



FACULTY OF JURIDICAL SCIENCES

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FACULTY OF JURIDICAL SCIENCES



LECTURE-40

Winding up of a Company(continued) & FEMA

Winding up an Unregistered Company

According to the Companies Act, an unregistered company includes any partnership, association, or company consisting of more than seven persons at the time when petition for winding up is presented.

But it will not cover the following:-

a) A railway company incorporated by an Act of Parliament or other Indian law or any Act of the British Parliament;

- b) A company registered under the Companies Act, 1956;
- c) A company registered under any previous company laws.
- d) An illegal association formed against the provisions of the Act.

However, a foreign company carrying on business in India can be wound up as an unregistered company even if it has been dissolved or has ceased to exist under the laws of the country of its incorporation. The provisions relating to winding up of an unregistered company:-

- a) Such a company can be wound up by the Tribunal but never voluntarily.
- b) Circumstances in which unregistered company may be wound up are as follows:-
 - If the company has been dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs.

- If the company is unable to pay its debts.
- If the Tribunal regards it as just and equitable to wind up the company.
- Contributory means a person who is liable to contribute to the assets of a company in the event of its being wound up. Every person shall be considered a contributory if he is liable to pay any of the following amounts - Any debt or liability of the company; Any sum for adjustment of rights of members among themselves; Any cost, charges and expenses of winding up; on the making of winding up order, any legal proceeding can be filed only with the leave of the Tribunal.

Locus Standi of a contributory to bring a petition for winding up

Recently, the Supreme Court of India in *Severn Trent Inc. v. Chloro Controls (India) Pvt. Ltd.* [(2008) 4 SCC 130] dealt with an interesting point of law related to the locus standi of a contributory to file a

petition for winding up. The issue before the Supreme Court called for an interpretation of Section 439(4)(b) of the Companies Act, 1956. Under this Section, a contributory is not entitled to present a petition for winding up unless the shares in respect of which he is a contributory, or some of them, (a) were originally allotted to him; or (b) were held by him and registered in his name for a certain period; or (c) devolved on him through the death of a former holder. Severn Trent did not dispute that category (a) was inapplicable in the case; but argued that it should be held to have conformed to categories (b) and (c).

Essentially, the contention was that the requirement of the shares having to be "registered in his name" was not a mandatory requirement, and could be waived in certain circumstances. Otherwise, a company (particularly in cases where two groups of shareholders are severely hostile to

each other) could prevent a contributory from bringing a petition for winding up by simply refusing to register the shares in the name of the contributory. Alternatively, Severn Trent argued that the shares could be deemed to have devolved upon it through the "death" of the former holder. After the merger between Capital Control (Delaware) and Severn Trent, the former had effectively met its "civil death" , and its shares had then devolved upon the latter.

The Court held that the plain language of Section 439 could not be modified or read down; and to come under category (b), it was essential that the shares should be held by the contributory and registered in his name. Section 439(4) was held to be a complete code in this respect, leaving no room for equitable considerations to be used to allow a petition in cases where a strict reading of the provisions would not allow one. Court stated, "... if

there is omission, default or illegal action on the part of the Company in not registering the name of the contributory even though he/it can be said to be a contributory by holding the shares... the law provides a remedy."

This case is significant because it is perhaps the only clear Supreme Court decision on the issue of locus standi of a contributory to bring a petition for winding up. The case now conclusively settles that Section 439(4) is an exhaustive code on the subject of winding up by contributories; and in order to present a petition for winding up, a contributory must be able to bring itself within the wordings of the categories mentioned in Section 439(4)(b); with all the categories being construed according to a strict literal meaning.

The scope of the Section 397 is well explained by the Supreme Court in *Shanti Prasad Jain V. Kalinga*

Tubes Limited' (1965) 35 Com cases 351 in which it was held that it is not enough to show that there is just and equitable cause for winding up the company through that must be shown as a preliminary to the application of Section 397. It must be further shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as part of a consecutive story.

There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from

oppression of a minority in the management of company' s affairs and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder.

CONCLUSION:

However, giving a restrictive meaning to section 397/398 of the Companies Act, 1956 is not in the interests of the minority shareholders. It is also equally true that the frivolous litigation misusing section 397/398 of the Companies Act, 1956 is to be discouraged at the initial stage itself considering the market dynamics and the impact.

1. The CLB can certainly look into the concluded proceedings, but, can not give a different finding on the same issue concluded by a Competent Court.
2. The Petitioners approaching the CLB can refer to the concluded proceedings; however, the petitioners may not be able to get a relief with the

similar or same grievances raised in the concluded proceedings.

3. Irrespective of pendency of any proceedings between the majority and the minority, the CLB can entertain a petition under section 397/398 of the Act and the CLB will take an appropriate decision as to the issue of grant of relief or the maintainability of a petition under those circumstances.

4. When it comes to the issue of applicability of settled legal principles like Res Judicata or Res Judice, the CLB will exercise its discretion based on the facts of the case and no hard and fast rule can be laid in this regard.

OVERVIEW OF FEMA:

The Foreign Exchange Management Act, 1999 was enacted to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign

exchange market in India. In fact it is the central legislation that deals with inbound investments into India and outbound investments from India and trade and business between India and the other countries. The FEMA provides:

- Free transactions on current account subject to reasonable restrictions that may be imposed
- RBI control over Capital Account Transactions
- Control over realization of export proceeds
- Dealings in Foreign Exchange through Authorised Person (e.g Authorised Dealer/ Money Changer/ Off-shore Banking Unit)
- Adjudication of Offences Appeal provisions including Special Director (Appeals) and Appellate Tribunal Directorate of Enforcement

APPLICABILITY:

Foreign Exchange Management Act, 1999 extends to the whole of India. The Act also applies to all branches, offices and agencies outside India owned

or controlled by a person resident in India and also to any contravention there under committed outside India by any person to whom this Act applies.

FEMA has considerably liberalised provisions in respect of foreign exchange. However, sometimes an extraordinary situation may arise. In such cases, Central Government can suspend operation of any or all provisions of FEMA in public interest, by issuing a notification. The suspension can be relaxed by issuing a notification. Copy of Notification shall be placed before Parliament for 30 days. (Section 40).

MCQs

1. However, giving a restrictive meaning to section 397/398 of the Companies Act, 1956 is not in the interests of the minority shareholders.
 - i. True
 - ii. False
 - iii. Can not say
 - iv. None of the above

2. However, giving a restrictive meaning to section 397/398 of the Companies Act, 1956 is in the interests of the minority shareholders.

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

3. Recently, the Supreme Court of India in *Severn Trent Inc. v. Chloro Controls (India) Pvt. Ltd.* [(2008) 4 SCC 130] dealt with an interesting point of law related to the locus standi of a contributory to file a petition for winding up.

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

4. According to the Companies Act, an unregistered company includes any partnership, association, or company consisting of more than seven persons at the time when petition for winding up is presented.

- i. True
- ii. False

- iii. Can not say
- iv. None of the above

5. A foreign company carrying on business in India can be wound up as an unregistered company even if it has been dissolved or has ceased to exist under the laws of the country of its incorporation.

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

