manually or with the help of Contract Management Software. All what is required to keep the track and take necessary action within the timelines. If necessary action has not been taken in time, a contract can give rise to a huge burden on a party. For example: Working under an

expired contract can hinder and create difficulty while enforcing the payment terms against the other party.

#### **4. Rules for tracking of Contracts for Renewal, Extension and Closure**

**i. Storage of Contract:** The storage of contract should be in a place where they are kept in safe custody and try to keep a copy of the Contract document readily available. In case, the number of contracts are on a higher side, online systems can be of great help.

**ii. Arrange for the systems of reminders:** Systems should be made in such a manner that ensuing activity is notified to the user well in advance in order to take necessary action.

**iii. Classifications:** Classifications of documents be made for the purpose of taking special care of the contracts whose stake are high and margin of error is very low. This will ensure timely action in case of important contracts.

**iv. Inform Stakeholders in advance:** Every organization have their own processes, long or short. Many a times, the authorities of various executives are also derived from their senior authority. For example: The Board Directors may authorize Company Secretary to execute contract on behalf of the company or Managing Director authorizing the Finance head for signing and executing the contract on behalf of the Company. Therefore, it is advisable, to give enough time to the other party for taking necessary approvals from their appropriate authority also to keep sufficient time for taking necessary approvals in your company.

#### **5. Build and Maintain relationships with Vendors, Clients**

The following is the inclusive list of actions that can prove to be beneficial for building and maintaining good relations with vendors and clients:

**i. Maintain Proper Communication:** Various communications are required to be made to vendors and clients during a project. It is advisable to communicate with the client or vendor and inform him/her the required course of actions in advance. However, special care must be taken to ensure that an individual client should not intrude on your personal time or negatively affect your productivity.

**ii. Effective Communications:** Clear and regular communication with the client or vendor can prove to be beneficial for maintaining good relationship. It will positively impact your relationship with the vendors and clients and their trust on you can be enhanced.

**iii. Individuals Communications:** It is advisable to address the vendor/client as an individual. Bulk messages are generally not liked or preferred by individuals. Sometimes personal greetings and wishes can also be beneficial for maintaining good relationship with the Vendors and Cleints.

**iv. Opinion Sharing:** You can share your opinions about the businesses of your clients or vendors and also suggest improvements. However, it must be note that the client or vendor may or may not accept your opinion.

**v. Do more than expected:** The clients or vendors appreciate when they are delivered more than what they have expected. An extra step from you can increase your trust amongst clients and vendors.

**vi. Be ready for the Change and adjust your work processes:** If a particular clients and vendors is important for your business, you have to be ready for the changes that are acceptable. However, cost-benefit analysis should be done before accepting any change request from vendors or clients. The cost should not too excessive for your business processes.

**vii. Ask for Feedback:** Asking for the feedback from your vendors and clients can have positive impact on you businesses. Feedbacks systems are good tool to increase trust in business relationships. Constructive feedbacks can also prove to be a beneficial factor for professional growth.

## **6. Control over any charges for services out of the Scope of the Contract**

The goods or services which are subject matter of a Contract are to be supplied or provided according to the terms of Contract. However, due to the circumstances (Bonafied or Malafied), some goods or services are provided that are out of the Scope of the Contract. In these circumstances, the parties may agree these out of scope transactions. But, the parties should evaluate the change to the transaction and its financial impact on them.

The parties should also assess relevant facts and situation and decide whether to approve or

reject the transactions that are out of scope of Contract. If the parties approve these transactions, no further liability arises but, if these transactions are rejected or challenged, the circumstances can give rise to individual liability for those who were at fault.

In another situation, there may arise circumstances which were unseen at the time of signing of Contract. In this situation, parties should agree to circumstances which have arisen later in front of the parties. However, if it is not possible to obtain the consent of the other party, the matter can be dealt according to the Principle of *Quantum Meruit*.

### **7. Charges/Payment of Services – Outside the Scope of the Contract: Indian Legal perspective**

“*Quantum Meruit*” loosely translates to ‘as much as one deserves’. It means something that has been earned. A *quantum meruit* claim arises, where work is done or services rendered by one party for the other, in circumstances which entitle the party doing the work or rendering the services to receive a reasonable additional remuneration, the situation being one where either there is no contract or there is a contract but the particular situation is not covered under that contract.

