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WINDING UP

Comparative Chart (Some of the Major Changes)

Points of Comparison	Companies Act, 2013	Companies Act, 1956
(1)	(2)	(3)
MODES OF WINDING UP		
Modes of winding up	Only two modes of winding up (i) by Tribunal and (ii) voluntary.	Three modes of winding up (i) by Tribunal, (ii) voluntary and (iii) winding up subject to supervision of Court.
WINDING UP BY TRIBUNAL		
Power/Jurisdiction to wind up company vested in which forum	Tribunal	High Court
Grounds for winding up by Tribunal	New grounds for winding up a company by NCLT under section 271 of the 2013 Act which were not there in section 433 of the 1956 Act [explained in the chapter]	Fewer grounds for compulsory winding up by Court in the 1956 Act than in the 2013 Act.
Company Liquidators and their appointments	• Section 277 of the 2013 Act dispenses the requirement of filing of certified copy of winding up order with ROC by the petitioner and the company. • The Tribunal shall directly send a copy of winding up order to ROC.	Section 445 of the 1956 Act provided that on the making of a winding up order, it shall be the duty of the petitioner and of the company to file with the Registrar a certified copy of the order, within 30 days from the date of the making of the order. If default is made in complying with the foregoing provision, the petitioner, or as the case may be, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to ₹ 1,000 for each day during which the default continues.
Application seeking leave to commence or proceed with suit/ other legal proceedings when winding up order passed	Section 279 of the 2013 Act requires time-bound disposal (within 60 days) by the Tribunal of any application seeking leave to commence or proceed with suit/other legal proceedings.	No such provision requiring time-bound disposal of applications.

Submission of report by Company Liquidator	Section 281 of the 2013 Act provides that the Company Liquidator shall also make a report on : (i) the viability of the business of the company ; or (ii) the steps which, in his opinion, are necessary for maximising the value of the assets of the company. This is a new requirement.	Such report not required.
Powers and duties of Company Liquidator	The list of powers of the liquidator in section 290 of the 2013 Act contains three additional powers which were not there in section 457 of the 1956 Act : • to sell the whole of the undertaking of the company as a going concern; • to obtain any professional assistance for protection of the assets of the company ; • to appoint as agent to do any business which the Company Liquidator is unable to do himself.	Less powers than under the 2013 Act.
Appointment of Company Liquidator	• In case of voluntary winding up, company shall appoint the Company Liquidator from the panel prepared by the Central Government. • On appointment, the Company Liquidator shall file a declaration in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the company and the creditors. Such obligation shall continue throughout the term of his or its appointment.	• No provisions for appoint-ment from panel prepared by Central Government. • No provision for declaration of interest.
Company liquidator to submit report on progress of winding up	Quarterly meetings and quarterly reporting required.	Annul meetings and reporting on progress of winding up required.

The term winding up of a company may be defined as the proceedings by which a company is dissolved.

There are 3 ways in which a company may cease to exist in the eye of law; they are :

(a) Under a scheme of reconstruction and amalgamation a company may be dissolved by the order to tribunal without being would up (sec. 232)

(b) When the company becomes a defunt company, the Registrar may remove the name of the company from the register of companies. (sec 248)

(c) Through winding up process.

Meaning. Winding up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of

such a dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights. During the process of winding up the company still exists and has corporate powers until dissolution.[1] Till dissolution the property of the company remains vested in the company.

It is pertinent to note that the company is not dissolved immediately on the commencement of the winding up proceedings. As a matter of fact, the winding up of a company precedes its dissolution i.e. the winding up is the prior stage and the dissolution, the next. On the dissolution, the existance of the company comes to an end after an order for its dissolution is passed by the Tribunal except in a scheme of amalgamation, and its name is struck off by the Registrar from the register of companies. But on the winding up, company's name is not struck off from the register. Thus, in between, the winding up and dissolution the legal status of the company continues and it can be sued in a Tribunal of Law.

However, there are marked distinctions between winding up and bankruptcy, which are :

1. In bankruptcy the property of the debtor is divested from him and rests in the official receivers or the official assignee, while in a winding up the property of the company is not divested from it.
2. An individual can be declared insolvent only when he is unable to pay his debts, whereas a company cannot be declared insolvent even if it is unable to pay its debts. It can only be wound up and this can be done even when it is solvent.
3. The doctrines of relation back and reputed ownership do not apply to winding up.

MODES OF WINDING UP (Section 270)

The following chart explains the various modes in which a company may be wound up.

