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SUBJECT : LAW

Test Code –FNJ 7394

BRANCH - () (Date :)

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DIVISION A: MULTIPLE CHOICE QUESTIONS

- | | | | | | |
|------|-----|------|-----|------|-----|
| (1) | (c) | (2) | (a) | (3) | (b) |
| (4) | (b) | (5) | (d) | (6) | (a) |
| (7) | (c) | (8) | (b) | (9) | (d) |
| (10) | (d) | (11) | (a) | (12) | (b) |
| (13) | (b) | (14) | (c) | (15) | (b) |
| (16) | (b) | (17) | (b) | (18) | (a) |
| (19) | (a) | (20) | (c) | | |

DIVISION B: DESCRIPTIVE QUESTIONS

1.

(a)

Section 161(1) of the Companies Act, 2013 provides that the articles of association of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director at the general meeting, as an additional director at any time and such director will hold office upto the date of the next annual general meeting or the last date on which such annual general meeting should have been held, whichever is earlier.

Accordingly, following are the answers-

- (i) Mr. Mantri cannot continue as director till the adjourned annual general meeting, since he can hold the office of directorship only up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier. Such an additional director shall vacate his office latest on the date on which the annual general meeting should have been held under Section 96 of the Companies Act, 2013. He cannot continue in the office on the ground that the meeting was not held or it could not be called within the time prescribed.
- (ii) The power to appoint additional directors vests with the Board of Directors and not with the members of the company. The only condition is that the Board must be conferred such power by the articles of the company.
- (iii) As a Company Secretary, I would put the following checks in place in respect of Mr. Mantri's appointment as an additional director:
 - (a) He must have got the Directors Identification Number (DIN).
 - (b) He must furnish the DIN and a declaration that he is not disqualified to become a director under the Companies Act, 2013.
 - (c) He must give his written consent in Form DIR-2 on or before his appointment as director and such consent stands filed with the Registrar within 30 days of his appointment.
 - (d) His appointment is made by the Board of Directors.
 - (e) His name is entered in the statutory records as required under the Companies Act, 2013.

(b)

According to Section 202 of the Companies Act, 2013, compensation can be paid only to a Managing Director, Whole-time Director or Manager. Amount of compensation cannot exceed the remuneration which he would have earned if he would have been in the office for the unexpired term of his office or for 3 years whichever is shorter. No compensation shall be paid, if the director has been found guilty of fraud or breach of trust or gross negligence in the conduct of the affairs of the company.

In light of the above provisions of law, following are the answers-

- (i) W.r.t. this part of the question, the company is not liable to pay any compensation to Mr. Silencer, if he has been found guilty of fraud or breach of trust or gross negligence in the conduct of affairs of the company. But, it is not proper on the part of the company to withhold the payment of compensation on the basis of mere allegations. The compensation payable by the company to Mr. Silencer would be Rs. 25 Lakh calculated at the rate of Rs. 12 Lakh per annum for unexpired term of 25 months.
- (ii) In respect to this part of the question, ad-hoc payment made of Rs. 5 Lakh, will not be possible for the company to recover from Mr. Silencer in view of the decision in case of Bell vs. Lever Bros. (1932) AC 161 where it was observed that a director was not legally bound to disclose any breach of his fiduciary obligations so as to give the company an opportunity to dismiss him. In that case the Managing Director was initially removed by paying him compensation and later on it was discovered that he had been guilty of breaches of duty and corrupt practices and that he could have been removed without compensation.

2. (a) The provision of Section 218 of the Companies Act, 2013, states that, the company shall require to take approval of the tribunal before taking action against the employee if there is any pendency of any proceedings against any person concerned in the conduct and management of the affairs company.

The company shall require approval in the following circumstances:

- discharge or suspension of an employee; or
- punishment to an employee by dismissal, removal, reduction in rank or otherwise; or
- change in the terms of employment to the disadvantage of employee(s);

The Tribunal shall notify its objection to the action proposed in writing.

In case, the company, other body corporate or person concerned does not receive the approval of the Tribunal within 30 days of making the application, it may proceed to take the action proposed against the employee. That means it can be consider as a deemed approval by the tribunal.

Appeal to the Appellate Tribunal

If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of 30 days of the receipt of the notice of the objection, refer an appeal to the Appellate Tribunal in such manner and on payment of fees of INR 1,000 as per the schedule of Fees.

The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned.

In the light of the above stated provisions, following are the answers:

- Yes, the termination of Mr. Shram made by the company is totally valid in law and company can do so by considering deemed approval of tribunal.
- In this scenario, Mr. Shram has not any remedy available. As per the provision of the law appeal to the appellate tribunal can be made only if the person is dissatisfied with the objection raised by the tribunal. Hence, in this case the tribunal has not replied Mr. Shram cannot refer an appeal to Appellate Tribunal.
- In this case, Mr. Shram can refer and appeal to appellate tribunal within 30 days of the receiving letter of objection raised by the tribunal and with payment of Fees on Rs. 1,000 as per schedule of Fees.

(b) Under provisions of section 5 of the Foreign Exchange Management Act, 1999 have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.

