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**CA FINAL**

**SUBJECT- LAW**

**Test Code – FNJ 7421**

**BRANCH - () (Date :)**

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## DIVISION A

### Case Scenario 1

1. a
2. a
3. d
4. d
5. b

### Case Scenario 2

1. c
2. c
3. a
4. a
5. d

### Independent MCQ's

1. a
2. c
3. b
4. b
5. b
6. c
7. d
8. b

## Division B : Descriptive Answer

- 1.(a)** Section 185 of the Companies Act, 2013 contains provisions which impose restrictions on the loans, etc. being given to directors, etc. According to the provision:

As per sub – section (1), a company is not permitted to advance any loan, or to give any guarantee or provide any security in connection with any loan taken by, -

- (a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or

(b) any firm in which any such director or relative is a partner.

Further sub – section (3) states that above provision shall not apply :

(a) where any loan is given to a managing or whole – time director –

(i) as a part of the conditions of service extended by the company to all its employees ; or

(ii) pursuant to any such scheme which is approved by the members by a special resolution.

(b) where a company in the ordinary course of its business :

- Provides loans or gives guarantees or securities for the due repayment of any loan; and
- In respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan.

Accordingly, following are the answers to the stated problems :

- (1) In the first case it would violate the section 185(1) of the Companies Act, 2013. Honesty Ltd. is not permitted, to advance any loan, or to give any guarantee or provide any security in connection with any loan taken by Mr. A (director) of the company.
  - (2) In the second case, as per section 185(3), restrictions imposed in section 185(1), will not apply to giving of loan to Mr. B, the whole time director if its given as a part of the conditions of service extended by the company to all its employees.
  - (3) In third case, if it is loan given to a company in the ordinary Course of business for due repayment of any loan and lending rate is not less than the bank rate prescribed by the Reserve bank, the restriction imposed under section 185(1) will not apply to such transactions.
- (b) (1) Section 164 talks about the disqualifications of directors under the Companies Act, 2013. In specific, sub – section (2)(b) of the said section, no person who is or has been a director of a company which has failed to pay any dividend declared and such failure continues for one year or more, shall not be eligible to be re – appointed as a director of that company or appointed in other company for a period of 5 years from the date on which the defaulted company fails to do so.

Mr. futuristic, a director on the board of ABC Ltd., had offer of appointment in other company PQR Ltd. He wishes to take up the post in the other company. In view of above stated provision, since Mr. futuristic was a director in a company which failed to pay dividend even after 1 year of declaration and so was a defaulted company. Therefore, he cannot be appointed in PQR Ltd.

- (2) Any director who is in receipt of any commission from the company and who is managing or Whole time director of the company shall not be disqualified from receiving any remuneration of commission from any holding or subsidiary company of such company

subject to its disclosure by the company in the Board's report as per section 197(14) of the Companies Act. However subject to the provisions of sections I to IV of schedule V of the Companies Act, 2013, a managerial person shall draw remuneration from one/both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is managerial person. Accordingly, Mr. Talented is advised to check that it does not exceed the higher maximum limit admissible in any of the companies i.e. either holding or subsidiary.

- 2.(a)** As according to section 245 of Companies Act, 2013, 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 (2) 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 an orders, to restrain the company from committing an act which is beyond the scope of or ultra – virus the articles or memorandum of the company.

Requisite number of members to make Application under Section 245(1) for Class Action for depositors is as prescribed in rule 84(4) of the National Company Law Tribunal (Second Amendment) Rules, 2019. Accordingly, in case of a company having a share capital the requisite number of member or members to file an application under section 245(1) shall be:

- (a) at least five per cent of the total number of members of the company; or
- (b) one hundred members of the company, whichever is less; or
- (c) In case of a listed company, member or members holding not less than two per cent of the issued share capital of the company.

In above case, members holds 2.53% ( $380/15000*100$ ) of issued share capital of Zolo Ltd. which is a listed company make application before tribunal (NCLT). Hence requirement of number of members holding more than 2% of issued share capital is complied with. Therefore their application can be admitted by NCLT.