Winding up u/s 270

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Compulsory winding up by the Tribunal

Voluntary winding up

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Member's Voluntary Winding Up

Creditor's Voluntary Winding Up

COMPULSORY WINDING UP BY TRIBUNAL (NCLT)

A company *may* be wound up by an order of the Tribunal. This is called compulsory winding up. The Tribunal will make an order for winding up on an application by any of the person enlisted in Section 272.[2]

Grounds for Compulsory Winding-up (Section 271)

Section 271 lays down the following grounds where a company may be wound up by the Tribunal.

1. Special resolution.
2. Inability to pay debts.

3. Just and equitable.

4. Default in filling P/L account and B/S or Annual Return.

5. Acted against Sovereignty & Integrity of India.

6. Sick Industrial Company u/s 424G.

1. Special resolution of the company. [Sec 271 (b)] If the company has by a special resolution resolved that it may be wound up by the Tribunal, the Tribunal may pass a winding up orders.

The power of the Tribunal in such a case is discretionary and should be exercised only where a *bona fide case is made out. The Tribunal may refuse to order winding up where it is opposed to public or company's interest.*

The public interest is one of the matters which ought to be taken into consideration while deciding the case of a winding up of a company. The only fact that special resolution has been passed by the shareholders is only one factor which cannot overrule the discretion of the Tribunal in the matter.[1]

This is based on the fact, barring other circumstances, the shareholders themselves are the best judge to decide as to whether or not the company should be wound up. It is the shareholders who had formed themselves into the company and, therefore, it is for them to dissolve the company. The directors are not entitled to file a winding up petition without the authority of the general meeting. However, the directors may file such a petition, subject to the general meeting ratifying their action. It may be noted that the company itself can present a petition for winding up.

Winding up under this ground is not a common feature because if such a large number of shareholders want the company to be wound up, they would prefer the mode of voluntary winding up, which involves less time and is cheaper than winding up.

2. Inability to pay debts [Sec 271 (2)]. The Tribunal may order for the winding up of a company if it is unable to pay its debts. The basis of an order for winding up under this clause is that the company has ceased to be commercially solvent i.e., it is unable to meet its current demands, although the assets when realised may exceed its liabilities. Thus, inability to pay debts is to be taken in the commercial sense. The test of inability to pay debts', therefore, is whether the company can pay its existing liabilities so long as it is a going concern. If the company is not in a position to meet its existing liabilities, a petition for winding up is maintainable even if it may have very valuable assets not presently realisable.

According to section 271 of the Act a company shall be deemed to be unable to pay its debts in the following cases.

(a) Statutory notice

If a creditor to whom the company owes a sum of ₹ 1,00,000 or more has served on the company a notice at the registerar office for payment and the company has for three weeks neglected to pay or otherwise satisfy him. In computing the time for three weeks, the day on which the notice is despatched and the day on which it is served should both be excluded.

[**Note :** 2013 Act has increased the limit to ₹ 1 lacs from ₹ 500]

A notice of demand giving less than three weeks time does not make the demand

ineffective. It only postpones the right of action to a date falling after the expiry of three weeks. But where the company bona fide disputes the debts, and the Tribunal is satisfied with the defence of the company, the Tribunal will not order for its winding up.

(b) Decreed debt

If execution or other process issued on a decree or order of any Civil Court in favour of a creditor is returned unsatisfied in whole or in part.

It is open to the petitioner to establish its claim in the civil court and if the decrees that man be obtained by it remains unsatisfied in whole or in part, the petitioner can seek the winding up of the company.[1]

(c) Commercial insolvency

If it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts and in determining whether a company is unable to pay its debts, the Tribunal will take into account the contingent and the prospective liabilities of the company. What has to be proved under this clause is not whether the company's assets exceed its liabilities, but whether it is unable to meet its current demands. If a company is unable to meet its current liabilities, it is commercially insolvent and liable to be wound up.

Example : The liabilities of a company amounted to ₹ 1,41,00,000 and its assets were not worth more than ₹ 60,00,000. It was held on a petition for winding up by a debentureholder that the company was not only commercially insolvent but hopelessly insolvent, and that an order for winding up was made. [Bachhraj Factories Ltd. v. Hirjee Mills Ltd. 57 Bombay L.R. 373].

The machinery for winding up will not be allowed to be utilised merely as a means for realising debts due from the company. A petition for winding up is not to be sought as a short cut and cheap device to coerce payment and stifle consent. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed as a scandalous abuse of the process of Tribunal.[2] Where the Tribunal is satisfied that the petitioners debt is *bona fide disputed the Tribunal will dismiss the petition even though the company's condition is such that it will be unable to pay its debts as they fall due.*[3]

Where, however, there is no doubt that the company owes the creditor a debt enabling him to a winding up order, but the exact amount of the debt is disputed, the Tribunal will make a winding up order without requiring the creditor to quantify the debt precisely.

