

**J.K. SHAH<sup>®</sup>**

**TEST  
SERIES**



**SUGGESTED SOLUTION**

**CS PROFESSIONAL**

**Subject – Resolution Of Corporate Disputes**

**Topic – Chp-05 to 07**

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**Answer to Q1.A.**

Section 213 deals with Investigation into the Company's Affairs by NCLT on Application made by Members or other Persons

The Tribunal may order after giving a reasonable opportunity of being heard to the parties concerned that affairs of a company ought to be investigated. Where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company and to report thereupon.

The tribunal may make this order on an application made by –

- (a) not less one hundred members or members holding not less than one – tenth of the total voting power, in case of a company having a share capital; or
- (b) not less than one – fifth of the persons on the company's register of members, in case company having no share capital

and supported by evidence showing good reason for seeking and order for conducting an investigation into affairs of the company.

The Tribunal may also make such order on an application made to it by any other person or otherwise, if it is satisfied that the circumstance suggest that –

- (a) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;
- (b) person concerned in the formation of the company or the management of its affairs have been guilty of fraud, misfeasance or other misconduct towards the company or towards its members; or
- (c) the members of the company have not been given all reasonable information including information relating to the calculation of commission payable to a managing or other director or the manager of the company.

If after investigation it is proved that –

- (a) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or
- (b) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,

then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud under Section 447.

**(5 MARKS)**

**Answer to Q1.B.**

Enforcement of the orders of Adjudicating Authority (Section 14):

- (1) Subject to the provisions of sub-section (2) of section 19, if any person fails to make full payment of the penalty imposed on him under section 13 within a period of ninety days from the date on which the notice for payment of such penalty is served on him, he shall be liable to civil imprisonment under this section.
- (2) No order for the arrest and detention in civil prison of a defaulter shall be made unless the Adjudicating Authority has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Adjudicating Authority, for reasons in writing, is satisfied—
  - a. that the defaulter, with the object or effect of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred, concealed, or removed any part of his property, or
  - b. that the defaulter has, or has had since the issuing of notice by the Adjudicating Authority, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.
- (3) Notwithstanding anything contained in sub-section (1), a warrant for the arrest of the defaulter may be issued by the Adjudicating Authority if the Adjudicating Authority is satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the certificate the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority.
- (4) Where appearance is not made pursuant to a notice issued and served under sub-section (1), the Adjudicating Authority may issue a warrant for the arrest of the defaulter.
- (5) A warrant of arrest issued by the Adjudicating Authority under sub-section (3) or sub-section (4) may also be executed by any other Adjudicating Authority within whose jurisdiction the defaulter may for the time being be found.
- (6) Every person arrested in pursuance of a warrant of arrest under this section shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey): Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him. Explanation. – For the purposes of this sub-section, where the defaulter is a Hindu undivided family, the karta thereof shall be deemed to be the defaulter.
- (7) When a defaulter appears before the Adjudicating Authority pursuant to a notice to show cause or is brought before the Adjudicating Authority under this section, the Adjudicating Authority shall give the defaulter an opportunity showing cause why he should not be committed to the civil prison.
- (8) Pending the conclusion of the inquiry, the Adjudicating Authority may, in his discretion, order the defaulter to be detained in the custody of such officer as the Adjudicating

Authority may think fit or release him on his furnishing the security to the satisfaction of the Adjudicating Authority for his appearance as and when required.

(9) Upon the conclusion of the inquiry, the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest.

Provided that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or release him on his furnishing security to the satisfaction of the Adjudicating Authority for his appearance at the expiration of the specified period if the arrears are not satisfied.

(10) When the Adjudicating Authority does not make an order of detention under sub-section (9), he shall, if the defaulter is under arrest, direct his release.

(11) Every person detained in the civil prison in execution of the certificate may be so detained,—

(a) where the certificate is for a demand of an amount exceeding rupees one crore, up to three years, and

(b) in any other case, up to six months: Provided that he shall be released from such detention on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison.