The compensation under the principle of *Quantum Meruit* is allowed in the courts under Section 70 of the Indian Contract Act, 1872. A claim for compensation by one against another under Section 70 of the Indian Contract Act, 1872 is not based on any subsisting contract between the parties. Rather, its basis is that something has been done by one party for the other, non-gratuitously, which the other party had accepted voluntarily. It covers a situation where there is no agreement at all.

However, three conditions need to be fulfilled before the benefit of this section can be invoked by a person. The three conditions under section 70 of Indian Contract Act, 1872 are as follows:

- **Lawful:** The first condition is that the claimant should either lawfully do something for another person or deliver something to him.
- **Non-Gratuitous Transaction:** The second condition is that while doing or delivering something, the claimant must not be acting gratuitously and
- **Enjoyment by the second party:** Thirdly, the person for whom something is done or to whom something is delivered must enjoy the thing done for or delivered to him as the

case may be.

The basis of quantum meruit equitable considerations. This is often described as “restitution for quasi-contract”. However, the facts necessary for exercising this jurisdiction must be proved by the claimant.

In *Matheson v. Smiley (1932, Canada)*, a surgeon who intended to charge his fees made an attempt to save life of a person who committed suicide but was not successful in saving him, was held entitled to remuneration for his professional services.

The case of *Alopi Parshad and Sons Ltd. v. Union of India* decided by the Hon’ble Supreme Court may be referred for better understanding and applicability of the Principle of Quantum Meruit. In this case the Supreme Court held that:

*“Compensation under quantum meruit is awarded for work done or services rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation quantum meruit cannot be awarded where the contract provides for the consideration payable on that behalf. Quantum meruit is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable.”*

In the case of *Mulamchand v. State of M.P.*, the Supreme Court held that, if a claim for compensation is made by one person against another person under Section 70 of the Indian Contract Act, 1872, it cannot be on the basis of any existing construction contract between the parties but on the basis different kinds of obligations.

## **8. Actions in Case of Breach of Contract**

Breach of contract occurs when a party renounces from his liability under the contract without any legal justification. Chapter VI (Section 73 to 75) of the Indian Contract Act, 1872 deals with the consequences of breach of the contract.

**Section 73 – deals with compensation for loss or damage caused by breach of contract**

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him, which naturally arose in the natural course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Damage is a disadvantage suffered by a person as a result of the act or default of another. Damages are the pecuniary recompense given by process of law to a person for the actionable wrong.

No compensation shall be given to any remote and indirect loss or damage sustained by reason of breach.

**Compensation for failure to discharge obligation resembling those created by contract.—**

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

*Explanation.*—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

An uncommonly known fact is that Section 73 is based on a case law, i.e., Hadley v. Baxendale (1854) 9 Ex. 354. In Hadley v. Baxendale, the mill of the Plaintiff (aggrieved) came to a standstill due to the delay on part of Defendant to send the repaired crankshaft back to the mill. In ordinary circumstances, a mill will not stop functioning in absence of one crankshaft. This was a special circumstance which was required to be communicated to the Defendant. Hence, the Defendant was held not liable for the loss suffered by the Plaintiff.

As per the abovementioned case, special damages can be awarded only when such circumstances were in the “contemplation of parties”. The well-known rule in this case was stated by the Court as follows:

*“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may reasonably and fairly be considered as arising naturally, i.e., according to usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.”*

### **Illustration to section 73**

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Bombay, and there take on board, on the first of January, a cargo, which A is to provide, and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before

the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and in consequence of this, B is obliged to procure another at a higher price than that which he was to

have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day, B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in

making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B, after being in consequence detained in Calcutta for some time and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

#### **Section 74: Compensation for breach of contract where penalty stipulated for**

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

*Explanation.*—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

*Exception.*—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

*Explanation.*—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

### ***Illustrations to section 74***

(a) A contracts with B to pay B Rs. 1,000, if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation; not exceeding Rs. 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

### **Section 75: Party rightfully rescinding contract, entitled to compensation**

A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

*Illustration to section 75:* A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

## **9. A decree for Specific Performance**

According to section 10 of Specific Relief Act, 1963, the specific performance of a contract shall be enforced by the court subject to the provisions contained in section 11(2) relating to contract made by a trustee in excess of his powers or in breach of trust, section 14 relating to Contracts not specifically enforceable and section 16 relating to Personal bars to relief.