Where there is a *bona fide counter claim put forward by the company, it will be a valid excuse for non-payment, and inability to pay will not be inferred.*[4]

A petition for winding up made with a view to enforcing payment of a debt which is bona fide disputed by the company, amounts to an abuse of the process of the Tribunal and will be dismissed.

Where in spite of repeated demand by a creditor, the company neglects to pay, it is prime facie evidence of inability to pay. The expression 'unable to pay its debts' should be taken in the commercial sense of being unable to meet current demands though the company may have large assets.

But it has been decided where the debt was not immediately due because the creditor had

1. Elmeh India v. Hi Sound Corder (D) Ltd. (1995) 83 Comp. C as 135 (Mad.)
2. Re British India General Insurance Co. Ltd. (1970) 40 Comp Cas 554.
3. Mann and another v Gold steinn (1968) 2 ALL E.R. 769.
4. Re Federal Chemicals works Ltd. (1964) Comp. cases 963.

agreed not to demand payment for 2 years, he could not immediately file a petition for winding up.[1]

3. Just and equitable. [Sec 271 (g)] The another ground on which the Tribunal can order the winding up of a company is when the Tribunal is of the opinion that it is just and equitable that the company should be wound up. This clause gives the Tribunal a very wide power to order winding up wherever the Tribunal considers it just and equitable to do. The Tribunal will consider such grounds to wind up a company for just and equitable reasons as are not covered by the preceding five clauses. What is just and equitable will depend upon the facts of each particular case. The Tribunal while winding up a company under this clause will have to take into consideration not only the interests of the shareholders and creditors but also public interest in the shape of needs of community, interests of the employees etc.[2]

It is important to note that relief based on the just and equitable clause is in the nature of a last resort when other remedies provided in the Act are not sufficient to protect the general interest of company.[3] Further the Tribunal may refuse to make an order for winding up if it is of the opinion that some other remedy is available to the petitioner and he is acting unreasonably in seeking to have the company wound up instead of following that other remedy.

Following are the instances where the Tribunals have dissolved the companies under the just and equitable clause.

(i) Loss of substratum. It is just and equitable to wind up a company where the company's main object or substratum is gone. The substratum of a company is deemed to be gone when—(a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss, or (d) the existing and the possible assets are insufficient to meet the existing liabilities of the company.

Example : A company was formed for the purpose of manufacturing coffee from dates under a patent which was to be granted by the Government of Germany. The German patent was never granted. On a petition of a shareholder it was held that the substratum of the company had failed and it was impossible to carry on the objects for which it was formed and therefore it was an equitable that the company should be wound up. [Res. German Date Coffee Company (1982) 20 Ch. 169]

(ii) Deadlock in management. When there is a deadlock in the managment of a company, it is a proper case for winding up under the just and equitable clause.

Example : A and B, who traded separately as cigarette manufacturers agreed to amalgamate their business and formed a private limited company of which they were the shareholders and the only directors. They had equal voting rights. A dispute arose which was submitted to arbitration but one of them refused to accept the award. Both then became so hostile that neither of them would speak to the other except through the secretary. There was a complete deadlock and as such the court (now Tribunal) ordered for the winding up of the company, although its business was flourishing. [Re. Yenjidije Tobacco Co. Ltd. (1916) 2 Ch 420].

(iii) Oppression of minority. Where the majority shareholders have adopted an aggressive or oppressive policy towards the minority, it is a sufficient ground for winding up of the company under this clause.

Example : Where the directors of a company were able to exercise a dominating influence on the management of the company and the managing director was able to out vote the minority of the shareholders and retain the profits of the business between members of the family and there were several complaints that the shareholders did not receive a copy of the balance sheet, nor was the auditor's report read at the general meeting, dividends were not regularly paid and the rate was diminishing, that constituted sufficient ground for winding up. *[Sabapathy Rao. v. Sabapathi Press Ltd. AIR 1924 Mad. 489].*

(iv) **Fraudulent purpose.** Where the company was conceived and brought forth in fraud, or for illegal purposes, it is just and equitable to wind up a company.

Example : Where the main object of a company is the conduct of a lottery, the mere fact that some of its objects were charitable will not prevent the company from being ordered to be wound up as being one formed for an illegal purpose. [Universal Mutual Aid and Poor Houses Association v. A.D. Thapa Naidu. AIR 1933 Mad. 16].

(v) **Incorporated or Quasi Partnership.** Where a private company consisting of members of one or more families or a group of friends, is really in nature of partnership business, any circumstances justifying the dissolution of a partnership (such as misconduct of one or more partners) will constitute just and equitable ground for winding up of the company though they may not consitute sufficient grounds for winding up under the provision of the Companies Act.