- (i) In respect of item No. (i). i.e., remittance out of lottery winnings, such remittance is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, Mr. Sane can not withdraw Foreign Exchange for this purpose
- (ii) Foreign Exchange for meeting expenses of cultural tour can be withdrawn by any person after obtaining permission from Government of India Ministry of Human Resources Development, (Department of Education and Culture) as prescribed in Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, in respect of item(ii), Mr. Sane can withdraw the Foreign Exchange after obtaining such permission.

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorized Person as defined in Section 2(c) read with section 10 of the Foreign Exchange Management Act, 1999.

3. (a)

- (i) The official liquidator can invoke the provisions contained in Section 328 of the Companies Act, 2013 to recover the sale of assets of the company. According to Section 328, if the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

Since in the present case, the sale of immovable property took place on 15th October, 2018 and the company went into liquidation on 10th March, 2019 i.e., within 6 months before the winding up of the company and since the sale has resulted in a loss of INR 50

lakhs to the company.

The official liquidator will be able to succeed in proving the case under Section 328 by way of fraudulent preference as the property was sold to a private company in which the son of the ex-managing director was interested.

Hence, the transaction made will be regarded as invalid and restore the position of the company as if no transfer of immovable property has been made.

(ii) Section 439 of the Companies Act, 2013 provides that offences under the Act shall be non-cognizable. As per this section:

1. Every offence under this Act except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.

2. No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder, member of the company, or of a person authorized by the Central Government in that behalf.

Thus, in the given situation, the court shall not initiate any suo motu action against the director Mr. X without receiving any complaint in writing of the Registrar of Companies, a shareholder of the company or of a person authorized by the Central Government in this behalf.

(b)

Section 45 provides that the offences under the Act shall be cognizable and non-bailable. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence under this Act shall be released on bail or on his own bond unless-

- (i) The Public Prosecutor has been given an opportunity to oppose the application for such release and
- (ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

In case of any person who is under the age of 16 years or in case of a woman or in case of a sick or infirm person or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs.

As in the given case, Mr. Fraudulent, a 16 year old person was accused of money laundering a sum of 70 lakh, Accordingly, as per above provision, though he is not under 16 years but accused of money laundering of amount of Rs. 70 Lakh, so will be released on bail on the direction of special court.

4.

(a)

(i) Regulation 24 : Corporate Governance Requirements with respect to Subsidiary of Listed Entity.

The Board: At least one Independent Director on Board shall be a Director on Board of Unlisted Material Subsidiary. The management of the unlisted subsidiary shall periodically bring to the notice of the board of directors of the listed entity, a statement of all significant transactions and arrangements entered into by the unlisted subsidiary.

A listed entity shall not dispose of shares in its material subsidiary resulting in reduction of its shareholding (either on its own or together with other subsidiaries) to less than **50%** or cease the exercise of control over the subsidiary without passing a special resolution in its General Meeting except in cases where such divestment is made under a scheme of arrangement duly approved by a Court/Tribunal or under a resolution plan duly approved under section 31 of the IBC and such an event is disclosed to the recognised stock exchange within one day of the resolution plan being approved.

Selling, disposing and leasing of assets amounting to more than 20% of the assets of the material subsidiary on an aggregate basis during a financial year shall require prior approval of shareholders by way of special resolution, unless the sale/disposal/lease is made under a scheme of arrangement duly approved by a Court/Tribunal/ duly approved resolution plan.

(ii) In this case, Mr. Vijay may opt for 'Option' derivative contract, which is an agreement to buy or sell a set of assets at a specified time in the future for a specified amount. However, it is not obligatory for him to hold the terms of the agreement, since he has an 'option' to exercise the contract. For example, if the current market price of the share is Rs. 100 and he buy an option to sell the shares to Mr. X at Rs. 200 after three-month, so Vijay bought a put option.

Now, if after three months, the current price of the shares is Rs. 210, Mr. Vijay may opt not to sell the shares to Mr. X and instead sell them in the market, thus making a profit of Rs.

110. Had the market price of the shares after three months would have been Rs. 90, Mr. Vijay would have obliged the option contract and sold those shares to Mr. X, thus making a profit, even though the current market price was below the contracted price. Thus, here, the shares of Travel Everywhere Limited is the underlying asset and the option contract is a form of derivative.

(b)

i) No. As per Section 4(e) of FCRA, 2010 read with Rule 6 of FCRR, 2011, even the persons prohibited under section 3, i.e., persons not permitted to accept foreign contribution, are allowed to accept foreign contribution from their relatives. However, in terms of Rule 6 of FCRR, 2011, any person receiving foreign contribution in excess of one lakh rupees or equivalent thereto in a financial year from any of his relatives shall inform the Central Government in prescribed Form within thirty days from the date of receipt of such contribution.

So Mr. Indian shall inform the Central Government of his receiving of the foreign contribution of 1.10 lakh from his relative due to receiving of foreign contribution in excess of 1 lakh rupees.

(ii) As per the Arbitration and Conciliation Act, 1996 an agreement must be in writing . There is however no requirement for the same to be in writing in one document. There is also no particular form or template for an arbitration agreement. The communication over email of the term of services is proper valid agreement and the same have been stood affirmed by reason of their conduct. This would be an arbitration agreement in writing contained in correspondence between the parties.