Section 12 bars the courts to grant relief of Specific performance of part of contract, other than on the grounds mentioned in this section. The Grounds are as under:

1. Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed be a only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

2. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(a) forms a considerable part of the whole, though admitting of compensation in money;

or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b) pays or has paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

*Explanation.*—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance.

## **10. An Injunction**

Injunction (or “stay order” in common parlance) is a preventive relief under the Specific Relief Act, 1963 whereby a court issues a direction to do or not to do a certain act. The law relating to injunctions in civil matters is dealt with under Section 36-42 of the Specific Relief Act, 1963 and Order XXXIX of the Code of Civil Procedure, 1908. An injunction is defined as an order of a competent court, which:

- (i) Forbids the commission of a threatened wrong,
- (ii) Forbids the continuation of a wrong already begun, or
- (iii) Commands the restoration of the *status quo* (the former course of things).

Clauses (i) and (ii) deal with preventive relief, whereas clause (iii) deals with an injunction called mandatory injunction, which aims at rectifying, rather than preventing the defendant’s misconduct.

According to section 36, Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual. However, section 39 further provides for the provision relating to Mandatory Injunctions. These injunctions are explained as under:

**i. Temporary Injunctions:** Temporary injunctions are such as are to continue until a specific time, or until the further order of the court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

**ii. Perpetual Injunction:** A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

**iii. Mandatory Injunction:** When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

## **Lesson 12: Applications, Petitions and Appeals under Companies Act, 2013**

### **1. Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2023 (May 15, 2023)**

In the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, for sub-rules (5) and (6) of rule 25, the following sub-rules shall be substituted, namely:-

“(5) Where no objection or suggestion is received within a period of thirty days of receipt of copy of scheme under sub-section (2) of section 233, from the Registrar of Companies and Official Liquidator by the Central Government and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may, within a period of fifteen days after the expiry of said thirty days, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.

Provided that if the Central Government does not issue the confirmation order within a period of sixty days of the receipt of the scheme under sub-section (2) of section 233, it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly.

(6) Where objections or suggestions are received within a period of thirty days of receipt of copy of scheme under sub-section (2) of section 233 from the Registrar of Companies or Official Liquidator or both by the Central Government and –

(a) such objections or suggestions of Registrar of Companies or Official Liquidator, are not sustainable and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may within a period of thirty days after expiry of thirty days referred to above, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.

(b) the Central Government is of the opinion, whether on the basis of such objections or otherwise, that the scheme is not in the public interest or in the interest of creditors, it may within sixty days of the receipt of the scheme file an application before the Tribunal in Form No.

CAA.13 stating the objections or opinion and requesting that Tribunal may consider the scheme under section 232 of the Act:

Provided that if the Central Government does not issue a confirmation order under clause (a) or does not file any application under clause (b) within a period of sixty days of the receipt of the scheme under subsection (2) of section 233 of the Act, it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly.”.

### **Earlier provisions**

(5) Where no objection or suggestion is received to the scheme from the Registrar of companies and official Liquidator or where the objection or suggestion of registrar and official liquidator is deemed to be not sustainable and the central government shall issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.

(6) Where objections or suggestions are received from the registrar of companies or official liquidator and the central government is of the opinion, whether on the basis of such objections or otherwise, that the scheme is not in the public interest of creditors , it may file an application before the tribunal in Form No.CAA.13 within sixty days of the receipt of the scheme stating its objections or opinion and requesting that tribunal may consider the scheme under section 232 of the act.

### ***Details of Change***

The amended rules have included the provisions relating to deemed no objection to the scheme from Central Government under section 233 of the Companies Act, 2023. Further, the timelines, for the objections, suggestion from Registrar of Companies and Official Liquidator and confirmation from Central Government, have also been prescribed.

## **2. Merger or amalgamation of a foreign company**

### **Merger or amalgamation of a foreign company with a Company and vice versa (Rule 25A)**

(1) A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.

(2) (a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval of the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Act and these rules.

(b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

(3) The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and sub-rule (2), as the case may be.

(4) Notwithstanding anything contained in sub-rule (3), in case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.

