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FINAL NOVEMBER 2018 EXAM

SUBJECT- CORPORATE AND ECONOMIC LAW

Test Code - FNJ 7014 N

BRANCH - () (Date :)

Head Office : Shraddha, 3rd Floor, Near Chinai College, Andheri (E), Mumbai – 69.
Tel : (022) 26836666

Answer 1:

(A)

As per section 233 (1) of the Companies Act, 2013 notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered between,

- ✓ 2 or more small companies
- ✓ a holding company and its wholly-owned subsidiary company. If 100% of its share capital is held by the holding company, except the shares held by the nominee or nominees to ensure that the number of members of subsidiary company is not reduced below the statutory limit as provided in section 187.
- ✓ such other class or classes of companies as may be prescribed.

The provisions given for fast track merger in the section 233 are in the optional nature and not a compulsion to the company. If a company wants to make application for merger as per section 232, it can do so.

Hence, here the Company Secretary of the XYZ limited has erred in the law and his contention is not valid as per law. The company shall have an option to choose between normal process of merger and fast track merger.

(B)

Under section 173(3) of the Companies Act, 2013 a meeting of the Board shall be calledby giving not less than seven days' notice in writing to every director at hisaddress registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Section 173(4) further provides that every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of Rs. 25,000.
In the given case as no notice, was served on Mr. P and Mr. Q who are the directors of the company, thus, under section 173(4) every officer of the company responsible for the default shall be punishable with fine of Rs. 25,000.

Neither the Companies Act, 2013 nor *the Companies (Meetings of the Board and its Powers) Rules, 2014* lay down any specific provision regarding the validity of a resolution passed by the Board of Directors in case notice was not served to all the directors as stipulated in the Act. We shall have to go by the provisons of the Act which clearly provide for the notice to be sent to every director failing which the resolutions passed will be invalid. The Supreme Court, in case of *Parmeshwari Prasad vs. Union of India (1974)* has held that the resolutions passed in the board meeting shall not be valid, since notice to all the Directors was not given in writing. Notice must be given to each director in writing. Hence, even though the directors concerned knew about the meeting, the meeting shall not be valid and resolutions passed at the meeting also shall not be valid.

(C)

Section 1 of the Insolvency and Bankruptcy Code, 2016 specifies of the extent, commencement and applicability of the Code. According to this, it extends to the whole of India and shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of any company incorporated under the Companies Act, 2013 or under any previous law.

In view of this, the IBC Code, 2016 applies to the corporate debtor incorporated under the Companies Act, 2013 or under any previous laws.

As per the definition of the Creditor given in section 3(10) of the Insolvency and Bankruptcy Code, 2016, it means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree holder. So, Standard International Ltd. is a creditor under the purview of the Code.

As per the facts given in question, Standard International Ltd., is a foreign trade creditor. He wanted to file a petition under the under Section 9 of the Insolvency and Bankruptcy Code, 2016 for

commencement of Insolvency process against the defaulter in India. Standard International Ltd. was not having any office or bank account in India.

As per the requirement of section 9 of the Code, along with application certain documents were needed to be furnished by the creditor to the Adjudicating authority.

Being a foreign trade creditor, Standard International Ltd was also required to provide a copy of certificate from the financial institutions maintaining accounts of the creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Since, Standard International Ltd. was not having any office or bank account in India, it cannot furnish certificate from financial institution as defined under the section 3(14) of the code. So, Petition under section 9 of the Code is not permissible.

(D)

In the given problem, on commission of default by the Wisdom Ltd. Mr. F filed an application for initiating corporate insolvency resolution process before adjudicating authority. Further, Mr. X another financial creditor moved an application for initiation of insolvency resolution process against the Wisdom Ltd.

According to the section 6 of the Code, where any corporate debtor commits a default, a financial creditor, Operational creditor or the Corporate debtor itself may initiate insolvency resolution process against such corporate debtor.

But as Section 13 of the Code, once an application is admitted by the Adjudicating authority, it shall by an order declare a moratorium for the purposes referred to in section 14. Then causes a public announcement of the initiation of CIRP by IRP and call for the submission of claims under section 15 and appoint an IRP in the manner as laid down in section 16 of the Code. Public announcement lays down all the relevant information related to the CIRP. So that the all creditors entitled under the law can raise their claim in this case.

So, no further application for initiation of CIRP can be initiated by Mr. X. however, he is entitled under the law to raise his claim in this case against the Wisdom Ltd.

