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**TEST
SERIES**



SUGGESTED SOLUTION

CS PROFESSIONAL

Subject – Resolution of Corporate Disputes

Topic – Chp-01 to 04

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Answer to Q1.A.

Democracy means the rule of the people, by the people and for the people. In that context, the shareholders democracy means the rule of shareholders, by the shareholders', and for the shareholders' in the corporate enterprise, to which the shareholders belong. Precisely it is a right to speak, congregate, communicate with co-shareholders and to learn about what is going on in the company.

Under the Companies Act, 2013, the powers have been divided between two segments: one is the Board of Directors and the other is of shareholders.

The Directors exercise their powers through meetings of Board of directors and shareholders exercise their powers through Annual General Meetings/Extraordinary General Meetings. Even if shareholders are capable of transacting all business in General Meetings, most of the powers are delegated to the Board of Directors through MOA and AOA of the Company.

The Companies Act has tried to demarcate the area of control of directors as well as that of shareholders. Basically all the business to be transacted at the meetings of shareholders is by means of an ordinary resolution or a special resolution.

Some of the businesses which can be transacted at meetings of shareholders are:

1. Alteration of Memorandum of Association and Articles of Association.
2. Further issue of share capital.
3. To transfer some portions of uncalled capital to reserve capital to be called up only in the event of winding up of the company.
4. To reduce the share capital of the company.
5. To shift the registered office of the company outside the state in which the registered office is situated at present.
6. To decide a place other than the registered office of the company where the statutory books, required to be maintained may be kept.
7. Payment of interest on paid-up amount of share capital for defraying the expenses on Construction when plant cannot be commissioned for a longer period of time.
8. To appoint auditors
9. To approach Central Government for investigation into the affairs of the company.
10. To allow Related Party Transaction
11. To allow a director, partner or his relative to hold office or place of profit.
12. Payment of commission of more than 1% of the net profits of the company to a managing or a wholtime director or a manager.
13. To make loans, to extend guarantee or provide security to other companies or make investment beyond the limit specified.
14. To borrow money and to charge out the assets of the company to secure the borrowed money.
15. To appoint directors.

16. To increase or reduce the number of directors within the limits laid down in Articles of Association.

17. To cancel, redeem debentures etc.

18. To make contribution to funds not related to the business of the company.

(5 MARKS)

Answer to Q1.B.

1) When the facts are similar in suits filed in different dominions by the members of the same class, standing against the same or similar defendants, it makes sense to combine them all and adjudicate it under one roof. Clubbing of similar claims/suits would also result in efficiency of judiciary, as the same would save precious time of judiciary from adjudicating similar dispute numerous times.

2) Therefore, specific provisions are incorporated under the Act to enable NCLT to club all similar applications in any jurisdiction, into one. For better understanding of this facet, it is profitable to analyse the provision of section 245(5) (b) of the Companies Act, 2013, which is reproduced below:

“(b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant’s side”.

3) The legislature intends to consolidate “all similar applications” existing at a time in any jurisdiction into one. The usage of word “similar” instead of “same” will invest vast powers in NCLT to adjudicate the matters and resist the multiplicity of proceedings. Hence Class Action Suits against similar defendants/respondents seeking similar relief may be consolidated into one.

4) Further the legislature also intends to bar the future class action on same subject matter. Same can be inferred from Section 245 (5)(c) of the Act, which is reproduced below:

“(c) two class action applications for the same cause of action shall not be allowed”.

5) On a bare perusal of the above, the intention of law makers is clear that no two class action applications shall be entertained on the same cause of action. It is pertinent to note that the bar is only upon class action and it does not cover other measures. Thus, other civil actions can be invoked on same cause of action. On a literal interpretation of the clause, it will not be wrong to state that any class action, whether brought by members or depositors, both are based on same cause of action.

(5 MARKS)

Answer to Q1.C.

Cheating has been defined under Section 415 of Indian Penal Code, 1860.

That whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

The main ingredients of cheating are as under:

1. Deception of any person.
2. (a) Fraudulently or dishonestly inducing that person
 - i. to deliver any property to any person; or
 - ii. to consent that any person shall retain any property; or
- (b) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Relevant Case Laws provided below:

1. In IRIDIUM INDIA TELECOM LTD. V. MOTOROLA INCORPORATED AND ORS., the SC has held that deception is necessary ingredient under both parts of section. Complainant must prove that inducement has been caused by deception exercised by the accused. It was held that non-disclosure of relevant information would also be treated a misrepresentation of facts leading to deception.
2. In M.N. OJHA AND OTHERS V. ALOK KUMAR SRIVASTAV AND ANR, the SC has held that where the intention on the part of the accused is to retain wrongfully the excise duty which the State is empowered under law to recover from another person who has removed non-duty paid tobacco from one bonded warehouse to another, they are held guilty of cheating.
3. In T.R. ARYA V. STATE OF PUNJAB, 1987, it was held that negligence in duty without any dishonest intention cannot amount to cheating. A bank employee when on comparison of signature of drawer passes a cheque there may be negligence resulting in loss to bank, but it cannot be held to be cheating.

(5 marks)

Answer to Q1.D.**Section 56 of Companies Act, 2013 deals with Transfer and Transmission of Securities**

- 1) Section 56(1) states that a company shall not register a transfer of securities of the company, or the interest of a member in the company in the case of a company having no share capital, other than the transfer between persons both of whose names are entered as holders of beneficial interest in the records of a depository, unless a proper instrument

of transfer in such form as may be prescribed, duly stamped, dated and executed by or on behalf of the transferor and the transferee and specifying the name, address and occupation, if any, of the transferee has been delivered to the company by the transferor or the transferee within a period of sixty days from the date of execution, along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities.

Provided that where the instrument of transfer has been lost or the instrument of transfer has not been delivered within the prescribed period, the company may register the transfer on such terms as to indemnity as the Board may think fit.

- 2) Section 56(2) states that nothing in sub-section (1) shall prejudice the power of the company to register, on receipt of an intimation of transmission of any right to securities by operation of law from any person to whom such right has been transmitted.
- 3) Section 56(3) states that where an application is made by the transferor alone and relates to partly paid shares, the transfer shall not be registered, unless the company gives the notice of the application, in such manner as may be prescribed, to the transferee and the transferee gives no objection to the transfer within two weeks from the receipt of notice.
- 4) Section 56(4) states that every company shall, unless prohibited by any provision of law or any order of Court, Tribunal or other authority, deliver the certificates of all securities allotted, transferred or transmitted –
 - (a) within a period of two months from the date of incorporation, in the case of subscribers to the memorandum;
 - (b) within a period of two months from the date of allotment, in the case of any allotment of any of its shares;
 - (c) within a period of one month from the date of receipt by the company of the instrument of transfer under sub-section (1) or, as the case may be, of the intimation of transmission under sub-section (2), in the case of a transfer or transmission of securities;
 - (d) within a period of six months from the date of allotment in the case of any allotment of debenture:

Provided that where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities.

- 5) Section 56(5) states that the transfer of any security or other interest of a deceased person in a company made by his legal representative shall, even if the legal representative is not a holder thereof, be valid as if he had been the holder at the time of the execution of the instrument of transfer.

Section 72 provides that when a shareholder nominates any person, then in case of the death of the shareholder company needs to transfer only to the nominee duly notified. In this case company has no further responsibility. In case of claim or any dispute in this regard the decision of the courts shall be final and binding.

6) Section 56(6) states that Where any default is made in complying with the provisions of sub-sections (1) to (5), the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees.

In case of transfer of dematerialized shares in a listed company, the company has no role to play. The depository participants would ensure the transfer is effected in accordance with law. In case a depository participant, with intention to defraud a person, transfers the shares illegally it shall be punishable under Section 447. This penalty is in addition to any other liability that may be attracted under Depositories Act 1996.

(5 MARKS)

Answer to Q2.A.

1) As per Section 452 of Companies Act, 2013,

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 authorised 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 one lakh rupees but which may extend to five lakh rupees.

2) The Court trying an offence under Section 452 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 two years.

(4 MARKS)

Answer to Q2.B.

