# 20
# *Defunct Companies*

A defunct company means a company which is not carrying on any business or which is not in operation. In such a case the Registrar will send a preliminary notice to the company inquiring whether the company is still in operation.[1] If no answer is received within one month, the Registrar will within fourteen days send another letter reminding the company of the first letter and informing it that if within one month no answer is received to the second letter, a notice will be published in the Official Gazette with a view to striking the name of the company off the register.[2] If no answer is received within one month or the answer received shows that the company is carrying on no business, he may publish in the Official Gazette and also intimate the company that on the expiry of three months its name will be struck off. The company may, however, in the meantime show cause why it should not be dissolved.[3] When the name is actually struck off, the fact must be published in the Official Gazette and the company shall stand dissolved. The same procedure has to be adopted where a company is being wound up and the Registrar has reasonable cause to believe that no liquidator is acting or that the affairs of the company have been completely wound up, but returns have not been filed.[4]

But the liability, if any, of every director, or other officer who was exercising any power of management and of every member of the company shall continue and may be enforced as if the company had not been dissolved.[5] "This only means that the existing liability of any director or member prior to the dissolution of the company will continue in spite of the dissolution. If the directors are not personally liable for the plaintiff's claim prior to the dissolution of the company, they will not be liable after the dissolution." And so in *Sri Krishna Dhoot* v *Kamlapurkar*[6]:

> The plaintiff, who had deposited certain notes with the Hyderabad Bullion Exchange Ltd, as membership security, instituted a suit against the company, its directors and members of its sub-committee for the recovery of the value of the notes when the company had become defunct and was dissolved by the Registrar by removing it from the register.

The directors and other officers were, however, held not liable as there would have been no claim against them prior to the dissolution of the company. As for the liability of the company, the court held that a suit against a company which is struck off the register and, therefore, stands dissolved, is not maintainable.

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1 S. 560(1). A copy of the letter is required to be sent to the Income Tax Authorities also. (Government Order of 1959).
2 *Id.* Sub-section (2).
3 S. 560(3).
4 S. 560(4).
5 S. 560(5). *See* L J Hall, *Restoration of Companies to Register*, 120 New LJ 789.
6 [1965] 1 Comp LJ 233 : (1965) 35 Comp Cas 913 AP.

Directors are also not liable for their failure to maintain the routine of a company which to the knowledge of the Registrar is already defunct though actual striking off had been postponed for one reason or another.[7] The court may order the winding up of the company without it being restored to the register.[8]

**Restoration**

The proper procedure in such cases is to apply to the Tribunal for restoration of the company's name. For, Section 560(6) provides that if a company, or any member or creditor feels aggrieved, he may within twenty years move the Tribunal. If it is found that the company was actually carrying on business or it is otherwise just to do so, the Tribunal may order the name of the company to be restored to the register. Accordingly, in *Bhogilal* v *Registrar of Joint Stock Companies*[9]:

> The creditor of a defunct company filed a petition for restoration of its name. The petitioner alleged that he had obtained a decree against the company a day before the publication of the notification. The directors of the company on being asked by the Registrar misinformed him that the company was not in operation. It was also found that the entire share capital of the company was not called up and that the uncalled capital was sufficient to satisfy the decree. Holding that it was just and equitable to restore the name of the company to the register, the court observed: "No steps were taken to discharge the liability which the company owed to the petitioner. The effect of the order of removal would be to make it difficult for the petitioner to obtain the fruits of his decree. Had the Registrar known that the company was actually defending a suit, it is extremely unlikely that he would have ordered the name of the company to be removed from the register."[10]

Thus the provision relating to restoration "seems primarily intended for companies which were active at the moment of their mortal wound".[11] But

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7 *Calculating and Business Machines P Ltd* v *State of Bihar*, (1983) 54 Comp Cas 100 Pat. *See* also *Narmada Choudhury* v *Motor Accidents Claims Tribunal*, (1985) 58 Comp Cas 596, directors held not personally liable.

8 *Cambridge Coffee Room Assn, Re*, [1952] 1 All ER 112. An order of winding up may be passed without vacating the order of dissolution, *Seth Kundan Lal* v *Hanuman Chamber of Commerce Ltd*, (1966) 36 Comp Cas 231 Punj ; *Morning Star P Ltd*, (1970) 40 Comp Cas 29 Ker : [1970] 1 Comp LJ 46.

9 AIR 1954 MB 70.

10 Following authorities were cited in the case : *Outlay Assurance Society, Re*, (1887) 34 Ch D 479 : 56 LT 477; *Carpenter's Patent Davit Boat Lowering & Detaching Gear Co, Re*, (1888) 1 Meg 26. *See* also *Umedbhai* v *Moreshwar*, AIR 1954 MB 146. Where a person had a claim against the company for personal injuries but the company was dissolved before the period of limitation for his claim expired, it was held that the company ought to be put back to the register, *Workvale Ltd, Re*, [1992] 2 All ER 627 CA.

11 *Test Holdings, (Clifton) Ltd*, [1969] 3 All ER 517. The court has power to pass an order of restoration subject to certain conditions. See *Purushotamdass* v *ROC*, (1986) 60 Comp Cas 154 Bom. *Bombay Gas Authority P Ltd* v *Central Govt*, (1996) 3 Bom CR 312, transfer of assets by company after struck off becomes valid if it is subsequently restored.

discovery of outstanding assets of the company is, of course, one of the reasons why restoration is sought. That is why a period of twenty years is allowed. The company may have unknown assets which do not come to light until many years after the company has been struck off and so dissolved.