(vi) Where the company is a bubble and has no business to carry on, it was wound up.

(vii) Where the company was insolvent and was being carried on for the benefit of the debentureholders, who had taken possession, a winding up order was made.

In the following cases, the courts (now Tribunal) have declined to make a winding up order on "just and equitable grounds."

(a) Where there were allegations of groupings among shareholders.[1]

(b) Where it was found that the substratum had not wholly gone and the majority of the shareholders opposed winding up.[2]

(c) Where there were allegations of mismanagement or misappropriation of funds by directors and nothing more.[3]

(d) Where the company was running at a loss.[4]

(e) Where the petitioner had an alternative remedy.[5]

In the case of a winding up petition on the just and equitable ground, while the petitioner will not be allowed to travel beyond the petition, one further point to be noted is whether the ground exists at the time of hearing the petition. The Tribunal will decide the question of winding up on the facts existing *at the time of hearing the petition and not merely on the date of the petition. If the facts which existed at the time of presenting the petition had subsequently melted away, that would be a case for not ordering winding up.*[6]

The following clauses (g) (h) and (i) provide additional grounds on which a company may be wound up by the Tribunal. [These clauses has been inserted by the Companies (Second Amendment) Act, 2002].

4. Non filing of Financial Statements or annual returns with the Registrar. If the company has made a default in filing with the Registrar its balance sheet and profit & loss account or annual return for five consecutive financial years. [Section 271(f)]

5. If company acts against sovereignity and integrity of India. If the company has acted against the interests of the sovereignity and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality.

Provided that the tribunal shall make an order for winding up of a company on application made by the Central Government or a State Government. [Section 271(c)]

6. Sick Company. If Tribunal is of the opinion that the company should be wound up under chapter XIX i.e. Where a sick industrial company is not likely to become viable in future and that it is just and equitable that the company should be wound up.

II. VOLUNTARY WINDING UP

A voluntary winding up of a company is entirely different from a compulsory winding up. Voluntary winding up is winding up by the members or creditors of a company without interference by the Tribunal.

The object of a voluntary winding up is that the company and its creditors are left to settle their affairs without going to the Tribunal, but they may apply to the Tribunal for any directions or orders if and when necessary. From the point of view of the company itself a voluntary winding up has more advantages over a compulsory winding up, the chief being that there are not so many formalities to be complied with. This form of winding up is by far the most common and the most popular.

A company may be wound up voluntarily when—

(a) the period fixed by the articles for the duration of the company has expired or an event upon which the company is to be wound up has happened and the company in general meeting has passed ordinary resolution.

(b) the company has for any cause whatever passed a special resolution to wind up voluntarily [Section 304]. The company may be wound up by special resolution even if it is prosperous. No articles of the company can prevent the exercise of this statutory right.

A resolution for voluntary winding up must be advertised in the official gazette and also in some newspaper, circulating in the district where the registered office of the company is situated, within 14 days of the passing of the resolution. If default is made in complying with this provision, the company and every defaulting officer shall be punishable with fine which may extend to ₹ 5,000 per day for every day during which default continues. [Section 307]. Officer herein includes the liquidator also.

A voluntary winding up commences from the date of the passing of the resolution. [Section 308].

The date of commencement of winding up is important for various matters, such as liability of past members who will not be affected if, on the date of commencement of winding up, a year had elapsed after they ceased to be members.

Consequences of Voluntary Winding Up

(1) Effect on status of a company. In the case of a voluntary winding up, the company ceases to carry on the business from the commencement of the winding up except so far as may be required for the beneficial winding up of the business. However, the corporate status and the corporate powers of the company will continue until it is dissolved. (Section 309).

A voluntary winding up does not necessarily operate as notice of dismissal to the company's employees, but there is no change in the personality of the employer. But where the circumstances of the winding up are such that the company can no longer carry on business, its contracts and its servants will necessarily cease, leaving the employees free to claim damages if they are so entitled.

Example : By a written agreement F was appointed managing director of a company for five years. Before the expiration of the five years, the company passed a resolution for voluntary winding up, as it could not by reason of its liabilities continue its business. F voted in favour of this resolution. It was held that—

(a) the voluntary winding up operated as a wrongful dismissal of F, and

(b) the fact that F voted in favour of the resolution did not prevent him from claiming damages. [Fowler v. Commercial Timber Co. Ltd. (1930) 2 K.B. 1 (C.A.)].

(2) Board's power to cease on appointment of a liquidator. On the appointment of a liquidator the powers of the board of directors, managing or whole time directors and the

manager. If there be any of these shall cease, except for the purpose of giving notice to the registrar of the appointment of the liquidator. (Sec. 313).