Explanation 1. For the purposes of this rule the term “company” means a company as defined in clause (20) of section 2 of the Act and the term “foreign company” means a company or body corporate incorporated outside India whether having a place of business in India or not:

Explanation 2. For the purposes of this rule, it is clarified that no amendment shall be made in this rule without consultation of the Reserve Bank of India.”

**3. Specimen of application for compounding**

**BEFORE THE .....**  
**COMPANY PETITION NUMBER.....2023**  
**IN THE MATTER OF SECTION 441 OF THE COMPANIES ACT, 2013**  
**(For the offence committed under Section \_\_\_\_\_ of the Companies Act, 2013)**

**AND**  
**IN THE MATTER OF:**  
**COMPANY NAME, HAVING ITS REGISTERED OFFICE AT ADDRESS**  
**.....PETITIONER No. 1**

**AND**  
**....., DIRECTOR, S/O MR. ...., R/O .....**  
**.....**  
**.....PETITIONER No. 2**

**INDEX OF DOCUMENT(S)**

S. No.	PARTICULARS	ANNEXURE NO.	PAGE NO.
1.	Petition under Section 441 of the Companies Act, 2013.		
2.	Affidavits verifying Petition	Annexure	
3.	Relevant annexures as per the circumstances of the case.	Annexure	

**FOR COMPANY**

**(NAME)**

**DIRECTOR**

**DIN:**

**(EMAIL ID)**

**(CONTACT NO)**

**PETITIONER NO. 2**

\_\_\_\_\_

**(NAME)**

**(DESIGNATION)**

**(RESIDENTIAL ADDRESS)**

**(EMAIL ID)**

**(CONTACT NO)**

**BEFORE THE .....**

**COMPANY PETITION NUMBER.....2023**

**IN THE MATTER OF SECTION 441 OF THE COMPANIES ACT, 2013**

**(For the offence committed under Section ..... of the Companies Act, 2013)**

**AND**

**IN THE MATTER OF:**

**COMPANY NAME, HAVING ITS REGISTERED OFFICE AT ADDRESS**

**.....PETITIONER No. 1**

**AND**

**....., DIRECTOR, S/O MR. ...., R/O .....**

.....

**.....PETITIONER No. 2**

**PETITION UNDER SECTION 441 OF THE COMPANIES ACT, 2013 FOR  
COMPOUNDING OF OFFENCE UNDER SECTION ..... OF THE COMPANIES  
ACT, 2013 (“ACT”)**

The Humble Petition of the petitioners above named most respectfully showeth:

**I. PARTICULARS OF THE COMPANY:**

1. **Company** (hereinafter referred to as the “**COMPANY**”) was incorporated as an ..... vide certificate of incorporation issued by the Registrar of Companies.
2. The registered office of the Company, at present, is situated .....
3. The present Authorized Share, Issued, Subscribed and Paid-up Capital of the Company is Rs. .... (Rupees ..... ) only divided into ..... Shares of Rs. .... (Rupees ..... ) each.
4. The Company is carrying on the following business-  
“.....”

Certified true copy of Certificate of Incorporation, Memorandum and Articles of Association of the Company is annexed herewith and Marked as **ANNEXURE-1**.

**II. PARTICULARS OF THE PETITIONER(S):**

The Petitioner No. 1 is the Company and its particular are mentioned in *Para 1* above. Petitioner No. 2 is the Director of the Company. The detailed particulars of the above said Petitioner(s) are mentioned in the affidavit(s) verifying this Petition, which are placed as **ANNEXURE-2**.

**III. JURISDICTION:**

The petitioner(s) declares that the subject matter of the petition is within the jurisdiction of the ROC, ..... and RD (region) NCLT ..... (bench), ..... The jurisdiction has been determined on the basis of the Registered office of the Company and provisions of Section 441 of the Companies Act, 2013, reference to which, the Registrar has to forward the Application for compounding before the appropriate forum, as he deems fit.

**IV. LIMITATION:**

The Petitioner(s) are filing this petition within the limitation period prescribed under the provisions of the Companies Act, 2013 for compounding of offence under section 441 of the Companies Act, 2013.