A contingent or prospective creditor is entitled to a petition for restoration.[12] An income tax officer is a creditor for this purpose and can apply for restoration.[12] So is a person entitled to claim damages under the Fatal Accidents Act.[13] The company which has been struck off may itself apply for restoration, though the court would not order restoration unless there is sufficient evidence of likely benefit to creditors or members.[14]

An officer of the company who was instrumental in getting the company struck off was held to have *locus standi*. He was not aggrieved when he activated the process of striking off. He could become aggrieved subsequently. The Act requires the applicant to be aggrieved at the time of his application.[15]

Restoration operates retrospectively.[16] It produces "as you were position".[17] An illustration of retrospective operation is *Box Co Ltd, Re*[18]:

> A company, in ignorance of the fact that it has been struck off the register, created a legal charge on two of its properties. On an application by the company the court restored it to the register and gave the order retrospective effect so as to validate the charges and their registration.

The effects of restoration have been thus stated in a case:[19]

> It is clear from the section that on the restoration of a company back to the register after its being struck off the consequence is as though it had never been struck off the register. The company will be deemed to have had its existence althrough. Another consequence is that the rights of all parties would be as though there had been no cessation or interruption in the existence of the company on account of the striking off and the subsequent restoration.

Sub-section (5) also preserves the power of the Tribunal to wind up a company the name of which has been struck off the register. This is so because striking off is different from winding up. In winding up the assets of the

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12 *Harvest Lane Motor Bodies Co, Re*, [1968] 2 All ER 1012 : (1969) 39 Comp Cas 961.

13 *ITO (Companies Circle), Re*, [1970] 1 Comp LJ 46.

14 *Belmont M & Co Ltd, Re*, [1951] 2 All ER 898; *Test Holdings (Clifton) Ltd*, [1969] 3 All ER 517; *Rai Saheb UN Mandal's Estate, Re*, AIR 1959 Cal 493 : (1960) 30 Comp Cas 172. A person who inherits the rights of a creditor or member may apply but not a person who acquires such rights, *New Timbiqui Gold Mines, Re*, [1961] 1 All ER 865 ; *Bayswater Trading Co, Re*, [1970] 1 All ER 608 : [1970] 1 WLR 343: (1970) 40 Comp Cas 1196.

15 *Conti* v *Uebersee Bank AG*, [2000] BCC 172 Scotland.

16 *Lindsay Bowman Ltd, Re*, [1969] 1 WLR 1443 : [1969] 3 All ER 601. All that is necessary is that they should be creditors at the time of striking off. *Aga Estate Agencies Ltd, Re*, 1986 BCLC 346.

17 *Bombay Gas Co P Ltd* v *Central Govt*, (1997) 89 Comp Cas 195 Bom.

18 [1970] 2 WLR 959 : [1970] 2 All ER 183.

19 *Pazaniappa Chettiar* v *South Indian Planting and Industrial Co Ltd*, AIR 1953 TC 161. Rights and liabilities of the company remain the same as before as if there had been no interruption in the life of the company. *Purushottamdas* v *ROC*, (1986) 60 Comp Cas 154 Bom ; *Lakshmana Chettiar* v *S I Planting Co*, (1953) 23 Comp Cas 246.

company are applied in payment of its debts. "But, if the nasme of a company is struck off the register, its undisposed property is not appropriated towards its liabilities. It vests in the Crown as *bona vacantia.*"[20] Thus the liability of the directors of a wound up private company to pay outstanding income tax under Section 179 of the Income Tax Act, 1961 will not arise if the company is merely struck off. The department may apply for restoration.[21]

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20 *Yeshwant Raghunath Bhide* v *ITO*, (1974) 44 Comp Cas 293, citing Gower, PRINCIPLES OF MODERN COMPANY LAW 652 (3rd Edn, 1969) and *U. N. Mandal's Estate P Ltd, Re*, AIR 1959 Cal 493 : 30 Comp Cas 172.

21 *Yeshwant Raghunath Bhide* v *ITO*, (1974) 44 Comp Cas 293, citing Gower, PRINCIPLES OF MODERN COMPANY LAW 652 (3rd Edn, 1969) and *U. N. Mandal's Estate P Ltd, Re*, AIR 1959 Cal 493 : 30 Comp Cas 172.

# 21
# *Winding Up*

Winding up is the second method of putting an end to the life of a company. In the words of Professor Gower: "[W]inding up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members. An administrator, called a liquidator, is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights."[1] Winding up of a company differs from the insolvency of an individual inasmuch as a company cannot be made insolvent under the insolvency laws. Moreover, a perfectly solvent company may be wound up.

The company is not dissolved immediately at the commencement of winding up. Its corporate status and powers continue.[2] "Winding up precedes dissolution."[3]

**Types of winding up [S. 425]**

The Act provides for two kinds of winding up:

1. Compulsory winding up under the order of the Tribunal.
2. Voluntary winding up, which itself is of two kinds, namely: (*a*) Members' voluntary winding up and (*b*) Creditors' voluntary winding up.

**WINDING UP BY TRIBUNAL**

Section 433 has been recast. The power of the court to order winding up has been vested in the Tribunal. Three additional grounds of winding up have been added. The new section is as follows:

433. *Circumstances in which company may be wound up by Tribunal.*—A company may be wound up by the Tribunal,—

(*a*) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(*b*) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;

(*c*) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

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1 THE PRINCIPLES OF MODERN COMPANY LAW, 647 (3rd Edn, 1969).

2 Company remains a tax payer until dissolved by order of court. *Gannon Dunkerley & Co* v *Asstt. Commr, Urban Land Tax*, (1992) 73 Comp Cas 168 Mad. Where the contention was that there was no use winding up the company because all the assets of the company had already been sold, the court ordered winding up, *Syndicate Bank* v *Printersall (P) Ltd*, (1991) 71 Comp Cas 215 Kant.

3 BACHAWAT J in *Pierce Leslie & Co* v *Wapshare*, (1969) 2 SCA 378, 389. The order of winding up does not change the character of the company as an industrial concern for the purposes of the State Financial Corpn Act, 1951, *International Coach Builders Ltd* v *Karnataka State Financial Corpn*, (1994) 81 Comp Cas 19 Kant.