**(5 MARKS)**

**Answer to Q1.C.**

Any person aggrieved by an order made by an adjudicating officer or by an order of the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority may prefer an appeal to a Securities Appellate Tribunal (SAT) having jurisdiction in the matter.

Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made by the Board or the Adjudicating Officer or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed. Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Procedure for Appeal :

The procedure for appeal to SAT is contained in the Securities Appellate Tribunal (Procedure) Rules, 2000 and has to be followed strictly.

1. The Memorandum of appeal shall be presented in the Form by any aggrieved person in the registry of the Appellate Tribunal within whose jurisdiction his case falls or shall be sent by

- registered post addressed to the Registrar. A memorandum of appeal sent by post shall be deemed to have been presented in the registry on the day it was received in the registry
2. Every appeal, application, reply, representation or any document filed before the Appellate Tribunal shall be typewritten, cyclostyled or printed neatly and legibly on one side of the good quality paper of foolscap size in double space and separate sheets shall be stitched together and every page shall be consecutively numbered and filed in the prescribed manner.
  3. The appeal shall be presented in 5[five] sets in a paper book along with an empty file size envelope bearing the full address of the respondent and in case the respondents are more than one, then sufficient number of extra paper books together with empty file size envelope bearing full addresses of each respondent shall be furnished by the appellant.
  4. Every memorandum of appeal shall be accompanied with the prescribed fee and such fee may be remitted in the form of crossed demand draft drawn on any nationalised bank in favour of “the Registrar, Securities Appellate Tribunal” payable at the station where the registry is located. (Mumbai).
  5. On receipt of an appeal the Securities Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
  6. The appeal filed before the Securities Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

**(5 MARKS)**

**Answer to Q1.D.**

Relevant Geographic Market

The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely: –

- (a) regulatory trade barriers;
- (b) local specification requirements;
- (c) national procurement policies;
- (d) adequate distribution facilities;
- (e) transport costs;
- (f) language;
- (g) consumer preferences; and
- (h) need for secure or regular supplies or rapid after-sales services.

Relevant Product Market

The Commission shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely: –

- (a) physical characteristics or end-use of goods;

- (b) price of goods or service;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialised producers; and
- (f) classification of industrial products.

**(5 MARKS)**

**Answer to Q2.A.**

Power to Search and Seizure

According to Section 67(1), where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorize in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things.

Order not to remove

Where it is not practicable to seize any such goods, the proper officer, or any officer authorized by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

Duration of Seizure

The documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

Return of documents not relied upon

The documents, books or things which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

**(4 MARKS)**

**Answer to Q2.B.**

Section 44 deals with Offences triable by Special Courts

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973

- a) an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed: Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or;
- b) a Special Court may, upon a complaint made by an authority authorized in this behalf under this Act take cognizance of offence under section 3, without the accused being committed to it for trial;

- c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorized to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.
- d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973 ( 2 of 1974) as it applies to a trial before a Court of Session.

(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to “Magistrate” in that section includes also a reference to a “Special Court” designated under section 43.

**(4 MARKS)**

**Answer to Q2.C.**

The provisions contained in section 420(2) of the Companies Act, 2013 can be dissected in the following limbs:

The Tribunal may at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record:

- (i) amend any order passed by it,
- (ii) and shall make such amendment, if the mistake is brought to its notice by the parties .

The word “may” suggest that the provision confers a discretionary power on the tribunal in the matter of rectifying what it may find to be a mistake in its order.

In SREE AYYANAR SPINNING & WEAVING MILLS LTD. V. CIT, it was held that under first part of the provision, the tribunal is empowered to suo motu rectify any mistakes apparent on record any time within two years from the date of its original order. Under the second part, either the taxpayer or the department may file an application highlighting the mistake apparent on record. In light of the provision, the Apex Court held that the appellate tribunal took time beyond the stipulated period even though the application was filed well within the period. Thus, in the event the applicant has filed the application within the stipulated period of two years from the date of original order, it is binding for the appellate tribunal to decide the matter on the basis of merits and not on the ground of limitation.