- (b)** As per the Foreign Exchange Management Act, 1999 read with Schedule III of the FEM(Current Account Transactions) Rules, 2000, thereunder, there are various facilities for persons other than individuals which requires the prior approval of RBI for drawl of foreign exchange. One of such facility is remittances exceeding USD 1,000,000 per project for other consultancy services procured from outside India. In the given case, the person (i.e., Milap Limited) obtaining such service from outside India is a body corporate, other than individual and accordingly to above provisions, where the remittances is exceeding the prescribed threshold, there Milap Limited will require to seek prior approval of RBI for drawl of such foreign exchange.

- 3.(a)** Section 326 of the Companies Act, 2013 talks about the overriding preferential payments to be made from the amount realized from the assets to be distributed to various kind of creditors. According to the proviso given in the section 326 the security of every secured creditor shall be deemed to be subject to a paripassu change in favour of the workman to the extent of their portion.

$$\text{Workman's Share to Secured Asset} = \frac{\text{Amount Released} * \text{Workman's Dues}}{\text{Workman's Dues} + \text{Secured Loan}}$$

$$\text{Workman's Share to Secured Asset} = \frac{4,00,00,000 * 1,25,00,000}{1,25,00,000 + 5,00,00,000}$$

$$4,00,00,000 \times \frac{1}{5}$$

$$\text{Workman's Share to Secured Assets} = 80,00,000$$

Amount available to secured creditor is Rs. 400 Lakhs – 80 Lakhs = 320 Lakhs

Hence, no amount is available for payment of government dues and unsecured creditors.

**(b)** According to section 5 of the Prevention of Money Laundering act, 2002, where the Director or any other officer (not below the rank of Deputy Director authorized by the Director), has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that –

- (a) any person is in possession of any proceeds of crime ; and
- (b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may by order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order, in such manner as may be prescribed.

Provided further that, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money – laundering is not attached immediately under this Chapter, the non – attachment of the property is likely to frustrate any proceeding under this Act.

Computation of period of attachment : Provided also that for the purposes of computing the period of 180 days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding 30 days from the date of order of vacation of such stay order shall be counted.

No effect on the right to enjoy the property : This section shall not prevent the person interested in the enjoyment of the immovable property attached from such enjoyment.

Here, “person interested”, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

**4.(a)** As per section 11(4) of the Securities and Exchange Board of India Act, 1992, the Board may, by an order, for reasons to be recorded in writing, in the interest of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely :-

1. suspend the trading of any security in a recognized stock exchange ;

2. restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;
3. suspend any office – bearer of any stock exchange or self – regulatory organization from holding such position;
4. impound and retain the proceeds or securities in respect of any transaction which is under investigation;
5. ‘attach, for a period not exceeding ninety days, bank accounts or other property of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder :

Provided that the Board shall, within ninety days of the said attachment, obtain confirmation of the said attachment from the Special Court, established under section 26A, having jurisdiction and on such confirmation, such attachment shall continue during the pendency of the aforesaid proceedings and on conclusion of the said proceedings, the provisions of section 28A shall apply :

Provided further that only property, bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached.

6. direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation.

The amount disgorged, pursuant to a direction issued, under the SEBI Act or the Securities Contracts (Regulation) Act, 1956 or the Depositories Act, 1996, as the case may be –

- Shall be credited to the Investor Protection and Education Fund (IPEF) established by the Board, and
- Such amount shall be utilised by the Board in accordance with the regulations made under this Act.”

Provided that the Board may take any of the measures specified in clause (d) or clause (e) or clause (f), in respect of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognized stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market :

Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.

Penalty : The Board may, by an order, for reasons to be recorded in writing, levy penalty under sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA and 15HB after holding an inquiry in the prescribed manner.

- (b) (i)** As per section 13(2) of the SARFAESI Act, 2002, where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non – performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub – section (4).

In the instant case, the bank issued notice to the company to discharge its liabilities in full within a period of 60 days from the date of notice and the company objected for full settlement and the time limit for settlement. In view of the provisions of the section 13(2) mentioned above, the objection of the company is not valid.

- (ii)** If, on receipt of the notice under sub – section (2), the company makes any representation or raises any objection, the bank shall consider such representation or objection and if the bank comes to the conclusion that such representation or objection is not acceptable or tenable, it shall communicate within fifteen days of receipt of such representation or objection the reasons for non – acceptance of the representation or objection to the company. [Section 3A]
- (iii)** Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882, the security interest created in favour of the bank may be enforced without intervention of the court or tribunal.