(*d*) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two;

(*e*) if the company is unable to pay its debts;

(*f*) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up;

(*g*) if the company has made a default in filing with the Registrar its balance-sheet and profit and loss account or annual return for any five consecutive financial years;

(*h*) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(*i*) if the Tribunal is of the opinion that the company should be wound up under the circumstances specified in Section 424-G:

Provided that the Tribunal shall make an order for winding up of a company under clause (*h*) on application made by the Central Government or a State Government."

A company may be wound up at an order of the Tribunal. This is also called compulsory winding up. The cases in which a company may be wound up are given in Section 433. They are as follows:

**1. Special resolution**

If the company has, by special resolution, resolved that it be wound up by the Tribunal.[4] The Tribunal is, however, not bound to order winding up simply because the company has so resolved. The power is discretionary and may not be exercised where winding up would be opposed to the public or company's interests.

**2. Default in holding statutory meeting**

If a company has made a default in delivering the statutory report to the Registrar or in holding the statutory meeting, it may be ordered to be wound up.[5] The petition for winding up on this ground can be presented either by the Registrar or by a contributory. If it is brought by any other person e.g., a creditor, it must be filed before the expiration of fourteen days after the last day on which the statutory meeting ought to have been held.[6] The power of the Tribunal is discretionary and instead of making a winding up order the

4 S. 433(*a*). Where the company itself was the petitioner and the financial position of the company was eroded, the court ordered winding up in public interest. *Bombay Metropolitan Transport Corpn Ltd* v *Employees*, (1991) 71 Comp Cas 473 Bom. The company's right to apply for winding up cannot be taken away by the fact that the company applied for closure under S. 25-O of the Industrial Disputes Act and its application was dismissed, even if winding up may lead to closure of business.

5 S. 433(*b*).

6 S. 439(7).

Tribunal may direct that the statutory report shall be delivered or that the meeting shall be held.[7]

### 3. Failure to commence business

If a company does not commence its business within a year from its incorporation or has suspended business for a whole year, it may be ordered to be wound up.[8] Here again the power is discretionary and will be exercised only when there is a fair indication that there is no intention to carry on business. If the suspension is satisfactorily accounted for and appears to be due to temporary causes, the order may be refused. An illustration is the decision of the Calcutta High Court in *Murlidhar* v *Bengal Steamship Co.*[9]

> To carry on its business, a company employed a steamer and two flats. The flats were acquired by the Government during the First World War and the company was not able to replace them immediately in view of the rise in prices. This resulted in suspension of business for more than a year. In a petition to wind up the company, it was held that "the suspension of business for a whole year is sufficiently accounted for and does not furnish an indication that there is no intention to carry on the business".[10]

Where, however, there was failure to resume business for five years and the prospects also seemed gloomy, winding up was ordered.[11] Similarly, where a company's business had remained suspended for ten years, its capital having been lost in misappropriation and the Orissa Government, which was the major contributory, having refused further help,[12] and where a company could not commence business for three years after incorporation, its main business having been acquired, where a private company did not commence any business inspite of loans by a financial institution which had taken over and disposed of the company's property, membership was reduced to less than the statutory minimum, all directors but one were reported to be absconding and the only available director filed a petition,[13] the court (now Tribunal)

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7 S. 443(3). This does not apply to private companies since they are not required to hold such a meeting, *S. R. Subramaniam* v *Drivers' & Conductors' Bus Service*, (1978) 48 Comp Cas 672 Mad.

8 S. 433(*c*).

9 AIR 1920 Cal 722: 59 IC 542. *See* also *Bengal Flying Club, Re*, [1966] 2 Comp LJ 213, where the assets of a club were acquired, but it carried on other activities and so an order to wind up was refused.

10 *See* also *Mohanlal Saraf* v *Cuttack Electric Supply Co*, [1964] 1 Comp LJ 58 Ori, where suspension of business due to acquisition was held not sufficient to found winding up order; *O. P. Basra* v *Kaithal Cotton Mills*, AIR 1962 Punj 151; *Malabar Iron & Steel Works* v *ROC*, AIR 1965 Ker 35; *Registrar of Companies* v *Jaipur Stock Exchange Ltd*, (1987) 62 Comp Cas 459 Raj, where also the company was making its due efforts; *Registrar of Companies* v *Jai Agro Industries*, (1987) 62 Comp Cas 358 Raj, business suspended for more than a year but otherwise the company in sound state.

11 *Rupa Bharati Ltd* v *ROC*, [1969] 1 Comp LJ 296.

12 *Orissa Trunks & Enamel Works Ltd, Re*, (1973) 43 Comp Cas 503 Ori.

13 *Surendra Kumar Pareek* v *Shree Guru Nanak Oils (P) Ltd*, (1995) 82 Comp Cas 642. *Biraj Kumar Barua* v *Barua and Barua Drugs P Ltd*, (2003) 114 Comp Cas 191 Gau, no business commenced, promoters did not pay for their shares, no meetings held, the court (now Tribunal)

ordered winding up.[14] Where the business of a private company which was a family concern remained suspended for many years for want of a quota of wires, the company had no creditors, the Registrar's attempt to put it on winding up on account of suspension of business and perpetuity of losses did not succeed. A family company, having no creditors, should not concern the public whether it is running in profits or losses. Where of the several business units of a company, the business of only one unit was closed with a proposal to dispose it off and to use the proceeds in the exploitation of other objects, the court did not agree that it was a ground for winding up. The court (now Tribunal) said that even if the business in all the units of the company was suspended, it would still be open to the court to examine whether it would be possible for the company to resume its business.[15]

After ordering winding up on this ground, the Tribunal can direct the liquidator to take care of the interests of the financial institutions which had advanced large sums of money to the company and also to investigate whether a secured creditor bank had sold the company's assets at prices lower than their real value.[16]

### 4. Reduction in membership

If the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two, the company may be ordered to be wound up.[17]

### 5. Inability to pay debts

A company may be ordered to be wound up if it is unable to pay its debts.[18] Inability to pay debts is explained in Section 434. According to this section a company shall be deemed to be unable to pay its debts in the following three cases:

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said that no useful purpose would be served in keeping the company alive. *S. Palaniappan* v *Tirupur Cotton Spg & Wvg Mills Ltd*, (2003) 114 Comp Cas 288 Mad, no proof that business was not commenced for one year.