- 1) The general principle of company law is that every member holds equal rights with other members of the company in the same class. The scale of rights of members of the same class must be held evenly for smooth functioning of the company.
- 2) In case of difference(s) amongst the members, the issue is decided by a vote of the majority. Since the majority of the members are in an advantageous position to run the company according to their command, the minorities of shareholders are often oppressed.
- 3) The company law provides for adequate protection for the minority shareholders when their rights are trampled by the majority. But the protection of the minority is not generally available when the majority does anything in the exercise of the powers for internal administration of a company.

- 4) The court will not usually intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of a company by its directors so long they are acting within the powers conferred on them under the articles of the company.
- 5) In other words, the articles are the protective shield for the majority of shareholders who compose the board of directors for carrying out their object at the cost of minority of shareholders.
- 6) The basic principle of non-interference with the internal management of company by the court is laid down in a celebrated case of Foss v. Harbottle that no action can be brought by a member against the directors in respect of a wrong alleged to be committed to a company. The company itself is the proper party of such an action.

(4 MARKS)

Answer to Q2.C.

- 1) Section 241 states that members may apply to Tribunal in cases of Oppression and Mismanagement.
- 2) However, bonafide decisions consistent with the company's articles cannot be equated with mismanagement even if they turn out wrong in the circumstances causing temporary losses.
- 3) In Mr. Vasudev P Hanji & Others v. Ashok Ironworks Pvt. Ltd. and in the case of Jaladhar Chakraborty & Ors. v. Power Tools and Appliances Co. Ltd. , it was held that "declaration of dividend is left to the collective decision of the Board and its non-declaration cannot be termed to be an oppressive conduct.
- 4) Thus, shareholders contention is not tenable and bonafide act of BOD are not oppression and mismanagement.

(4 MARKS)

Answer to Q2.D.

As per Section 405 of Companies Act, 2013,

The essential ingredients of the offence of criminal breach of trust are as under :

1. The accused must be entrusted with the property or with dominion over it,
2. The person so entrusted must use that property, or;
3. The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,
 - (i) of any direction of law prescribing the mode in which such trust is to be discharged, or;
 - (ii) of any legal contract made touching the discharge of such trust.

In the given case, there is an express or implied contract between Mr. Parth and Mr. Krish, that the money would be invested by Mr. Krish on behalf of Mr. Parth. But Mr. Krish invests the same in his own business which is violation of Section 405 of the Indian Penal Code, 1860. Hence, he has committed criminal breach of trust.

(4 MARKS)

Answer to Q2.E.

The Hon'ble Securities Appellate Tribunal, in Ketan Parekh vs. Securities & Exchange Board of India observed that,

- 1) Whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism will depend upon the intention of the parties which could be inferred from the attending circumstances because direct evidence in such cases may not be available.
- 2) Factors determining intention cannot be exhaustive, however, an illustrative list is given below of some factors which determine intention of the parties.

These include:

- the nature of the transaction executed,
 - the frequency with which such transactions are undertaken,
 - the value of the transactions,
 - whether they involve circular trading and whether there is real change of beneficial ownership,
 - the conditions then prevailing in the market
- 3) Any one factor may or may not be decisive and it is from the cumulative effect of these that an inference will have to be drawn.
 - 4) Thus, an unintentional and mere accidental omission or commission generally will not stand the test of legal scrutiny in establishing a fraud.

(4 MARKS)

Answer to Q2.F.

Section 245(1) provides that such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (3) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely: –

- (a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;
- (b) to restrain the company from committing breach of any provision of the company's memorandum or articles;
- (c) to declare a resolution altering the memorandum or articles of the company as void, if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;
- (d) to restrain the company and its directors from acting on such resolution;
- (e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) to restrain the company from taking action contrary to any resolution passed by the members;

(g) to claim damages or compensation or demand any other suitable action from or against –

- i. the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;
- ii. the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
- iii. any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

(4 MARKS)

Answer to Q3.A.

‘Fraud’, in general, refers to a wrongful or criminal deception practiced which is intended to result in financial or personal gain to oneself and a financial or personal loss to the other.

As per Business Dictionary, ‘Fraud’ is an act or course of deception, an intentional concealment, omission, or perversion of truth, to:

- (1) Gain unlawful or unfair advantage,
- (2) Induce another to part with some valuable item or surrender a legal right, or
- (3) Inflict injury in some manner.