Answer 2:

(A)

Power of Central Government/SEBI to direct rules to be made or to make rules: The Central Government is empowered under section 8 of the Securities Contracts (Regulation) Act, 1956 to issue written order directing all or any of the recognized stock exchanges to make any rules or to amend any rules already made within 2 months from the date of the order in respect of matters specified in section 3(2). One of the matters specified in section 3(2) is the governing body of stock exchange, its constitution and powers of management and the manner in which its business is to be transacted. Hence, the Central Government is empowered to direct the Stock Exchange in respect of prohibition of broker-member being appointed as president of the stock exchange. According to the notification issued by the Central Government under section 29A, this power is also exercisable by SEBI.

If any recognized stock exchange fails or neglects to comply with any order made by SEBI within 2 months, SEBI may itself make the rules made, either in the form prepared in the order or with such modifications thereof as may be agreed to between the stock exchange and SEBI. The amended rules should be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognized stock exchange is situated. After such publication, the rules will be valid, as if they had been made or amended by the stock exchange itself.

Hence, SEBI can issue directions to the recognized stock exchange to amend the rules and if the said stock exchange does not take steps for amending the rules, SEBI may amend the rules on its own by following the procedure laid down in section 8.

(B)

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, without Central Government approval, pay remuneration to the managerial person not exceeding Rs. 120 Lakhs in the year in case the effective capital of the company is between *Rs.*100 crores to 250 crores. The limit will be doubled if approved by the members by special resolution and further if the appointment is for a part of the financial year the remuneration will be pro-rated.

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. X 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.

(C)

There are two basic types of arbitration agreement :

(i) **Arbitration clause** - a clause contained within a principal contract. The parties undertake to submit disputes in relation to or in connection with the principal contract that may arise in future to arbitration.

(ii) **Submission agreement** – an agreement to refer disputes that already exist to arbitration. Such an agreement is entered into after the disputes have arisen.

In first case, the agreement already carries the term that all disputes shall be arbitrated in Delhi at the time of entering into joint venture agreement. This would be an arbitration clause as it is contained in the principal contract (JVA) and no disputes have arisen till yet. It concerns future disputes that may arise.

In the second case, the Principal contract (JVA) does not have any term relating to arbitration. Disputes arose between the parties concerning quality of supplied goods in 2017. To resolve this dispute, parties later entered into an agreement "That all disputes including quality of goods supplied by Ronnie and Coleman Company Limited to Arnold Food Processors Limited shall be submitted to arbitration. The parties hereby agree to abide by the decision of the arbitrator." Such an agreement that is made after the disputes have arisen would be called a submission agreement.

(D)

As per provisions of section 581 ZH of the Companies Act, 1956, a Producer Company may, by special resolution, make donation or subscription to any institution or individual for the following purposes:-

(a) For promoting the social and economic welfare of Producer Members or Producers or general public; or
(b) For promoting the mutual assistance principles.

Thus as per the above stated provisions of the Companies Act, 1956, a Producer Company may make a donation by passing a special resolution and for the above mentioned purposes.

The 1st Proviso to the said section 581ZH lays down the monetary limit for making the donation by a Producer Company. According to the said proviso the aggregate amount of all such donation and subscription in any financial year shall not exceed three per cent of the net profit of the Producer Company in the financial year immediately preceding the financial year in which the donation or subscription was made.

Since the net profit of the Producer Company as per its last profit & loss account was Rs. 20.00 lacs, it can make a total donation of Rs. 60,000/- in this year being three percent thereof.

Answer 3:

(A)

As per Section 149(10) of the Companies Act 2013, an Independent Director shall hold office for a term up to five consecutive years on the Board of a company. He shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report. As per section 149(11) no independent director shall hold office for more than two consecutive terms. However, such independent director shall be eligible for appointment after the expiration of three years of ceasing to be an independent director.

The Ministry of Corporate Affairs in its General Circular 14/2014 dated June 09 , 2014 clarified that section 149 (10) of the Act provides for a term of "up to five consecutive years" for an independent director. As such while appointment of an independent director for a term of less than five years would be permissible, appointment o f any term (whether for five years or less) is to be treated as one term under section 149(10) of the Act.

Further under section 149 (11) of the Act, no person hold office of independent director for more than 'two consecutive terms'. Such a person shall have to demit office after the consecutive terms even if the total number years of his appointment in such two consecutive terms is less than 10 years.

Therefore Mr. Robert cannot be appointed as an Independent Director at the AGM proposed to be held in 2018. In such case, the person completing two consecutive terms of less than 10 years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of three years.

(B)

"Money laundering" does not mean just siphoning of fund:

Money Laundering is a moving of illegally acquired cash through financial systems so that it appears to be legally acquired. Thus, money laundering is not just the siphoning of fund but it is the conversion of money which is illegally obtained.