14 *Registrar of Companies* v *Chouhan Bros Industries (P) Ltd*, (1973) 43 Comp Cas 525 Pat. Winding up was ordered where because of heavy indebtedness the company's assets were under creditors' possession and no business could be done for more than a year, *Karnataka Rubber Ltd* v *Karnataka SFC*, [1999] 3 Comp LJ 231 Kant also where the persons connected with the company totally disappeared from the scene. *Bhartiya Gramin Vikas Vitta Nigam Ltd, Re*, (2000) 27 SCL 249 All. Another case of heavy indebtedness, *Bajaj Organics Ltd* v *Sprolac Laboratories P Ltd*, [1999] 3 Comp LJ 234 AP. Where the project of a hotel company became delayed because of administrative uncertainties, winding up was not ordered, *Bikkina Gopalkrishna Rao* v *Seavalley Resorts P Ltd*, [2000] 2 Comp LJ 65 AP.

15 *Paramjit Lal Bhadwar* v *Prem Spg and Wvg Mills*, (1986) 60 Comp Cas 420 All. Where a company's subsidiaries were functioning, winding up was not ordered though the company itself had ceased to function. *Eastern Telegraph Co Ltd, Re*, [1947] 2 All ER 104: (1948) 18 Comp Cas 46. Where suspension of business was backed by the shareholders' resolution for winding up passed at a meeting called by the court, winding up was ordered. It was not necessary to keep the company alive for booking guilty officers. Remedies are available in the state of winding up also. *A. Sreedharan Nair* v *Union Hardwares P Ltd*, (1997) 89 Comp Cas 37 Ker.

16 *Karnataka Rubbers Ltd* v *Karnataka State FC*, (1999) 33 CLA 472 Kant.

17 S. 433(*d*).

18 S. 433(*e*).

*(a) Statutory Notice*

Firstly, if a creditor to whom the company owes a sum exceeding one lakh rupees has served on the company, a demand for payment and the company has for three weeks neglected to pay or otherwise satisfy him.[19] Where there was no 21 days notice, the defect was held to be not curable even by a subsequent notice during the pendency of the proceedings.[20] The expression "neglects to pay the sum demanded" in Section 434(1)(*a*) is not equivalent to the word 'omitted'. Neglect to pay a debt on demand is omission to pay without reasonable cause. Failure to pay in spite of several communications including service of statutory notice was held to be evidence of neglect and inability.[21]

"The debt must be presently payable and the title of the petitioner demanding it should be complete."[22] The debt must be really due.[23] Where a

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19 *See*, for example, *Babu Ram* v *Krishna Bharadwaj Cold Stores & General Mills Co (P) Ltd*, [1962] 2 Comp LJ 215 All, where neglect to pay a supplier of goods was held to be sufficient although the assets of the company were more than the debts. *Kundremukh Iron Ore Co* v *Rooky Roadways (P) Ltd*, (1986) 60 Comp Cas 1069 Kant, a person claiming from a carrier compensation for short delivery is not a creditor; reversed in *sub nom.*, (1990) 69 Comp Cas 178 Kant. Where the dispute is a bona fide dispute and yet the company makes a conditional offer to pay, it is not a neglect to pay, *Suresh Shenoy* v *Cochin Stock Exchange Ltd*, (1989) 65 Comp Cas 240 Ker. Where a financially sound company disputed the claim on bona fide grounds, that was held to be not a neglect to pay. *New Era Furnishers (P) Ltd* v *Indo-Continental Hotels & Resorts Ltd*, (1990) 68 Comp Cas 208 Raj. The presumption of deemed inability arises where there is due service of notice and not where there is no proof of notice. *Kalra Iron Stores* v *Faridabad Fabricators (P) Ltd (No 2)*, (1992) 73 Comp Cas 337 Delhi. The notice need not carry the warning of winding up, *Devendra Kumar Jain* v *Polar Forgings & Tools Ltd*, [1993] 1 Comp LJ 184 Del; (1993) 1 Punj LR 67; *United Contractors* v *Orissa Minerals Development Co Ltd*, (1995) 2 Cal LJ 309 Cal, demand notice is a step in aid, it is not a precondition for bringing the whole claim of the plaintiff in a subsequent suit. *S. N. Enterprises P Ltd* v *Sanpaolo Hambro Nicco Fin Ltd*, (1997) 2 Cal LT 60, arbitration clause no bar to winding up proceedings. *Associated Design Planning Group (P) Ltd* v *Prodosh Kumar Mullick*, (1995) 18 Corpt LA 14; (1995) 1 Cal LT 54, loan by director, winding up proceedings is not a method of recovery. *Parimahal Holdings P Ltd* v *LKP Merchant Financing Ltd*, (2003) 114 Comp Cas 121 Bom, the debt must be quantified. There cannot be a presumption that the claim of interest must have gone beyond Rs 500 (now Rs 1,00,000). *Uniplex India Ltd* v *State (Govt of NCT of Delhi)*, AIR 2001 SC 2625; (2001) 106 Comp Cas 669. Notice under Sections 433(*e*) and 434(*a*) containing a demand for payment of the amount covered by a dishonoured cheque, if issued within the statutory period contained in proviso (*b*) to Section 138 of Negotiable Instruments Act, held, would be good enough for the purpose of that section as well.

20 *Manganese Ore (India) Ltd* v *Sandur Manganese & Iron Ores Ltd*, (1999) 98 Comp Cas 755 Kant.