In the appointment of a liquidator the powers of the board of directors cease except so far as the company in general meeting or the liquidator (in a members voluntary winding up) or the committee of inspection or if there is no such committee, the creditors (in a creditors voluntary winding up), sanction the continuance. (Sec. 313).

(3) Avoidance of transfer etc. after commencement of winding up. In the case of a voluntary winding up, any transfer of shares in the company, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of the winding up, shall be void. (Sec. 334).

4. Discharge of Employees

A resolution to wind up voluntarily operates as notice of discharge to the employees of the company except.

(a) When the liquidation is only with a view to 'reconstruction'.

(b) When business is continued by the liquidator for the beneficial winding-up of the company.

It may be noted, that employees have a right to claim damages for premature termination of their services.

TYPES OF VOLUNTARY WINDING UP

A voluntary winding up may be :

(A) A members' voluntary winding up.

(B) A creditors' voluntary winding up.

A. Members' Voluntary Winding Up

A member's voluntary winding up takes piace only when the company is solvent. It is initiated by the members and is entirely managed by them. The liquidator is appointed by the members. No meeting of creditors is held and no committee of inspection is appointed. To obtain the benefit of this form of winding up, a declaration of solvency must be filed.

Declaration of Solvency. Section 305 provides that where it is proposed to wind up a company voluntarily the directors or a majority of them, may, at a meeting of the Board, make a declaration verified by an affidavit that the company has no debts or that it will be able to pay its debts in full within a period not exceeding 3 years from the commencement of winding up as may be specified in the declaration.

(i) Such declaration shall be made within five weeks immediately preceding the date of the passing of the passing of the resolution for winding up.

(ii) Shall be delivered to the Registrar before that date.

(iii) Shall also be accompanied by a copy of the auditors on the profit and loss account and the balance sheet of the company prepared upto the date of the declaration and must embody a statement of the company's assets and liabilities as on that date.

Directors making such a declaration without reasonable grounds are liable to heavy penalities. If the debts are not paid or provided for within the period stated, they are presumed not to have reasonable grounds. They shall be liable to imprisonment for a term

which may extend to 3 to 5 years or with fine which may extend to ₹ 50,000 to 3 lacs or with both. [Section 305 (4)]

Where such a declaration is duly made and delivered, the winding up following shall be called members' voluntary winding up. Where the same is not duly made, it shall be called creditors' voluntary winding up.

Provisions Applicable to Members' Voluntary Winding Up

1. Appointment of liquidator. [Section 310]. The company in general meeting shall appoint one or more liquidators for winding up the affairs of a company and for distributing the assets. The company shall also fix his remuneration and unless his remuneration is not fixed, he will not take charge of his office. Such remuneration cannot be increased in any circumstance whatsoever. The liquidator may be appointed at the meeting at which the resolution for voluntary winding up is passed.

2. Board's power to cease. [Section 313]. On the appointment of a liquidator all the powers of the board and other managerial personnel shall come to an end, except in so far as the company in general meeting or the liquidator sanctions the continuance thereof. However, a resolution for voluntary winding up does not automatically dismiss all servants but if it takes place because the company is insolvent it does operate as a discharge.[1]

3. Power to fill vacancy in the office of liquidator. [Section 311]. Where a vacancy for whatever cause occurs in the office of the liquidator the company in general meeting, subject to any agreement with the creditors fill the vacancy. The general meeting may be called by any contributory or by any continuing liquidator.

4. Notice of appointment of liquidator to registrar. [Section 312]. The company shall give notice to the registrar of the appointment of a liquidator. The company shall also give notice of every vacancy occurring in the office of liquidator and of the names of the liquidators appointed to fill every such vacancy. The notice shall be given by the company within 10 days of the event to which it relates. If default is made in complying with these provisions, the company and its officers who are in default shall be punishable with fine upto ₹ 1000 for every day during which the default continues.

5. Duty of the Liquidator to inform the Assessing officer. Every Liquidator of a Company being wound up is to give notice of his appiontment as liquidator to the Assessing officer, having jurisdiction to assess the income of the company, within 30 days of his appointment. It may also be noted that the official liquidator has been held to be principal officer of the company for income tax assessment purposes.[2]

6. General meeting at the end of each year. [Section 316]. The Company Liquidator shall report quarterly on the progress of winding up of the company in such form and in such manner as may be prescribed to the members and creditors and shall also call a meeting of the members and the creditors as and when necessary but at least one meeting each of creditors and members in every quarter and apprise them of the progress of the winding up of the company in such form and in such manner as may be prescribed.

If the liquidator fails to comply with the above mentioned provisions, he shall be punishable in respect of each failure with fine which may extend to ₹ 10 lakhs.