Prevention of Money Laundering Act, 2002 has been enacted with aim for combating channellising of money into illegal activities.

Significance and Aim of Prevention of Money Laundering Act, 2002:

The preamble to the Act provides that it aims to prevent money–laundering and to provide for confiscation of property derived from, or involved in, money–laundering and for matters connected therewith or incidental thereto.

In order to further strengthen the existing legal framework and to effectively combat money laundering, terror financing and cross-border economic offences, an Amendment Act, 2009 was passed. The new law seeks to check use of black money for financing terror activities. Financial intermediaries like full-fledged money changers, money transfer service providers and credit card operators have also been brought under the ambit of The Prevention of Money-Laundering Act. Consequently, these intermediaries, as also casinos, have been brought under the reporting regime of the enforcement authorities. It also checks the misuse of promissory notes by FIIs, who would now be required to furnish all details of their source. The new law would check misuse of "proceeds of crime" be it from sale of banned narcotic substances or breach of the Unlawful Activities (Prevention) Act. The passage of the Prevention of Money Laundering (Amendment), 2009 have enabled India's entry into Financial Action Task Force (FATF), an inter-governmental body that has the mandate to combat money laundering and terrorist financing.

(C)

As per section 411 of the Companies Act, 2013 the qualification of chairperson of NCLAT shall be a person who is or has been a judge of the Supreme Court or the Chief Justice of a High Court. In the given case, chairperson is a judge and not a chief justice of a High Court, so his appointment is invalid. However, Section 431 of the Companies Act, 2013 provides of the provisions that no

act or proceeding of the Tribunal or the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Tribunal or the Appellate Tribunal, as the case maybe.

Accordingly, the act or proceeding of the Appellate Tribunal (NCLAT) shall not be invalid on the basis of defect in the constitution of the Appellate Tribunal.

(D)

As per the arbitration and Conciliation Act, 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 a 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.

Answer 4:

(A)

(a) According to Section 152(6) of the Companies Act, 2013, unless the articles provide for the retirement of all directors at every annual general meeting, not less than two – thirds of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation.
Directors liable to retire by rotation : 11 * 2/3 = 7.3 or 8
So, maximum number of persons, who can be appointed as directors not liable to retire by rotation : 11 – 8 = 3.

(b) According to Section 152(6)(c) of the Companies Act, 2013, 1/3rd of such of the Directors for the time being as are liable to retire by rotation, or their number is neither three nor a multiple of three, then, the number nearest to the 1/3rd shall retire from office. Therefor the Directors liable to retire by rotation are 11*2/3 i.e. 7.3 or 8.
No. of directors to retire at AGM : 8 * 1/3 i.e. 2.67. Hence nearest to 1/3rd is 3.

(c) According to Section 160 of the Companies Act, 2013, a person who is not a retiring director in terms of Section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he has, not less than 14 days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director.
In the instant case, one nomination was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received i.e. 14th day. Hence, the contention of the directors are valid.

(d) According to Section 149(1) of the Companies Act, 2013, if the company wants to appoint more than 15 directors, it can do so after passing a special resolution. Hence, the Board of directors of Frontline Limited, before increasing the strength of directors from 11 to 18 by appointing additional directors, have to pass a special resolution.
But, these appointments cannot be done through single resolution. Each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cast against such agreement. A resolution moved in contravention of this provision shall be void, whether or not objection thereto was raised at the time it was so moved. [Section 162 of the Act].

(B)

Section 2(e) of Foreign Exchange Management Act, 1999 states that 'capital account transactions' means–

(a) a transaction which alters the assets or liabilities, including contingent liabilities, outside India of person's resident in India

(b) a transaction which alters assets or liabilities in India of persons resident outside India and includes transactions referred to in section 6(3).

According to the said definition, a transaction which alters the contingent liability will be considered as capital account transaction in the case of person resident in India, but it is not so in the case of person resident outside India.

Purchase of immovable property by Mr. Hillary Benjamin in India is a capital account transaction. It has also been specifically provided in section 6(3)(i) as a capital account transaction.

Guarantee will be considered as a capital account transaction in the following cases:

(1) Guarantee in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India.
(2) Guarantee in respect of any liability, debt or other obligation incurred by a person resident outside India. In this case, Mr. Hillary Benjamin, a resident outside India gives a guarantee in respect of a debt incurred by a person resident in India and owed to a person resident in India. Hence, it would appear that guarantee by Mr. Hillary Benjamin cannot be considered as a capital account transaction within the meaning of Section 2(e), particularly because it is a contingent liability.