21 *Arrow Electronics International Inc.* v *Niful Data Systems (P) Ltd*, (1997) 88 Comp Cas 234 Del. Where statutory notice was given by the underwriter of the company's shares for his dues and the company neither replied to it nor raised any defence, but paid half of the amount claimed, the petition was admitted, *Mehta Integrated Finance Ltd* v *Bharat Parentals Ltd*, (1999) 98 Comp Cas 791 Guj.

22 *Jumbad Coal Syndicate Ltd, Re*, AIR 1936 Cal 628: 163 IC 845. An unliquidated claim, such as a right to recover damages is not a debt for this purpose. *Newfinds* v *Vorion Chemicals & Distilleries Ltd*, (1976) 46 Comp Cas 87 Mad. Where a company guaranteed a debt and the principal debtor having failed to pay, the company also did not pay, the amount due was held to be a debt due from the company enabling the creditor to file a petition for winding up. *Ram Bahadur Thakur* v *Sahu Jain Ltd*, (1981) 51 Comp Cas 301 Del. Where loans were given to the company indirectly through the medium of another person, the company was not a debtor. *New India Corpn* v *N. M. T. Assn*, (1983) 54 Comp Cas 32 Kant. *Indian Oil Corpn Ltd* v *NEPC (India) Ltd*, (2003) 114 Comp Cas 207 Mad, the existence of the debt was established,

company guaranteed another man's debt and the liability under it had become established which the company failed to pay, winding up was ordered.[24] Winding up shall be refused if there is a *bona fide* and reasonable dispute as to a substantial part of the debt on which the petition is based,[25] because "when a debtor company believes even wrongly that it is justified in law to refuse to pay, such a refusal cannot be regarded as neglect to pay".[26] "Where the object of a petition to wind up a company is to bring pressure upon the company in order to make it pay the petitioner cheaply and expeditiously when the company desires to dispute the debt in the civil court, the petition is an abuse of the process of the court and is liable to be dismissed."[27] "Petition for winding up is not to be sought for as a short cut and cheap device to coerce payment and stifle contest."[28] The true rule, which has existed for many years is that the court would not allow a winding up petition to be used for the purpose of deciding a dispute as to a debt which is raised *bona fide* on substantial grounds.[29] Thus where a cricket match, being insured, had to be abandoned on account of rains, the insurance company appointed a surveyor to determine whether this type of loss was covered by the terms of the policy, it could not be said that the

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the company could not show that the security in the hands of the petitioning creditor was sufficient for his claim, petition maintainable.

23 *Mohd. Amin Bros Ltd* v *Dominion of India*, (1949) 54 CWN 514. Where the sum due was admitted but there was no provision in the contract about interest, the court admitted the petition to fix interest liability and to order winding up if not paid, *Devendra Kumar Jain* v *Polar Forgings & Tools Ltd*, (1993) 1 Comp LJ 184 Del: (1993) 1 Punj LR 67.

24 *S. Kantilal & Co* v *Rajaram Bandekar (irigao) Mines (P) Ltd*, (1993) 76 Comp Cas 800 Bom.

25 *The Co* v *Rameshwar Singh*, AIR 1920 Cal 1004: 23 CWN 844: 58 IC 561.

26 *British India Bkg Corpn* v *Sylhet Commercial Bank*, AIR 1949 Ass 45; *Standard Dyer Ltd* v *Parshotham & Bros*, [1967] 1 Comp LJ 6, where the relationship of creditor and debtor between the petitioner and the company was found not to exist.

27 *P. Satyarazu* v *Guntur Cotton, Jute & Paper Mills*, AIR 1925 Mad 199: 85 IC 333; *Tulsi Das Lallubhai* v *Bharat Khand Cotton Mills Ltd*, 16 Bom LR 692. The remedy cannot be used as an alternative to a civil suit. Accordingly, a petition was rejected when the petitioner had already resorted to a civil suit. *State Trading Corpn of India Ltd* v *Punjab Tanneries Ltd*, (1989) 66 Comp Cas 634 P&H; *T. Srinivasa* v *Flemming (India) Apothek (P) Ltd*, (1990) 68 Comp Cas 506 Kar.

28 *Chellaradh & Co* v *Sundaram*, AIR 1955 Mys 122; *See* also *Bharat Vegetable Products Ltd, Re*, 56 CWN 29; *Godavaribai* v *Amalgamated Commercial Traders*, [1965] 2 Comp LJ 272; *Amber Flour Mills Ltd* v *Vimal Chand Jain*, (1991) 70 Comp Cas 561 Del, jurisdiction not available as a substitute for recovery; *Karamchand Thapar & Bros (Coal Sales) Ltd* v *ACME Paper Ltd*, (1994) 1 Comp LJ 274 Del. A petition against a Govt Financial Corporation just because it did not provide further loans was held to be abuse. *PICUP* v *North India Petro*, (1994) 3 SCC 348: [1994] 79 Comp Cas 835 SC.

29 *A Company (No 006685 of 1996), Re*, (1997) 1 BCLC 639 Ch D. The court cannot be dragged into disputed questions of fact which cannot be sorted out without evidence, *Rohtak & Hissar Districts Electricity Supply Co P Ltd* v *Amausi Textile Mills P Ltd*, (1999) 19 SCL 541. A petition was not allowed where a civil suit was pending over the same claim, *Sir Shadilal Enterprises* v *Cooperative Co Ltd*, (2001) 103 Comp Cas 863 All. In *Deccan Enterprises P Ltd* v *Deccan Syntex Ltd*, [2000] 1 Comp LJ 189 AP, parties relegated to a civil suit because of complications. *Rediffusion, Young & Rubicam P Ltd* v *Solidaire India Ltd*, (2003) 114 Comp Cas 721 Mad, *bona fide* dispute. *ICDS Ltd* v *Asha Latex and Allied Industries P Ltd*, (2003) 114 Comp Cas 581 Bom, petitioner resorted to arbitration proceedings, suppressing this fact, filed a winding up petition, debt also disputed, for these reasons petition dismissed.