**V. FACTS OF THE CASE ARE:**

1. The Petitioners submits that .....(hereinafter referred to as “Company”) i.e. the petitioner no. 1 was incorporated on ..... under the provisions of the Companies Act, 2013 under the jurisdiction of Registrar of Companies, ....., and the other petitioners i.e. Petitioner No. 2 is the Director of Company, it has duly complied with all compliances applicable on it under various provisions of the Companies Act, 2013 and rules made there-under, in timely manner.
2. The Petitioners further submits before the Hon’ble Adjudicating Authority that they have ..... has mentioned and alleged the company and its all directors and manager for the non-compliance of ..... of the Companies Act, 2013 read with .....
3. The Petitioners further submits that in the said .....  
.....  
.....
4. The petitioners further submit before the Hon’ble Adjudicating Authority that said non-compliance has happened inadvertently .....
5. The petitioners further submit before the Hon’ble Adjudicating Authority that the Company **HAS MADE GOOD OF THE DEFAULT** so happened by .....
6. The Petitioners further submits that the company and its board has already identified Mr. ...., i.e. the petitioner no. 2 as the authorized person for the adherence of all the compliances under prescribed laws including the Companies Act, 2013 and therefore onl petitioner no. 2 has to be considered as the ‘**Officer in default**’. The List of officers in default and list of Signatories of the Company has been attached herewith and marked as **Annexure-.....**

7. The Petitioners further submits before this Hon'ble Authority that .....  
.....  
.....

8. Since the above contravention of Section ..... of the Companies Act, 2013 is compoundable in terms of Section 441 of the Companies Act, 2013, and is a onetime offence, the Petitioner(s) hereby are making a Suo motto petition for compounding the above contravention.

9. The Petitioner No. 1 has taken-up the matter relating to default of the provisions of Section ..... of the Companies Act, 2013 for moving the petition under Section 441 of the Companies Act, 2013 at the Board Meeting held on ....., and has also authorized ..... as its authorized representative.

10. The Petitioner No. 2 has also executed the power of attorney in favor of ....., to act as their legal representative and to take necessary action in respect to present matter.

(A Copy of said Board Resolution dated ....., power of attorney(ies) alongwith Memorandum of Appearance of ..... showing his acceptance has been annexed herewith and marked as **Annexure-.....**.)

11. The petitioner(s) hereby declare that the officer(s) in default in respect of above said non-compliance is the petitioner no. 2 only.

**VI. MATTERS NOT PREVIOUSLY FILED OR PENDING IN ANY COURT:**

The Petitioner(s) further declares that they had not filed any application, writ petition or suit regarding the matter in respect of which this petition has been made, before any court of law or any other authority or any other bench of the Board / NCLT and no such application, writ petition or suit is pending before any of them. The Petitioners further submit(s) that prosecution may/may not have been launched in the court in respect of the subject matter of this Application against the Company and its officers in default as on the date of filing of this application, but there is no such communication made to company and its any officer in this regard and it is not there in their knowledge if any such prosecution

has been filed. The Petitioners are moving this application in good faith and wishes to get the offence compounded.

**VII. GROUND OF RELIEF AND RELIEF (S) SOUGHT:**

**GROUNDS OF RELIEF:**

1. As mentioned *in the para V of the* petition, the Company was not able to comply with the provisions of section ..... of the Companies Act, 2013 due to ....., and inadvertently.
2. In subsequent years, the Company has taken all reasonable steps to ensure that the provisions contained in section ..... of the Companies Act, 2013 and have duly complied.
3. That the default occurred is due to inadvertence which has ultimately been regularized and made good and, therefore, the offence under section ..... of the Companies Act, 2013 deserves to be compounded.
4. That the Petition has been made bona-fide and in the interest of justice and, therefore, this is a fit case for Hon'ble Regional Director/NCLT to exercise its discretionary power in granting relief to the Company and other Petitioner(s) by compounding the Offence.
5. That the Petitioner(s) have already, on their part, taken all reasonable steps in order to ensure that the default is not committed in future.
6. The Petition is made bona-fide and in the interest of the Law and no body shall be prejudiced by the compounding of the offences under section ..... of the Companies Act, 2013. This may be taken as just and equitable ground for taking a lenient view and compounding of the offence.
7. The Company is suo-moto filing an application under section 441 for compounding of an offence committed section ..... of the Companies Act, 2013.
8. The Petitioners state that the tentative fee payable from the date of occurrence of violation/ offence till the date of making the offense/ violation good (..... days) is INR .....