7. **Final meeting and dissolution. [Section 318].** When the affairs of the company are fully wound up, the liquidator shall perform the following duties:

(a) He shall make up an account of the winding up, showing how the same has been conducted and how the property has been disposed of.

(b) He shall call a general meeting of the company for laying before it the said accounts. This meeting is the final meeting of the company. The meeting shall be called by advertisement specifying the time, place and object thereof. The advertisement shall be made not less than one month before the meeting in the official gazette and also in some local newspaper where the registered office of the company is situated. Failure to call meeting is punishable with fine which may extend to 1 lac rupees.

(c) Within one week after the meeting, the liquidator shall send a copy of the account to the registrar and the official liquidator[1] and also a return of the holding of the meeting and the date thereof. If the copy is not so sent or the return is not so made, the liquidator shall be punishable with fine which may extend to 1 lac rupees.

If a quorum is not present at the final meeting, the liquidator shall make a return that the meeting was duly called and that no quorum was present thereat.

The registrar on receiving the account and either of the returns shall forthwith register the same. The official liquidator on receipt of the account and the return is required to make a scrutiny of the books and papers of the company. The liquidator of the company, its past and present officers, shall afford an opportunity to the official liquidator for this purpose. The official liquidator shall send a report of the scrutiny to the Tribunal. If the report shows that the affairs of the company have been conducted bonafide *i.e. not in a manner prejudicial to the interests of its members or public interest, then from the date of the submission of the report to the Tribunal, the company shall be deemed to be dissolved.*

If the report shows that the affairs of the company have been conducted in a manner prejudicial to the interests of members or public interest, the Tribunal shall by order direct the official liquidator to make a further investigation of the affairs of the company. For this purpose the Tribunal shall invest him with all such powers as it may deem fit. On receipt of the report of the official liquidator on such further investigation the Tribunal may either make an order that the company shall stand dissolved or make such other order as the circumstances of the case brought out in the report permit.

Dissolution of a Company.

The word 'dissolution' implies bringing the existence of the company to an end.

A dissolved company cannot hold any property or be sued in Tribunal of law. Any property still remaining shall vest in the government on dissolution.

B. Creditors' Voluntary Winding Up

Where a company proposes to wind up voluntarily and the directors are not in a position to make the statutory declaration of solvency, the winding up is a creditor's voluntary winding up. The provisions for creditors voluntary winding up are similar to those applicable

to the member's voluntary winding up except that in the former, it is the creditors who appoint the liquidator, fix his remuneration and generally conduct the winding up.

Provisions of creditor's voluntary winding up. They are discussed as under :

1. Meeting of creditors. (Section 306). When the declaration of solvency is not made by the directors, the company shall cause a meeting of the creditors of the company to be called on the day or next following day on which the resolution for voluntary winding up is to be proposed. Notice of the meeting of creditors shall be posted to creditors simultaneously with notice of the meeting of the company. The notice calling the meeting of the creditors shall be advertised in the official gazette and once at least in two newspapers circulating in the district where the registered office of the company is situated. The board of directors shall lay before the meeting of the creditors a full statement of the position of the company's affairs together with the list of its creditors and the estimated amount of their claims. One of the directors must preside at the meeting.

If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned, and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors shall have effect as if it had been passed immediately after the passing of the resolution for winding up of the company.

- Section 306 of the 2013 Act provides that company cannot be wound up voluntarily unless two-thirds in value of creditors of the company are in favour of that. If two thirds in value of creditors of the company are of the opinion that the company will not be able to pay for its debts in full from the proceeds of assets sold in voluntary winding up and pass a resolution that it will be in interest of all parties if the company is wound up by the Tribunal, the company shall within 14 days thereafter file an application before the Tribunal. This is a new requirement which was not there in the 1956 Act.

2. Notice to registrar. [Section 306]. The company shall give notice of resolution passed at the creditors meeting to the registrar within 10 days of its passing.

If the company fails to send the notice, within the prescribed period, the registrar of companies, the company, every officer of the company and the liquidator shall be punishable with fine which may extend to ₹ 50,000 to 2 lacs for every day during which the default continues.

3. Appointment of liquidator. [Section 310]. The creditors and the company shall appoint a person to be the liquidator. If different persons were nominated, the person nominated by the creditors shall be the liquidator. Any director, member or creditor of the company may, within 7 days of the nomination made by the creditors, apply to the Tribunal for an order that the person appointed by the company shall be the liquidator. Where no person is nominated by the creditors, the person nominated by the company shall be the liquidator. On the other hand, if no person is nominated by the company, the person nominated by the creditors shall be the liquidator.