company had neglected to pay.[30] MAJITHIA J of Punjab and Haryana High Court captured the working principles in terms of the following propositions:[31]

> The principles on which the company court acts are: (1) that the defence of the company is in good faith and one of substance; (2) the defence is likely to succeed in point of law; and (3) the company produces *prima facie* proof of the facts on which the defence depends.[32]

However, where the dispute is not real, but is put forward by the company as a cloak to hide its inability to pay its debts, the application for winding up would be allowed. Thus, for example, in *Vanaspati Industries Ltd* v *Firm Prabhu Dayal*:[33]

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30 *British India General Insurance Co, Re*, AIR 1971 Bom 102: (1970) 40 Comp Cas 554. *See* also *British Burmah Petroleum Co* v *Kohinoor Mills*, (1980) 50 Comp Cas 544 Bom, where the debt was evidenced by two letters of doubtful authenticity; *Yashodan Chit Fund (P) Ltd*, (1980) 50 Comp Cas 356, Bom, non-payment of rent pending fixation of standard rent; *Ronaq Singh* v *Ambala Bus Syndicate*, (1980) 50 Comp Cas 349 P&H, agreement to receive payment in instalments; *Premier Vegetable Products Ltd* v *United Asian Bank*, (1980) 50 Comp Cas 680 Raj, a company receiving goods but not accepting bill of exchange, not allowed to say that there was no debt because the bill had not been accepted; *Maharashtra Small Scale Industries Corpn* v *Trawlers (P) Ltd*, (1980) 50 Comp Cas 674 Bom, inability to pay workmen; *U. V. Shenoy* v *Karnataka Engineering Products*, (1981) 51 Comp Cas 116 Kant, company allowed to defend dishonour of cheques on the ground that the goods supplied were of inferior quality. *Fred Hausman* v *Bio-Solar (P) Ltd*, (1987) 61 Comp Cas 714 Del, machinery delivered in damaged state, claim for price, disputed debt. Where the company showed liability only to the extent of one-fourth of the amount claimed and the petitioner showed nothing, the petition was dismissed. *Gangadhar Narsinghdass Agarwal* v *Timble (P) Ltd*, (1992) 74 Comp Cas 246 Bom. Where the company paid the amount which was due and disputed the rest of the claim, the petition was dismissed. *SN Steel Corpn* v *Dany Dairy and Food Engrs*, (1992) 73 Comp Cas 357 All. The company has to substantiate the defence of payment. *M. V. Paulose* v *City Hospital (P) Ltd*, (1992) 73 Comp Cas 362 Ker. No privity of contract with the company, hence no right to sue, *B. Vishwanathan* v *Seshayee Paper & Boards Ltd*, (1992) 73 Comp Cas 136 Mad. The existence of an arbitration agreement does not take away the right of petition. *Goetz India Ltd* v *Pure Drinks (New Delhi) Ltd*, (1994) 80 Comp Cas 340, 363 P&H.

31 *Kripal Singh* v *Sutlej Land Finance (P) Ltd*, (1989) 66 Comp Cas 841, 844. See *R. P. Bansal* v *Bansal & Co*, AIR 1995 Del 234, claimant did not indicate the state of account and the company submitted a detailed counter-claim ruling out the petitioner; *Tata Davy Ltd* v *Steel Strips Ltd*, AIR 1995 P&H 1, nothing of the claim was left after deduction of amounts for poor quality of goods supplied. *Elmeh India* v *Hi-Sound Corder (P) Ltd*, (1995) 83 Comp Cas 135 Mad, deposit account not produced.

32 The Supreme Court in *Amalgamated Commercial Traders (P) Ltd* v *ACR Krishnaswami*, (1965) 35 Comp Cas 456, laid down that conditional declaration of dividend does not create a debt and the company could dispute its liability. Following this in *Sharma Enterprises* v *J N Hotels (P) Ltd*, (1994) 1 Bihar LJR 576, it was held that where in a pending money suit against the company, the latter raised a good counter-claim, a petition for winding up for that very debt was not sustainable. Another decision emphasising that the company's counter-claim should be *prima facie* valid and put-up *bona fide* is *Federal Chemical Works Ltd, Re*, (1964) 34 Comp Cas 963; *Trilok Chand* v *Swastika Strips (P) Ltd*, (1995) 82 Comp Cas 423 P&H, liability to pay on take-over, goodwill overvalued, genuine dispute. *Trend Designs Ltd, Re*, (1998) 29 Corpt LA 135 Ker, a company cannot be said to be unable to pay its debts if it has substantial profits and current assets; a company cannot be expected to discharge a debt which it does not admit on *bona fide* grounds.

33 AIR 1950 EP 142; *K. S. Trivedi & Co* v *Ashok Leyland Ltd*, [1989] 3 Comp LJ 351, neither the amount nor due date given with certainty; *Hindustan Sanitary and Hardware Store* v *J C T Electronics Ltd*, (1990) 67 Comp Cas 585 Punj, where the company paid off a major part of the claim and secured the balance by a bank guarantee; *Ultimate Advertising and Marketing Co* v *G B Laboratories*, (1990) 66 Comp Cas 232 All, where the principal paid off and only interest amount disputed, order not granted, here the court also added that winding up is in the discretion of the court and the same may be refused even if all the

The petitioner claimed to be a creditor of the defendant company. The company never disputed that the amount claimed was wrong. They only said that they had some kind of a counter-claim, which the court found to be of a very nebulous character. All they said was that the accounts required scrutiny and that the petitioner was not presently entitled to the sum claimed, but why, it was not clearly stated. The court, therefore, held that there was no *bona fide* dispute with regard to the sum due.