All capital account transactions are prohibited unless specifically permitted. RBI is empowered to issue regulations in this regard [Section 6(3)]. Permissible capital account transactions by persons resident outside India are given in Schedule II to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. According to the said regulations both the purchase of immovable property by Mr. Hillary Benjamin and guarantee by Mr. Hillary Benjamin are permissible.

(C)

As per Section 186(2) of the Companies Act, 2013, no company shall directly or indirectly

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding sixty per cent of its paid – up share capital, free reserves and securities premium account on one hundred per cent of its free reserves and securities premium account, whichever is more, except with the prior approval by means of a special resolution passed at a general meeting.

However, explanation provided in section 186(2) of the Companies Act, 2013 states that for the purposes of this sub – Section, the word "person" does not include any individual who is in the employment of the Company.

As per the given facts, ASK Housing Finance Company Limited was prepared to give housing loans to the employees of M/s NEWS Pharmacy Limited on the condition that such loans are guaranteed by the M/s NEWS Pharmacy Limited exceeding the limits prescribed in the Companies Act, 2013.

Here, the loans are to be guaranteed by M/s. News Pharmacy Limited for its employees which falls within the purview of the explanations which includes guarantees given for the employees. So, section 186(2) shall not be applicable to it. Hence, it can give the guarantee without any condition on the limits imposed in the Section 186(2). Hence, there are no legal requirements to be fulfilled under the Companies Act, 2013 to give

effect to the above proposal.

Answer will remain the same, even if the company provides securities instead of guarantee as the provisions of the Section 186(2) are applicable for providing security also.

(D)

The foreign contribution should be received only in the exclusive single foreign contribution account of a Bank (also called designated FC account), as mentioned in the order for registration or prior permission granted and should be separately maintained by the associations. However, one or more accounts (called Utilization Account) in one or more banks may be opened by the association for 'utilising' the foreign contribution after it has been received in the designated FCRA bank account, provided that no funds other than that foreign contribution shall be received or deposited in such account or accounts and in all such cases, intimation is to be given online within 15 days of opening of such account.

Answer 5:

(A)

According to section 226 of the Companies Act, 2013, an investigation may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that—

(a) an application has been made under section 241;
(b) the company has passed a special resolution for voluntary winding up; or
(c) any other proceeding for the winding up of the company is pending before the Tribunal.

In the instant case, Decent Marbles Limited has been incurring business losses for past couple of years. The company passed a special resolution for voluntary winding up. Meanwhile complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public.

As, the company has passed a special resolution for voluntary winding up of the company, then also the investigation may be initiated against the company under section 226 of the Companies Act, 2013.

(B)

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

1. Notwithstanding anything in the Code of Criminal Procedure, 1973, 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 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 moto 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.

Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.

(C)

(i) The minimum contribution that should be made by the promoters should be in accordance with the Regulation 32 (1) of the SEBI (ICDR) Regulations, 2009. According to the said regulations the promoters of the issuer shall contribute in the public issue in case of an initial public offer, not less than twenty per cent. of the post issue capital. In the above case, pre-issued capital is Rs. 3 crores and proposed issue is Rs. 9 crores (90,00,000 equity shares of Rs. 10 each). Of the total post issue capital ie. Rs. 12 crores (Rs. 3 crores + Rs. 9 crores), the promoters have to contribute minimum of Rs. 2.4 crores (20% of Rs. 12 crores). For the purpose of promoters' contribution, the following securities shall be considered as ineligible as per Regulation 33 (i) (b).

Specified securities acquired by promoters during the preceding one year at a price lower than the price at which specified securities are being offered to public in the initial public offer: Provided that nothing contained in this clause shall apply: if promoters pay to the issuer, the difference between the price at which specified securities are offered in the initial public offer and the price at which the specified securities had been acquired.

In the above case, shares acquired by the promoters on 1st January, 2004 shall not be taken into account for the computation of promoter's contribution, as the allotment was made in the preceding one year. However, shares acquired during the 1st January, 2000 shall be taken into account for promoter's contribution. Further, it is to be noted that there is a difference in price (shares which were earlier acquired at Rs. 10 each as on 1st January, 2000 and the issue price in July, 2004 (Rs. 15 per share). In view of the proviso in the said Regulation, the difference in price Rs. 15 including premium of Rs. 5 per share for issue in July, 2004 and acquisition @ Rs. 10 per share = Rs. 5 per share for 10 lakh equity shares (Rs. 50 lakhs) acquired in 1st January, 2004 need to be brought in by the promoters. In view of the proviso to the said Regulation, the acquisition of shares in July, 2004 of 10 lakh shares will also be taken into consideration for calculating promoters' contribution. Of the total Rs. 2.4 crores issue of shares, if Rs. 2 crores issue already acquired by the promoters are taken into account, then the promoters are eligible to subscribe only for the balance of 4 lakh shares (ie. 2.4 crores – 2 crores = 0.4 crores or 4 lakh equity shares).

