



FACULTY OF JURIDICAL SCIENCES

Course : B.A.LL.B./BBALL.B IInd Semester

SUBJECT: COMPANY LAW
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FACULTY OF JURIDICAL SCIENCES



LECTURE-39

Winding up of a Company(continued)

CREDITOR'S VOLUNTARY WINDING UP

In Palmer's Company Precedents, Part 11, 1960 Edn., at p. 25, the following passage appears

"A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a company unable to pay its debts."

It is possible in the case of insolvent companies. It requires the holding of meetings of creditors besides those of the members right from the

beginning of the process of voluntary winding up. It is the creditors who get the right to appoint liquidator and hence, the winding up proceedings are dominated by the creditors.

In *Pankaj Mehra v. State Of Maharashtra*, 2000 100 CompCas 417 SC it was laid down that once a petition for winding up is presented it is not a necessary concomitant that the winding up would follow.

This position is made clear in Section 440(2) which says that "the court shall not make a winding up order on a petition presented to it under Sub-section (1), unless it is satisfied that the voluntary winding up or winding up subject to the supervision of the Court cannot be continued with due regard to the interests of the creditors or contributories or both."

So a judicial exercise is called for to reach the satisfaction of the court that winding up has to be continued with due regard to the interest of the

creditors or the contributors. Section 443 of the Companies Act is important in this context.

Distinguish between 'Members' Voluntary Winding-up' and 'Creditors'

Members' voluntary winding-up can be resorted to by solvent companies and thus requires the filing of Declaration of Solvency by the Directors of the company with the Registrar. Creditors' winding-up, on the other hand, is resorted to by insolvent companies. In Members' voluntary winding-up there is no need to have creditors' meeting. But, in the case of creditors' voluntary winding-up, a meeting of the creditors must be called immediately after the meeting of the members.

Liquidator, in the case of members' winding-up, is appointed by the members. But in the case of creditors' voluntary winding-up, if the members and creditors nominate two different persons as

liquidators, creditors' nominee shall become the liquidator. In the case of Creditor's voluntary winding-up, if the creditors so wish, a 'Committee of Inspection' may be appointed. In the case of Members' voluntary winding-up, there is no provision for any such Committee.

The remuneration of liquidator/(s) is fixed by the members in case of Members' voluntary winding-up (Section 490) whereas the same is to be fixed by the Committee of Inspection, if any, or by the creditors in case of Creditors' voluntary winding-up (Section 504).

In *Bowes v. Hope Life Insurance and Guarantee Co.* and in *Re General Company for Promotion of Land Credit* it was stated that "a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it"; but nonetheless it is a form of equitable execution. Propriety does not affect the power but only its exercise. If so, it follows that in

terms of cl. (d) of r. 1 of O.XL of the Code of Civil Procedure, a Receiver can file a petition for winding up of a company for the realisation of the properties, movable and immovable, including debts, of which he was appointed the Receiver.

Winding Up Subject To Supervision Of Court

1. Winding up subject to supervision of court, is different from "Winding up by court."
2. Here the court can only supervise the winding up procedure. Resolution for winding up, is passed by members in the general meeting. It is only for some specific reasons, that court may supervise the winding up proceedings. The court may put up some special terms and conditions also.
3. However, liberty is granted to creditors, contributories or other to apply to court for some relief. (522) Where a Company is being wound up voluntarily, any person who would have been entitled to petition for compulsory winding up may

petition instead for the voluntary winding up to be continued subject to the supervision of court.

4. The Petitioner must prove that voluntary winding up cannot continue with fairness to all concerned parties.

5. Court may then appoint an additional Liquidator or continue with the existing Liquidator to give security.

6. The Liquidator must file with the Registrar every three months a report of the progress of the liquidation - The court may also appoint liquidators, in addition to already appointed, or remove any such liquidator. The court may also appoint the official liquidator, as a liquidator to fill up the vacancy.

7. Liquidator is entitled to do all such things and acts, as he thinks best in the interest of company. He shall enjoy the same powers, as if the company is being wound-up voluntarily.

8. The court also may exercise powers to enforce

calls made by the liquidators, and such other powers, as if an order has been made for winding up the company altogether by court.

MCQs

1. Liquidator is entitled to do all such things and acts, as he thinks best in the interest of company. He shall enjoy the same powers, as if the company is being wound-up voluntarily.

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

2. Court may not then appoint an additional Liquidator or continue with the existing Liquidator to give security.

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

3. The Petitioner must prove that voluntary winding up cannot continue with fairness to

all concerned parties.

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

4. Winding up subject to supervision of court, is different from "Winding up by court."

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

5. Liquidator, in the case of members' winding-up, is appointed by the members. But in the case of creditors' voluntary winding-up, if the members and creditors nominate two different persons as liquidators, creditors' nominee shall become the liquidator.

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