Similarly, in *Harinagar Sugar Mills Co* v *Pradhan*,[34] SUBBA RAO J (afterwards CJ) allowed a petition as "the alleged dispute as to the liability of the company to the joint family was not *bona fide* but was only a part of a scheme of collusion between the company and the *karta* of the family".[35]

It is also necessary that the creditor should have delivered a demand under his hand at the registered office of the company.[36] "Statutory notice is a highly formal and important document and it would appear to follow that the provision of the Act as to its service upon the company must be strictly observed."[37] Thus, where the amount due was incorrectly stated in the notice, the petition failed.[38]

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grounds are made out; *Goyal Electro Steel*, 67 Comp Cas 305 Raj, goods received in damaged state; *Joti Prasad Bala Prasad* v *A C T Developers (P) Ltd*, (1990) 68 Comp Cas 601 Del, *bonafide* disputes about goods supplied to the company; *Aluminum Extrusions and Industrial Components (P) Ltd* v *Central Paints Ltd*, (1990) 68 Comp Cas 477 MP, vague plea of dispute. Debts arising out of settlement of accounts in a family company. Hence bona fide defence ruled out. *Deepa Anant Bandekar* v *Rajaram Bandekar (Sirigao) Mines Ltd*, (1992) 74 Comp Cas 42 Bom. The company did not pay rent from day one and replied to the petition saying that it had applied for fixation of standard rent, held not *bona fide* in *Sharda Bhandari* v *Ananya Electronics Ltd*, (1993) 78 Comp Cas 167 Delhi. Payment of arrears of lease money due on premises taken over by the company, allowed to be raised before the company court, *Devendra Kumar Jain* v *Polar Forgings and Tools Ltd*, (1993) 1 Comp LJ 184 Del: (1993) 1 Punj LR 67.

34 [1966] 2 Comp LJ 17.

35 Where a company had accepted a number of bills of exchange and in defence the company only said that the acceptances were conditional, but offered no proof of such conditions, it was held that winding up could not be refused. *United Western Bank Ltd*, (1978) 48 Comp Cas 378; *Universal Consortium of Engineers Ltd, Re*, (1983) 54 Comp Cas 33 Cal, no proof of debt offered; *Madan Debi Kundalla* v *Alpine Dairy Ltd*, (1983) 54 Comp Cas 41 Cal, defence of defective goods raised a long time after the supply, not tenable. Where the company first acknowledge the debt and disputed it for the first time at the hearing, that was not the symptom of a *bona fide* dispute. *Bajrangbali Engg Co Ltd, Re*, [1990] 1 Comp LJ 243: AIR 1989 Cal 356. A claim which required to be substantiated by evidence is fit for a civil suit, *Malhotra Steel Syndicate* v *Punjab Chemi Plants*, (1989) 65 Comp Cas 546 P&H. Company paying half the debt, petition allowed because the other half was of more than Rs 500, *United Asian Bank* v *Jaipur Oil Products Ltd*, (1989) 66 Comp Cas 438; *Surendra Packers* v *Punjab Land Development and Reclamation Corpn Ltd*, (1989) 66 Comp Cas 883 P&H, company raising no points.

36 S. 434(2).

37 See RANKIN CJ in *Japan Cotton Trading Co* v *Jajodia Cotton Mills*, AIR 1927 Cal 625, and *see* also *Janbazar Manna Estate Ltd, Re*, AIR 1931 Cal 692: 133 IC 321; *Laxmi Sugar Mills* v *National Industrial Corpn*, [1968] 1 Comp LJ 292 Punj. Where the particulars of the notice changed because of payments to creditors, the notice became technically incompetent, a new petition was not allowed to be founded on such notice, *Shantilal Khushaldas* v *Jayabala*, (1994) Mh LJ 432.

38 *Ofu Lynx Ltd* v *Simon Carves India Ltd*, (1971) 41 Comp Cas 174: AIR 1973 Cal 413. A time-barred claim cannot be the basis of a petition, but where the company acknowledged the debt in its balance-sheet that was held to be sufficient both as a proof of the debt and as an extension of the period. *Pandam Tea Co* v *Darjeeling Commercial Co*, (1977) 47 Comp Cas 15 Cal. Where the notice did not mention the date within which payment should be made or

Notice should be served at the company's registered office. Where the registered office was not functioning and a different address was being given for correspondence, a service at that address, and not at the registered office, was held to be not a good service for the purposes of a winding up petition.[39] Notice sent to the administrative office of the company instead of the registered office was held to be not effective service.[40] But there are contrary rulings.[41] Where a company contested the claim on the ground that the documents in question were not signed in accordance with the articles and, therefore, the company was not liable, that was held to be a *bona fide* dispute disentitling the claimant from winding up order.[42] It may not be necessary to specify in the notice any particular section of the Act, but the notice must give some indication that in the event of non-compliance, steps would be taken for an order of winding up. Where the petitioner had not mentioned in his notice the period within which he must be paid and only asked for payment at an early date, it was not considered to be a valid notice for winding up order.[43]

Once the requirements of a creditor's petition are fulfilled and there is a non-compliance with the statutory notice, winding up may be ordered and the company will not be heard to say that the petitioner is acting *mala fides*, or that he has an alternative remedy or that the company is solvent or that the majority of the creditors are opposed to winding up[44] or that the petition was presented only to save the period of limitation.[45]

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mentions a period less than 21 days, it may still be a valid notice, because the Act gives the company a 21 day waiting period. See *Sytron (India) Ltd, Re*, (1990) 69 Comp Cas 767 Cal; *N. K. Gossain & Co (P) Ltd* v *Dytron (India) Ltd*, (1990) 69 Comp Cas 757 Cal.

39 *Vysya Bank Ltd* v *Randhir Steel and Alloys (P) Ltd*, (1993) 76 Comp Cas 244 Bom: (1991) Mah LJ 1578 distinguishing *Fortune Copper Mining Co. Re*, (1870) LR 10 Eq 390, where the registered office of the company was pulled down and service elsewhere was held to be sufficient.