**5.(a)** According to section 2(42) of the Companies Act, 2013, “foreign company” means any company or body corporate incorporated outside India which –

- (a)** has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b)** conducts any business activity in India in any other manner.

According to the Companies (Registration of Foreign Companies) Rules, 2014, “electronic mode “ means carrying out electronically based, whether main server is installed in India or not, including, but not limited to-

- (a)** business to business and business to consumer transactions, data interchange and other digital supply transactions :
- (b)** offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities in India or from citizens of India;
- (c)** financial settlements, web based marketing, advisory and transactional services, data base services and products, supply chain management.
- (d)** Online services such as telemarketing, telecommuting, telemedicine, education and information research, and
- (e)** all related data communication services whether conducted by e – mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

In view of the above provisions, Radix Ltd., will be treated as foreign company for being involved in business activity through telemedicine

(b) The priority order in which the liquidator shall distribute the proceeds will be as under :

Particulars	Amount (in Rs.)	
Amount realised from the sale of liquidation of assets		7,00,000
Less : (i) Fees payable to resolution professional	37,500	
(ii) Expenses incurred by the resolution professional in running the business of Star House (P) Ltd. As going concern	17,500	(55,000)
Balance available		6,45,000
Less : (i) Secured creditors who has relinquished the security	2,50,000	
(ii) Workmen salary payable for a period of 24 months preceding the liquidation commencement date [1,50,000* (24/30)]	1,20,000	(3,70,000)
Balance available		2,75,000
Less : Unsecured Financial Creditor	2,00,000	(2,00,000)
Balance available		75,000
Less : (i) Income tax payable	25,000	
(ii) Cess payable to State Government	10,000	(35,000)
Balance available		40,000
Less : Balance Workmen salary payable (apart for a period of 24 months preceding the liquidation commencement date) [1,50,000 – 1,20,000]	30,000	(30,000)
<b>Balance Available for equity shareholders</b>		<b>10,000</b>

6.(a) (i) 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 or a 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 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.

(ii) **Resolution passed at the meeting of EBX Limited held at its registered office situated at \_\_\_\_\_ on \_\_\_\_\_ (day) at \_\_\_\_\_ A.M.**

“RESOLVED that pursuant to the provisions of Sections 149, 150, 152 and any other applicable provisions of the Companies Act, 2013 and the rules made thereunder (including any statutory modification(s) or re – enactment thereof for the time being in force) read with Schedule IV to the Companies Act, 2013, Mr. S (holding DIN -----), Director of the



Company who retires by rotation at the Annual General Meeting and in respect of whom the Company has received a notice in writing from a member proposing his candidature for the office of Director, be and is hereby appointed as an Independent Director of the Company to hold office for five consecutive years for a term up to ----, 20 ----.”

- (b)(i)** Section 12 of the Insolvency and Bankruptcy Code states that any Corporate & Insolvency Resolution Process shall be completed within a period of one hundred and eight days from the date of admission of the application to initiate the process.

However, the National Company Law Tribunal (NCLT) may on an application made by the resolution professional, under a resolution passed by the Committee of Creditors, by a vote of 66% of voting shares, after consideration provide one extension which shall not extend more than 90 days.

Second proviso to Section 12(3) states that the corporate insolvency resolution process (CIRP) shall compulsorily be completed within 330 days from the insolvency commencement date including any extension of the time period of corporate insolvency resolution process granted under Section 12 and also the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

**(ii) Establishment of Appellate Tribunal**

According to section 25 of the Prevention of Money Laundering Act, 2002, the Appellate Tribunal constituted under sub – section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act.

**Appeals to Appellate Tribunal**

Section 26 deals with the right and time frame to make an appeal to the Appellate Tribunal. The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act may prefer an appeal to the Appellate Tribunal.

The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Adjudicating Authority is received and it shall be in such form and be accompanied by prescribed fees. The appeal shall be in such form and be accompanied by such fee as may be prescribed. The Appellate Tribunal may extend the period if it is satisfied that there was sufficient cause for not filing it within the period of 45 days.

The Appellate Tribunal may after giving the parties to the appeal an opportunity of being heard, pass such order as it thinks fit, confirming, modifying or setting aside the order appealed against.

**Appeal to High Court**

The Act also provides further appeal. According to Section 42 any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the order of the Appellate Tribunal.

In the light of the provisions of the Act explained above the company is advised to prefer an appeal to Appellate Tribunal in the First instance.