Thus, Section 420(2) read with Rules 11, 154 and 155 substantiate that the Tribunal has power to rectify a mistake apparent from the record on its own motion or on an application by a party under the Act.

**(4 MARKS)**

**Answer to Q2.D.**

Procedure for Compounding:

- 1) Call for a board meeting to decide on compounding as per the Companies Act, 2013.
- 2) Arrive at the amount of the fine involved as per the relevant section(s).
- 3) Hold the Board Meeting and pass resolution(s) to compound and provide for preparation and providing necessary authorization for compounding.
- 4) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Tribunal or the Regional Director or any officer authorized by the Central Government, as the case maybe. The filing with ROC is done in the e-form GNL-1 prescribed for this purpose. Also deliver sufficient number of hard copies of the compounding application to ROC for him to forward it to RD/Tribunal based on the quantum of fee involved.
- 5) There will be a personal hearing before the Regional Director or Tribunal which will decide the amount to be paid for compounding.
- 6) Get the order passed by the RD/Tribunal and pay the amount stipulated within the time fixed.
- 7) File Order of RD/NCLT with ROC in form INC-28 and ROC will take note of the same.

**(4 MARKS)**

**Answer to Q2.E.**

Rejection of Application (Regulation 6)

(1) An application may at any time be rejected on the following grounds:

- a) Where the applicant refuses to receive or respond to the communications sent by the Board;
- b) Where the applicant does not submit or delays the submission of information, document, etc., as called for by the Board;
- c) Where the applicant who is required to appear, does not appear before the Internal Committee on more than one occasion;
- d) Where the applicant violates in any manner the undertaking and waivers as provided in Part-C of the Schedule-I;
- e) Where the applicant does not remit the settlement amount within the period specified in clause (a) of sub-regulation (2) of regulation 15 and/or does not abide by the undertaking and waivers. (2) The rejection under sub-regulation (1) shall be communicated to the applicant:

Provided that the applicant shall continue to be bound by the waivers given in respect of limitation or laches in respect of the initiation or continuation or restoration of any legal proceeding and the waivers given.

**(4 MARKS)**

**Answer to Q2.F.**

Circumstances under which adjudication can be ordered u/s 454:

- a) There must have been a default or non-compliance of the provisions of the Companies Act, 2013;
- b) The default has to be ascertained and the nature of non-compliance must be



identified by the concerned office of the RoC or emanate from inspection/investigation or from the statutory auditor's report or the secretarial audit report

c) Fine is not the same as penalty. Penalty is a broader term which includes fine. Before initiating adjudication proceedings u/s 454, it has to be ascertained if the penal provisions in the section alleged to have been violated for which these proceedings are sought to be initiated are in the nature of fine or penalty.

In general usage, a layman uses these two words synonymously. In fact, in the Companies Act, 2013, there are many sections which talk of "fine" and many other sections talk of "penalty". Those sections which have stipulated "fines" will necessarily be outside the purview of section 454 since S.454(3) clearly authorizes the adjudicating officer with a power to impose only penalty and it is implied that he has to take cognizance of the penalty stipulated under the section which has been violated. In whichever fines have been stipulated, the defaulting parties can take recourse to seeking compounding of the offence whether a show cause notice is issued or not.

Interestingly, neither section 621A of the Companies Act, 1956, used, nor section 441 of the present act uses the word "penalty" in the text of these sections. The words used in these sections are fine or imprisonment by way of punishment.

**(4 MARKS)**

**Answer to Q3.A.**

The Central Government, in order to facilitate voluntary dispute resolution mechanism, vide Notification dated September 9, 2016 has come up with Companies (Mediation and Conciliation) Rules, 2016 (hereinafter referred to as "Rules").

The Rules pertain to section 442 of the Companies Act, 2013 (hereinafter referred to as "Act, 2013") which provides for the setting up of Mediation and Conciliation Panel for facilitating mediation and reconciliation between the parties during any stage of the proceeding before the quasi-judicial bodies i.e. the Central Government, Tribunal or Appellate Tribunal.