4. Committee of inspection. [Section 315]. The creditors at their meeting may appoint a committee of inspection consisting of not more than five persons. Where such a committee is appointed, the company may also appoint at a meeting such number of persons not exceeding five to act as the members of the committee. The creditors may resolve that any of the person appointed by the company ought not to be the members of the committee of

inspection. In such cases, unless the Tribunal otherwise directs, they cannot act on the committee. The Tribunal may appoint other persons in place of persons objected to.

5. **Liquidator's remuneration. [Section 310].** Remuneration of the liquidator may be fixed by the committee of inspection or the creditors if there is no committee of inspection. Otherwise the Tribunal may fix his remuneration. Remuneration fixed as above cannot be increased in any circumstances.

6. **Power of board to cease. [Section 313].** The board usually ceases to function on appointment of the liquidator. The board may act in so far as the committee of inspection (if any) or the creditors in general meeting may sanction the continuance thereof.

7. **Vacancy in office of liquidator. [Section 311].** The creditors in general meeting may fill up any vacancy caused in the office of the liquidator other than a liquidator appointed by or by the direction of the Tribunal.

8. **Meeting at the end of each year. [Section 316].** Where the winding up continues for more than a year, the liquidator shall call a general meeting of the company and a quarterly meeting of the creditors. The liquidator shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year. The object of these provisions is to give regular information to the creditors and shareholders.

If the liquidator fails to comply with these provisions he is liable to be fined upto ₹ 10 lacs in respect of each failure.

9. **Final meeting and dissolution. [Section 318].** As soon as the affairs of the company are wound up, the liquidator shall make up the account of the winding up showing how the winding up has been conducted and property of the company has been disposed of. He shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the accounts before the meetings. Each such meeting shall be advertised in the official gazette and also in some newspaper circulating in the district where the registered office of the company is situated. Within a week after the meeting, the liquidator shall send to the registrar a copy of the account and a return which will be registered. Thereafter the procedure is the same as in member's voluntary winding up.

Difference between Member's Voluntary Winding Up and Creditor's Voluntary Winding Up

1. Declaration of solvency is a must in a member's voluntary winding up, whereas it is not necessary in a creditor's voluntary winding up.
2. It is not necessary to have a creditor's voluntary meeting in the case of member's voluntary winding up, whereas in the case of creditor's voluntary winding up, it is a statutory duty of the company to call a meeting of the creditors.
3. The liquidator is approved by the members in case of member's voluntary winding up whereas both members and creditors appoint liquidator in case of creditor's voluntary winding up.
4. There is no committee of inspection in case of member's voluntary winding up, but in case of the latter there is one.
5. In the case of member's voluntary winding up it is the members who control the winding up, and the creditors do not play an active role as the company is solvent. In the case of creditor's voluntary winding up, it is the creditors who control the winding up as the company is considered to be insolvent.

6. In a member's voluntary winding up, the liquidator can exercise some of the powers with the sanction of a special resolution of the company. In a creditor's voluntary winding up, he can do so with the sanction of the Tribunal or the committee of inspection or of meeting of creditors.

CONSEQUENCES OF WINDING UP

Winding up affects a number of parties. The consequences of winding up are as under:

1. Consequences as to shareholders

A member of a company is liable and bound to pay the full amount on the shares held by him. This liability continues even after the company goes into liquidation; for the purposes of winding up, he is described by the Act as a contributory. The term 'contributory' means a person liable to contribute to the assets of a company in the event of its being wound up, and inlcudes the holder of any shares which are fuily paid up. Contributory may be present or past. The liability of a present contributory is limited to the amount remaining unpaid on the shares held by him. A past contributory can only be called upon to pay if the present contributory is unable to pay.

2. Consequences as to creditors

The object of winding up is to realise the assets and discharge the liabilities and then if there be any surplus, to pay it off to the shareholders. It is the duty of the liquidator to pay off the liabilities of the company. In order to ascertain the liabilities, the Act requires that all persons having claims of whatever nature against the company should submit proofs of what is due to them. Every kind of a liability, whether present or future, certain or contingent and however difficult of valuation is provable and has got to be proved. This Section applies to proofs of debts where a company is solvent *i.e. where its assets are sufficient to pay all its debts and liabilities as well as the costs of the winding up.*

Where an insolvent company is being wound up, the insolvency rules will apply and only such claims shall be provable against the company as are provable against an insolvent person.

Right of secured creditors. The position of a secured creditor in relation to the winding up of a company is quite different from that of an unsecured creditor. He can stand wholly outside the winding up proceedings unless he abandons his security and joins the ranks of unsecured creditors.

A secured creditor, has three alternatives before him.

