



FACULTY OF JURIDICAL SCIENCES

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FACULTY OF JURIDICAL SCIENCES



LECTURE-38

Winding up of a Company(continued)

The petition for winding up to the Tribunal may be made by :-

1. The company, in case of passing a special resolution for winding up.
2. A creditor, in case of a company's inability to pay debts.
3. A contributory or contributories, in case of a failure to hold a statutory meeting or to file a statutory report or in case of reduction of members below the statutory minimum.

4. The Registrar, on any ground provided prior approval of the Central Government has been obtained.

5. A person authorised by the Central Government, in case of investigation into the business of the company where it appears from the report of the inspector that the affairs of the company have been conducted with intent to defraud its creditors, members or any other person.

6. The Central or State Government, if the company has acted against the sovereignty, integrity or security of India or against public order, decency, morality, etc.

In *Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami*, (1965) 35 Company Cases 456 (SC), this Court held that "It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented

ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court."

The above mentioned decision was later followed by this Court in *Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd.* 1971) 3 SCC 632. it was further stated that if the court is satisfied, that sufficient reasons exist in the petition for winding up, then it will pass a winding up order. Once the winding up order is passed, following consequences follow:

1. Court will send notice to an official liquidator, to take charge of the company. He shall carry out the process of winding up, (sec. 444)
2. The winding up order, shall be applicable on all the creditors and contributories, whether they have filed the winding up petition or not.
3. The official liquidator is appointed by central Government (sec. 448).

4. The company shall relevant particulars, relating to, assets, cash in hand, bank balance, liabilities, particulars of creditors etc, to the official liquidator. (sec. 454).

5. The official liquidator shall within six months, from the date of winding up order, submit a preliminary report to the court regarding :

- Particulars of Capital
- Cash and negotiable securities
- Liabilities
- Movable and immovable properties
- Unpaid calls, and

6. An opinion, whether further inquiry is required or not (455)

In Vijay Industries v. NATL Technologies Ltd, (2009) 3 SCC 527, it was laid down that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the

ground that the company is unable to pay its debts is not substantiated and nonpayment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956.

The Central Govt. shall keep a cognizance over the functioning of official liquidator, and may require him to answer any inquiry. The official liquidator, usually a public accountant, must, of course, be a person wholly independent and outside the influence neither of the company, nor in any way connected with its business. In the course of the winding-up operation a liquidator usually consults with the shareholders and the creditors of the company, with the purpose of facilitating his task or proposing a compromise or arrangement between the parties.

When the creditors are all paid, or the capital of the

company (if limited) is exhausted, the liquidator is to lay before the Court a complete account, show in the manner in which the operations have been conducted and the property of the company disposed of. The Court, upon exhibition of the said account, pronounces the dissolution of the company.

STAY ORDER

Where, the court has passed a winding up order, it may stay the proceedings of winding up, on an application filed by official liquidator, or creditor or any contributory. The general scheme of the Companies Act is that the Court should have complete control of all proceedings in winding up.

VOLUNTARY WINDING UP OF A REGISTERED COMPANY

When a company is wound up by the members or the creditors without the intervention of Tribunal, it is called as voluntary winding up. It may take place by:-

1. By passing an ordinary resolution in the general meeting if :-

- the period fixed for the duration of the company by the articles has expired;
- some event on the happening of which company is to be dissolved, has happened.

2. By passing a special resolution to wind up voluntarily for any reason whatsoever.

Within 14 days of passing the resolution, whether ordinary or special, it must be advertised in the Official Gazette and also in some important newspaper circulating in the district of the registered office of the company. It was held in *Neptune Assurance Co. Ltd. vs Union Of India*, 1973 SCR (2) 940, that in the Companies Act the expression "voluntary winding up", means a winding up by a special resolution of a company to that effect. Similarly, the expression "winding up by the court" means winding up by an order of the Court in accordance with S. 433 of the Companies Act. The

Companies Act (Section 484) provides for two methods for voluntary winding up:-

1. Members' voluntary winding up

It is possible in the case of solvent companies which are capable of paying their liabilities in full.

There are two conditions for such winding up:-

a) A declaration of solvency must be made by a majority of directors, or all of them if they are two in number. It will state that the company will be able to pay its debts in full in a specified period not exceeding three years from commencement of winding up. It shall be made five weeks preceding the date of resolution for winding up and filed with the Registrar. It shall be accompanied by a copy of the report of auditors on Profit & Loss Account and Balance Sheet, and also a statement of assets and liabilities upto the latest practicable date; and

b) Shareholders must pass an ordinary or special resolution for winding up of the company

MCQs

1. When a company is wound up by the members or the creditors without the intervention of Tribunal, it is called as voluntary winding up.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

2. When a company is wound up by the members or the creditors with the intervention of Tribunal, it is called as voluntary winding up.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

3. Where, the court has passed a winding up order, it may stay the proceedings of winding up, on an application filed by official liquidator, or creditor or any contributory.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

4. Where, the court has passed a winding up order, it may not stay the proceedings of winding up, on an application filed by official liquidator, or creditor or any contributory.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

5. The Central Govt. shall keep a cognizance over the functioning of official liquidator, and may require him to answer any inquiry.

- i. True
- ii. False
- iii. Can not say
- iv. None of the above