Qualifications for Empanelment (Rule 4)

A person shall not be qualified for being empanelled as mediator or conciliator unless he –

- (a) has been a Judge of the Supreme Court of India; or
- (b) has been a Judge of a High Court; or
- (c) has been a District and Sessions Judge; or
- (d) has been a Member or Registrar of a Tribunal constituted at the National level under any law for the time being in force; or
- (e) has been an officer in the Indian Corporate Law Service or Indian Legal Service with fifteen years' experience; or
- (f) is a qualified legal practitioner for not less than ten years; or
- (g) is or has been a professional for at least fifteen years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary; or

- (h) has been a Member or President of any State Consumer Forum; or
- (i) is an expert in mediation or conciliation who has successfully undergone training in mediation or conciliation.

Disqualifications for empanelment (Rule 5)

A person shall be disqualified for being empanelled as mediator or conciliator, if he –

- (a) is an undischarged insolvent or has applied to be adjudicated as an insolvent and his application is pending;
- (b) has been convicted for an offence which, in the opinion of the Central Government, involves moral turpitude;
- (c) has been removed or dismissed from the service of the Government or the Corporation owned or controlled by the Government;
- (d) has been punished in any disciplinary proceeding, by the appropriate disciplinary authority; or
- (e) has, in the opinion of the Central Government, such financial or other interest in the subject matter of dispute or is related to any of the parties, as is likely to affect prejudicially the discharge by him of his functions as a mediator or conciliator.

**(8 MARKS)**

**Answer to Q3.B.**

Before an inspector commences investigation into the affairs of a company, it is advisable for the Secretary to prepare a report touching upon various aspects of the activities of his company particularly those transactions in respect of which fraud or misfeasance or mismanagement is alleged.

This exercise will enable the secretary to handle the investigation into the affairs of his company with courage and confidence.

The aspects which should be considered by the company secretary include:

- 1) Basic information about the company – Name of the company; date of incorporation; location of the registered office, branches, factories and other offices; status of the company – public or private; objects of the company – capital structure; voting rights attached to the shares; shareholding pattern of the company.
- 2) Business activities – Nature of existing business, licensed and installed capacities, expansion programme and sources of finance, whether the company belongs to a particular group; if so the names of other companies falling within the same group.
- 3) Debentures, bank finance and deposits.
- 4) Foreign collaboration agreements.
- 5) Management—Brief history of past management set up; existing management set up; composition of Board of Directors; whether the terms and conditions of the appointment of

managerial personnel are being adhered to; details regarding appointment of directors and their relatives to an office or place of profit.

- 6) Whether all the statutory registers including minute's books are being maintained up-to-date?
- 7) Whether the internal checks and internal control system is being properly followed?
- 8) Working results and financial position – General assessment of working of the company, evaluation of the level of performance and efficiency of the management, a review of the profits of the company, performance data, financial position of the company in the context of its working results for the last three years.
- 9) Compliance by the company and its officers with the provisions of the Companies Act, 1956/2013.
- 10) Compliance with the provisions of other Acts applicable to the company.
- 11) Whether the loans taken and loans advanced to Directors, the firms in which they are partners or companies in which they are Directors are in accordance with the provisions of the Act.
- 12) The investments made by the company.
- 13) Sole selling agency agreement.
- 14) Instance of mismanagement and other irregularities.
- 15) Acquisition/disposal of substantial assets.
- 16) A scrutiny of abnormal/heavy expenditure items.
- 17) Complaints, if any, against the company and its management and steps taken to redress them.
- 18) Brief particulars of the litigations against the company and the reasons thereof.
- 19) Management's relations with the employees and labour.
- 20) Shareholders—Instance of oppression of minority shareholders, allegations of non-receipt of dividend, notices of meetings, accounts, share certificates, etc.; illegal forfeiture of shares, etc. and steps taken to redress Investors, complaints.
- 21) Auditors—Name and address of Statutory auditors, Secretarial Auditor and Cost Auditor, compliance as per the provisions of Companies Act, 2013.

**(8 MARKS)**