5.

(a)

(i) Under section 380(1) of the Companies Act, 2013 every foreign company shall, within 30 days of the establishment of place of business in India, deliver to the Registrar for registration the following documents.

- (a) A certified copy of the charger, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instruments are not in the English language, a certified translation thereof in the English language;
- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, the Companies (Registration of Foreign Companies) Rules, 2014, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely :

- (1) personal name and surname in full;
 - (2) any former name or names and surname or surnames in full;
 - (3) father's name or mother's name and spouse's name;
 - (4) Date of birth;
 - (5) Residential address;
 - (6) Nationality;
 - (7) If the present nationality is not the nationality of origin, his nationality of origin;
 - (8) Passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)
 - (9) Income – tax permanent account number (PAN), if applicable;
 - (10) Occupation, if any;
 - (11) Whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);
 - (12) Other directorship or directorships held by him;
 - (13) Membership Number (for Secretary only); and
 - (14) E – mail ID.
- (d) the name and address or the names and addresses of one or more persons resident in India authorized to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
- (e) the full address of the office of the company in India which is deemed to be its principal place of business in India;
- (f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;
- (g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
- (h) any other information as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

(ii)

According to section 448 of the Companies Act, 2013, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made there under, any person makes a statement,

- (a) which is false in any material particulars, knowing it to be false; or
- (b) which omits any material fact, knowing it to be material,

he shall be liable under section 447.

In the present case, Mr. Truth, a director of Horizan Private Limited filed returns, report or other documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar.

Hence, Mr. Truth shall be liable under section 447 for false statements.

Penal Provisions: As per Section 447, any person who is found to be guilty under this section shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud, provided that, where the fraud involves public interest, the term of imprisonment shall not be less than 3 years.

Hence Mr. Truth, a director of Horizan Private Limited shall be punishable with imprisonment and fine prescribed as aforesaid.

(b)

As per Regulation 3 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

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

- (a) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company;
- (b) is not a related party of the corporate debtor; or
- (c) is not an employee or proprietor or a partner:
 - (i) of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor; or
 - (ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm, in the last three financial years.

As per the given facts, Mr. IP was proposed to be appointed as a resolution professional for the insolvency resolution process initiated against BMR Ltd. Whereas, Mr. R, a relative of director of BMR Ltd. is a partner in the insolvency professional entity in which Mr. IP is partner.

Since Mr. R is a partner in IP Entity in which Mr. IP is also a partner, so Mr. IP is not eligible for appointment as Resolution Professional as he is not independent of the corporate debtor.

6.

(a)

Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to a managerial personnel is linked to the effective capital of the company. Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may pay remuneration to the managerial person not exceeding Rs. 120 Lakhs in the year in case the effective capital of the company is Rs. 100 crores to 250 crores. However, the remuneration in excess of Rs. 120 Lakhs may be paid if the resolution passed by the shareholders is a special resolution.

From the foregoing provisions contained in schedule V to the Companies Act, 2013 the payment of Rs. 50 Lacs in the year as remuneration to Mr. Ram is valid in case he accepts it, as under the said schedule he is entitled to a remuneration of Rs. 120 Lakhs in the year and his terms of appointment provide for payment of the remuneration as per schedule V.

Whereas with respect to payment to Mr. Bharat, the company proposes to pay suitable additional remuneration to Mr. Bharat, a director, for professional services rendered as software engineer, whenever such services are utilized. According to section 197(4) of the Companies Act, 2013, the remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either

- (i) by the articles of the company, or
- (ii) by a resolution or,
- (iii) if the articles so require, by a special resolution, passed by the company in general meeting, and

The remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.

However, any remuneration for services rendered by any such director in other capacity shall not be so included if—

- (i) the services rendered are of a professional nature; and
- (ii) in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Hence, in the present case, the additional remuneration to Mr. Bharat, a director for professional services rendered as software engineer will not be included in the maximum managerial remuneration and is allowed but opinion of Nomination and Remuneration Committee is to be obtained.

(b)

RPS Limited

_____ (Place)

To

Mr. X (Director)

(Address in India only)

Dear Sir,

The following resolution which is intended to be passed as a resolution by circulation as provided in Section 175 of the Companies Act, 2013 is circulated herewith as per the provisions of the said section.

If only you are Not Interested in the resolution, you may please indicate by appending your signature in the space provided beneath the resolution appearing herein below as a separate perforated slip, if you are in favour or against the said resolution. The perforated slip may please be returned if and when signed within seven days of this letter.

However, it need not be returned if you are interested in the resolution.

Yours faithfully,

(Secretary)

RPS Limited

Resolution by circulation passed by directors as per circulation effected

.....20.....

Resolved that 1,000 equity shares in the company be and hereby allotted to Mr.A. 202, KherGali, SherMark, Ludhiana, Punjab from whom full amount has been received.

It is further resolved that necessary return of allotment be filed in the office of the ROC under the signature of Mr.Y, a Director.

For / Against

Signature