‘Wilful fraud’ is a criminal offence which calls for severe penalties, and its prosecution and punishment (like that of a murder) is not bound by the statute of limitation.

As per Black Law Dictionary, ‘Fraud’ refers to ‘All multifarious means which human ingenuity can devise, and which are resorted to by one individual to get an advantage over another by false suggestions or suppression of the truth. It includes all surprises, tricks, cunning or dissembling, and any unfair way which another is cheated.

Under Indian Penal Code, 1860, The term ‘Fraud’ is not defined in the Indian Penal Code per se, but yes Section 25 defines as to what would amount to ‘fraudulently’. As per the definition, fraudulently refers – “A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.” This shows that fraud as a crime is nowhere defined in the Indian Penal Code, but implication of this term is made at various places in Indian Penal Code.

Whenever the term fraud or defraud appears in the context of criminal law, two things are automatically to be assumed.

- First is deceit or deceiving someone; and
- Second is, injury to someone because of such deceit

Under Indian Contract Act, 1872,

Section 17 of the Act defines Fraud as – “Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto his agent, or to induce him to enter into the contract.

Under Companies Act, 2013,

Explanation of Section 447 of Companies Act 2013 defines Fraud and related terms as below:

- (i) ‘Fraud’ in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;
- (ii) ‘Wrongful gain’ means the gain by unlawful means of property to which the person gaining is not legally entitled;
- (iii) ‘Wrongful loss’ means the loss by unlawful means of property to which the person losing is legally entitled.

On a close analysis of the definition of the term fraud as provided in the Companies Act, 2013, the following points emerge:-

1. The definition of the term fraud is inclusive in nature.
2. Fraud need not only in relation to a company; it may relate to any body corporate also. Thus, the horizon is larger.
3. Fraud includes any act, omission, concealment of facts or abuse of position by a person.
4. The definition also extends to those persons who connive with another in committing a fraud.
5. Intention is important.
6. The targets of the fraud could be the company, its shareholders, its creditors or any other person.
7. It is not necessary that there should be a wrongful gain or wrongful loss to do a fraud. Thus, gain or loss arising out of the fraud cannot be a basis for deciding the violation or handing over punishment.

On a plain reading of the definition it is amply vivid that the term has a wide encompassing coverage of the acts and also of the fraudsters.

(8 MARKS)

Answer to Q3.B.

Chapter XVI of the Companies Act, 2013 (Section 241 to Section 246) deals with the provisions relating to prevention of oppression and mismanagement of a company. Oppression and mismanagement of a company mean that the affairs of the company are being conducted in a manner that is oppressive and biased against the minority shareholders or any member or

members of the company. To prevent the same, there are provisions for the prevention and mismanagement of a company.

Regulatory Framework

Section/ Regulation	Section/Regulation Title	Particulars
241	Application to Tribunal for Relief in cases of oppression	Provides circumstances in which an application may be made to NCLT by any member who has right to apply under Section 244 Or By the Central Government for relief in cases of oppression and mismanagement in the affairs of the company.
242	Power of Tribunal	It deals with powers of NCLT when application is made under Section 241 for relief in cases relating to oppression and mismanagement.
243	Consequences of termination or modification of certain agreements	It deals with consequences of termination or modification of certain agreements as a result of order of tribunal under Section 242.
244	Right to apply under section 241	It deals with rights of members to apply under section 241. In case of company having a share capital not less than 100 members or not less than one tenth of total number of members whichever is less or any member/s holding not less than 1/10th of the issued share capital In case of company having share capital not less than 1/5th of total number of members
245	Class action	An application by such number of members, depositors or class of them to NCLT to seek remedy against

		conduct of affairs of the company prejudicial to the interest of the company or its members or depositors.
Rule 81 of NCLT Rules	Application under Section 241	Format of application and procedural aspects
Rule 82 of NCLT Rules	Application not to be withdrawn without leave of the tribunal	
Rule 83 of NCLT Rules	Application under Section 243	
Rule 83A of NCLT Rules	Application under Section 244	Provides for format of application
Rule 84 to Rule 87 of NCLT Rules	Procedural aspects, thresholds etc relating to class action suits.	

(8 MARKS)