(ii) Lock-in of specified securities held by promoters:

As per regulation 36 of the SEBI (ICDR) Regulations, 2009, In a public issue, the specified securities held by promoters shall be locked-in for the period stipulated hereunder:

a) minimum promoters' contribution shall be locked-in for a period of three years from the date of commencement of commercial production or date of allotment in the public issue, whichever is later;

b) promoters' holding in excess of minimum promoters' contribution shall be locked-in for a period of one year: Provided that excess promoters' contribution as provided in proviso to clause (b) of regulation 34 shall not be subject to lock-in.

(D)

According to section 18(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with prescribed fees to the Appellate Tribunal within 45 days from the date of receipt of the order of Debts Recovery Tribunal.

Further, no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than 25% of debt.

Thus, in the given situation Solomon Optimum Nutrition Limited can appeal to the Appellate Tribunal (now to NCLAT) by following the above provisions.

Answer 6:

(A)

Draft Minutes

Minutes of 17th meeting of the Board of Directors of Jai Entertainment Limited held on _____the _____ 2017, at B-17, Industrial Area,Suncity

Present :

1. Chairman
2. Director
3. Director

In attendance Secretary

Item No. 1 : Leave of Absence

Leave of absence wasgrantedto _____Director.

Item No. 2 : Confirmation of minutes of the 16th Board meeting :

The minutes of the 16th meeting of the Board of Directorsheldon_____ were considered and confirmed.

Item No. 3: Appointment of Managing Director:

The Board noted the appointment of Mr. Kaabil, director of the company as the Managing Director of the company. In this connection, the following resolutions were passed:

"Resolved that Mr. Kaabil who fulfils the conditions specified in Parts I and II of Schedule V to the Companies Act, 2013, be and is here by appointed as the Managing Director of the company for a period of five years effective from _____ and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule V to theAct.

Resolved further that the Secretary of the Company be and is hereby directed to file the necessary returns with the registrar of Companies and to do all acts and things as may be necessary in this connection."

Item No. 4: Next Board Meeting:

The next meeting of the Board will be held on _____the _____20____ at the registered office of the company. The meeting ended with a vote of thanks to the chair.

(B)

In this case, Mr. Vivaan 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 Vivaan bought a put option.

Example:

Now, if after three months, the current price of the shares is Rs. 210, Mr. Vivaan 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. Vivaan 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 an underlying asset and the option contract is a form of derivative.

(C)

According to Section 417 (1) of the Companies Act, 2013, the Central Government may, after consultation with the Chief Justice of India, remove from office the President, Chairperson or any Member, who –

(a) Has been adjudged an insolvent; or –
(b) Has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude : or
(c) Has become physically or mentally incapable of acting as such President, the Chairperson, or Member, or
(d) Has acquired such financial or other interest as is likely to affect prejudicially his functions as such President, the Chairperson or Member; or
(e) Has so abused his position as to render his continuance in office prejudicial to the public interest :

Provided that the President, the Chairperson or the Member shall not be removed on any of the grounds specified in clauses (b) to (e) without giving him a reasonable opportunity of being heard.

As per the proviso stated above, in case of sub – clause (a), i.e. where there is a case of insolvency, there is no requirement of giving an opportunity of being heard by the member of the NCLAT. Hence, the action taken by the Central Government against PRTJ is valid.

Circumstances under which the Central Government can remove the President, the Chairperson etc.

According to Section 417(2) of the Companies Act, 2013, the President, the Chairperson or the Member shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government in which such President, the Chairperson or Member had been informed of the charges against him and given a reasonable opportunity of being heard.

In the instant case, it is advised that the decision of the Central Government to remove (without giving reasonable opportunity of being heard) Mr. PRTJ, member of NCLAT who was adjudged as an insolvent by a competent authority is appropriate as per the clause (a) of Section 417(1) of the Companies Act, 2013.

(D)

Penalty for wrongful withholding of property : Section 452 of the Companies Act, 2013 provides for Penalty for wrongful withholding of property. According to the section :

(1) If any officer or employee of a company -
(a) Wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorized by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

(2) The Court trying an offence may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to 2 years.

Hence, as per the provisions of the Companies Act, 2013 and not giving any emphasis on the terms of employment, the manager of the company can recover possession of the room and the cash wrongfully obtained and the benefits that have been derived from such property or cash.