**RELIEF (S) SOUGHT:**

In view of the facts mentioned above in above paragraph, the Petitioner(s) respectfully prays your Honor that:

(a) Offence committed by the Petitioner(s) on account of violation of section ..... of the Companies Act, 2013 be compounded.

(b) Such further order or orders be made, as the Hon'ble Board may deem fit and proper.

**VIII. INTERIM ORDER, IF ANY PRAYED FOR:** None

**IX. PARTICULARS OF THE BANK DRAFT:** N.A.

FOR PETITIONER NO.1

FOR PETITIONER NO. 2

.....  
(NAME)

.....  
(NAME)

DIRECTOR

DIRECTOR

DIN:

DIN:

(EMAIL ID)

(EMAIL ID)

(CONTACT NO)

(CONTACT NO)

X. LIST OF ANNEXURES(S):

S. No.	PARTICULARS	ANNEXURE NO.	PAGE NO.
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**FOR COMPANY  
(NAME)**

**DIRECTOR**

**DIN:**

**(EMAIL ID)**

**(CONTACT NO)**

**PETITIONER NO. 2**

\_\_\_\_\_  
**(NAME)**

**(DESIGNATION)**

**(RESIDENTIAL ADDRESS)**

**(EMAIL ID)**

**(CONTACT NO)**

***ANNEXURE***

**BEFORE THE .....**

**COMPANY PETITION NUMBER ..... 2023**

**IN THE MATTER OF SECTION 441 OF THE COMPANIES ACT, 2013**

**(For the offence committed under Section ..... of the Companies Act, 2013)**

**AND**

**IN THE MATTER OF:**

**COMPANY NAME, HAVING ITS REGISTERED OFFICE AT ADDRESS**

**.....PETITIONER No. 1**

**AND**

**....., DIRECTOR, S/O MR. ...., R/O .....**

.....

**.....PETITIONER No. 2**

**AFFIDAVIT VERIFYING PETITION**

I, ....., Director of ....., do hereby solemnly affirm and state as under: -

1. That I am the Director and Authorized Representative of the Petitioner No. 1 Company.
2. That I have read the petition now shown to me, and state that the statements made in paragraph I to VI thereof are correct and true to my knowledge.

3. That the contents made in paragraphs VII are in the form of Prayer, and the contents made in paragraphs X contains list of enclosures.

**DEPONENT**

**VERIFICATION**

I, the above named deponent, do hereby verify that the contents of Para 1, 2, and 3 of the above affidavit are true and correct to the best of my knowledge and that no part hereof is false and nothing material has been concealed therefrom.

Verified at ..... on this ..... day ....., 2023.

**DEPONENT**

**BEFORE THE .....**

**COMPANY PETITION NUMBER.....2023**

**IN THE MATTER OF SECTION 441 OF THE COMPANIES ACT, 2013**

**(For the offence committed under Section ..... of the Companies Act, 2013)**

**AND**

**IN THE MATTER OF:**

**COMPANY NAME, HAVING ITS REGISTERED OFFICE AT ADDRESS**

**.....PETITIONER No. 1**

**AND**

**....., DIRECTOR, S/O MR. ...., R/O .....**

.....

**.....PETITIONER No. 2**

**AFFIDAVIT VERIFYING PETITION**

I, ....., S/o Mr. ...., aged about ..... years R/o ..... do hereby solemnly affirm and state as under: -

1. That I am the Director of the Petitioner No. 1 Company and Petitioner No. 2 in the present petition.

2. That I have read the petition now shown to me, and state that the statements made in paragraph I to VI thereof are correct and true to my knowledge.
3. That the contents made in paragraphs VII are in the form of Prayer, and the contents made in paragraphs X contains list of enclosures.

**DEPONENT**

**VERIFICATION**

I, the above-named deponent, do hereby verify that the contents of Para 1, 2, and 3 of the above affidavit are true and correct to the best of my knowledge and that no part hereof is false and nothing material has been concealed therefrom.

Verified at ..... on this ..... day ....., 2023.