(i) He may rely on his security for the payment of all that may be due to him and ignore the liquidation altogether; or

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(1867) L.R. 2HL 325.

(ii) he may value or realise the security and prove for the deficiency in the winding up, or

(iii) he may give up the security and prove for the whole amount.

Where the secured creditor proceeds to realise the security, he is liable to pay all the expenses incurred by liquidator for the preservation of the security before its realisation.

Right of unsecured creditors. All debts due to unsecured creditors are to be treated equally and paid *pari passu*.

When the list of claims is settled the liquidator has to commence making payments.

The assets available to the liquidator are applied in the following orders :

- Overriding preferential payments.
- Cost of the liquidation.
- Preferential payments.
- Debenture holders secured by a floating charge.
- Unsecured creditors.
- Balance returned to the contributories.

Overriding Preferential Payments U/s 326

(1) In the winding up of a company—

(*a*) workmen's dues ; and

(*b*) debts due to secured creditors,

shall be paid in priority to all other debts.

(2) The debts payable under clause (*a*) and clause (*b*) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Preferential payment. Section 327 enumerates certain debts which are to be paid in priority to all other debts. Such payments are called preferential payments. It may however be noted that such payments are made after paying the secured creditors, and costs, charges and expenses of the winding up.

These preferential payments are :

(a) All revenues, taxes, cesses and rates due from the company to the central or state government or to a local authority. The amount should have become due and payable within 12 months before the winding up.

(b) All wages or salary of any employee in respect of services rendered to the company and due for a period not exceeding 4 months within 12 months, before the winding up and any compensation payable to any workman under any of the provisions of Chapter V-A of the Industrial Disputes Act. 1947. The amount must not exceed ₹ 20,000[1] in the case of any one claimant.

(c) All accrued holiday remuneration becoming payable to any employee or in the case of his death to any other person in his right, on the termination of his employment before or by the effect of the winding up.

(d) All amounts due in respect of contributions payable by the company as employer but this is not payable if the company is being would up voluntarily for the purpose of reconstruction and amalgamation.

(e) All amounts due in respect of any compensation or liability for compensation in respect of death or disablement of any employee under the Workmens' Compensation Act, 1923 but this is not payable if the company is being wound up voluntarily for reconstruction or amalgamation.

(f) All sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company.

(g) The expenses of any investigation held in pursuance of section 235 and 237, in so far as they are payable by the company.

3. Consequences as to servants and officers

A winding up order by a Tribunal operates as a notice of discharge to the employees and officers of the company except when the business of the company is continued. The same principle will apply as regards discharge of employees in a voluntary winding up. Where there is a contract of service for a particular period, an order for winding up will amount to wrongful discharge and damages will be allowed as for breach of contract of service.

Example : A agreed to act as a director of a company for seven years and not to engage in any competing business for seven years after he should cease to hold office. Company was ordered to be wound up. It was held that the winding up order operated as a wrongful dismissal of A and that he was free from his agreement not to compete with the company. [Measures Bros. Ltd. v. Measures. (1910). 1 Ch. 336].

4. Consequences of proceedings against the company

When a winding up order is made, or an official liquidator has been appointed as provisional liquidator no suit or legal proceeding can be commenced and no pending suit or legal proceeding continued against the company except with the leave of the Tribunal and on such terms as it may impose. In the case of a voluntary winding up, the Tribunal may restrain proceedings against the company if it thinks fit.

It may be noted that law does not prohibit proceedings being taken by the company against others including directors, or officers or other servants of the company.

5. Consequences as to costs

Where the assets of the company are insufficient to satisfy the liabilities, the Tribunal may make an order for payment out of the assets of the costs, charges and expenses incurred in the winding up. The Tribunal may determine the order of priority in which such payments are to be made. (Section 298).

6. Consequences as to documents

When a company is being wound up whether by Tribunal or voluntarily, the fact must be made known to all those having any dealing with the company; every document in the nature of an invoice, order for goods or business letter issued in the name of the company, after the commencement of winding up must contain a statement that the company is being wound up. (Sec. 344).

Where a company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, be prima facie evidence of the truth of all matters recorded therein. (Sec. 345).

Where an order for winding up of the company by Tribunal is made, any creditor or contributory of the company may inspect of the books and the papers of the company, subject to the provisions made in the rules by the central government in this behalf.

When the affairs of a company have been completely wound up, and it is about to be dissolved, its books and papers and those of the liquidator may be disposed of in such manner as the Tribunal directs. This applies to a winding up by Tribunal.

In the case of a member's voluntary winding up, they may be disposed of in the manner directed by a special resolution of the company and in the case of a creditor's voluntary winding up, in the manner directed by committee of inspection or if there is no such committee by the creditors. (Sec 347).