**DEPONENT**

## Lesson 13: Adjudications and Appeals under SEBI Laws

### **1. Securities and Exchange Board of India (Settlement Proceedings) (Second Amendment) Regulations, 2023(August 9, 2023)**

In the Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018, in regulation 23, after sub-regulation 2, following sub-regulation shall be inserted-

*(2A) In case of specified proceedings which may be initiated or are proposed to be initiated, the Panel of Whole Time Members shall dispose of such proceedings on the basis of the approved settlement terms.*

They shall be deemed to have come into force from January 17, 2023.

#### *Analysis of Amendment*

Sub-regulation 23(2A) has been inserted to specifically empower the Whole Time Members to *dispose of specified proceedings*.

*As per regulation 2(1)(f)*, "specified proceedings" means the proceedings that may be initiated by the Securities and Exchange Board of India or have been initiated and are pending before the Board or any other forum, for the violation of securities laws, under Section 11, Section 11B, Section 11D, sub-Section (3) of Section 12 or Section 15-I of the Act or Section 12A or Section 23-I of the Securities Contracts (Regulation) Act, 1956 or Section 19 or Section 19H of the Depositories Act, 1996, as the case may be.

### **2. Example of Synchronised Trading to understand Factors to be taken into account while adjudging quantum of penalty**

The following example is helpful to gain more clarity of the powers of Adjudicating Officer and Factors to be taken into account while adjudging quantum of penalty (Section 15J of SEBI Act & Section 23 J of Securities Contracts (Regulations) Act, 1956 and Section 19-I of Depositories Act, 1996)

### **Example: Synchronised Trading:**

SEBI suspected manipulation in the trading of Futures & Options segment (F&O), and found that the company and some other firms had undertaken fictitious trades.

- Order of Adjudicating Officer

According to the A.O., a manipulative/deceptive device had been used for synchronization and reversal of trades and the trades were essentially fraudulent/fictitious in nature and resulted in creating a misleading appearance of active trading in those securities.

- Judgement of SAT

However, the Order was struck down by the Securities Appellate Tribunal (SAT) in 2011 on grounds that synchronization and reversal of trades effected by the parties with a significant price difference, some in a few seconds and majority, in any case, on the same day had no impact on the market, had not affected the NIFTY index in any manner nor induced investors. SAT held that such trades are illegal only when they manipulate the market in any manner and induce investors.

- Judgement of Supreme Court

It was held that the trade reversals in the instant case amply demonstrated that the parties did not intend to transfer beneficial ownership through these transactions. Rather, the repeated reversals adversely affected the price discovery system, deprived other market players from participating in the trades, were a misuse of market mechanism and therefore violative of transparent norms of trading in securities.

Considering the perfect matching of quantity, price and time and sale in the impugned transactions, parties being persistent in the number of such trade transactions with huge price variations (without any major variation in the price of the underlying securities) wherein one party repeatedly booked profits whilst the other repeatedly incurred losses, the Supreme Court noted that it would be too naïve to hold that such transactions were by mere coincidence.

### **3. Role of *mens rea* in levying Penalty**

Under the Securities and Exchange Board of India Act, 1992, Securities Contracts (Regulation) Act, 1956 (SCRA) and the Depositories Act, 1996 (collectively also known as securities laws), SEBI pursues two streams of enforcement actions i.e., Administrative /Civil (or) Criminal. Administrative/civil actions include issuing directions such as remedial orders, cease and desist orders, suspension or cancellation of certificate of registration and imposition of monetary penalty under the respective statutes and action pursued or defended in a court of law/tribunal. Criminal action involves initiating prosecution proceedings against violators by filing complaint before a criminal court.

In the case of the chairman *SEBI V. Shriram mutual fund & ANR appeal (Civil) 9523-9524 of 2003* it was held that A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15(D)(b) and Section 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow.

## **Lesson 14: Appearance before other Regulatory and Quasi-judicial Authorities**

### **Appearance under the Competition Act, 2002**

Section 35(2) has been inserted *vide* Competition (Amendment) Act, 2023 According to section 35(2) of the Competition Act, 2002, a party may call upon experts from the fields of economics, commerce, international trade or from any other discipline to provide an expert opinion in connection with any matter related to a case. A CS in a competent professional that may give advices to the parties under section 35(2) on calling upon by any party.

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*Note: Students appearing in December, 2024 Examination should also update themselves on all the relevant Notifications, Circulars, Clarifications, Orders etc. issued by ICSI, MCA, SEBI, RBI & Central Government upto 31<sup>st</sup> May, 2024.*