40 *N. L. Mehta Cinema Enterprises (P) Ltd* v *Pravin Chandra P. Mehta*, (1991) 70 Comp Cas 31 Bom. A notice served on the company's administrative office would have been regarded as good if it were not short in terms of time, *Manganese Ore (India) Ltd* v *Sandur Manganese & Iron Ores Ltd*, (1999) 98 Comp Cas 755 Kant. *Indian Oil Corpn Ltd* v *NEPC Ltd*, (2003) 114 Comp Cas 207 Mad, notice sent at address shown on the company's letterhead as regd. office, good, even if the office had been shifted, the claimant not knowing it. Service at administrative office has been recognised as valid service. *Laxmi Industrial Greases P Ltd* v *Punjab Chemi Plant International Ltd*, (2001) 103 Comp Cas 429 P&H, notice served on and received by the managing director, substantial compliance. Services at the company's registered office is not merely a technical formality, it has to be strictly complied with, *P. S. V. P. Vittal Rao* v *Progressive Construction P Ltd*, [1999] 2 Comp LJ 228 AP. The notice coming back with the postal remark 'refused' was held to be good service, *Raj Kumar* v *Organic Chem Oils Ltd*, (1998) 93 Comp Cas 386 P&H. A notice to the managing director has been held to be no good, *N Gopalkrishnan* v *Asianet Satellite Communications Ltd*, [2000] 1 Comp LJ 285. Notice sent by Legal Aid & Advice Board on its own behalf and not on behalf of a creditor was held to be incompetent, *Bichitrananda Panda* v *Orissa Construction Ltd*, (1999) 97 Comp Cas 345 Ori. Service of notice by registered post followed by publication in newspapers was held to be sufficient compliance with Rule 32 of the Companies (Court) Rules, 1956, *Doshi Leather Cloth Mfg Co Ltd, Re*, [2000] 25 SCL 225 Bom.

41 *See* the rulings cited in the note above.

42 *Softsule (P) Ltd, Re*, (1977) 47 Comp Cas 438 Bom.

43 *Paramjit Lal Bhadwar* v *Prem Spg and Wvg Mills*, (1986) 60 Comp Cas 420 All.

44 *Advent Corpn Ltd, Re*, [1969] 2 Comp LJ 71; *Seksaria Cotton Mills, Re*, [1969] 2 Comp LJ 155 Bom.

45 *V. K. Jain* v *Richa Laboratories (P) Ltd*, (1993) 78 Comp Cas 283 Delhi: [1994] 1 Comp LJ

But even so the power of the court is discretionary. The utility of this discretion is amply illustrated by the decision of the Bombay High Court in *Asnew Drums Co Ltd, Re*.[46] A company's indebtedness aggregated to over Rs 78 lakhs of which the petitioner had a claim of only Rs 11,350. He fulfilled the requirements of the statutory notice. The company prayed for time so as to enable it to draw a scheme of compromise with all its creditors. The court stayed the petition to enable the company to call a meeting of its creditors, but subject to the condition that the company shall not deal with or dispose of its assets in the meantime.[47]

The discretion of the court has been revitalised by the Supreme Court in *M. Gordhandas & Co* v *Madhu Woollen Industries (P) Ltd*.[48] The court found that the debts were not only disputed, but were also falsely shown in the accounts by the petitioners when they were themselves the directors. The other creditors were opposed to winding up. Explaining the weight that ought to be attached to this fact Ray J (later CJ) said:[49]

> The wishes of the creditors will be tested on the ground whether the case of the persons opposing the winding up is reasonable, secondly, whether there are matters which should be inquired into and investigated if a winding up order is made. It is also well-settled that a winding up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally.

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270; *UCO Bank* v *Achal Alloys (P) Ltd*, [1993] 3 Comp LJ 43 MP, defenceless indebtedness to bank. *Sharda Bhandari* v *Ananya Electronics Ltd*, (1993) 78 Comp Cas 167 Delhi, an application for fixation of standard rent is not a defence to the liability to pay the outstanding rent. *Devendra Kumar Jain* v *Polar Forgings & Tools Ltd*, [1993] 1 Comp LJ 184 Del: (1993) 1 Punj LR 67, the company paying the principal but not the interest allowed by the company judge, a good ground of winding up. *S. Kantilal & Co* v *Rajaram Bandekar (irigao) Mines (P) Ltd*, (1993) 76 Comp Cas 800 Bom, debt due under a guarantee.

46 (1968) 38 Comp Cas 287 Bom; *see* also *Nagree* v *Asnew Drums*, (1967) 2 Comp LJ 289.

47 *See* also *Kudremukh Iron Ore Co Ltd* v *Kooky Roadways (P) Ltd*, (1990) 69 Comp Cas 178 Kant, where a carrier had become liable for short delivery of goods and the claim was held to be capable of sustaining a petition though its amount was not yet ascertained. Another example of grant of time was in *Rishi Enterprises, Re*, (1992) 73 Comp Cas 271 Guj, the company was in temporary difficulties and the employment of 500 persons was at stake, the company was also doing well in business. *Star Straw Board Mfg Co* v *Mahalaxmi Sugar Mills Co*, (1991) 2 Punj LR 128, company paying undisputed part of the claim, for the balance one-month allowed at 18% interest.

48 (1971) 3 SCC 632: (1972) 42 Comp Cas 125: AIR 1971 SC 2600; *Garodia Hardware Store* v *Nimodia Plantations and Industries (P) Ltd*, AIR 1998 Gau 18, winding up ordered because of inability to pay debts. The agreement for sale of property of the company was not specifically enforced because that way only one person would have got all the benefit. *Tolani Shipping Co Ltd* v *Saw Pipes Ltd*, (1998) 28 Corpt LA 160 Delhi, complicated and disputed claims not to be accepted as the basis of a petition. *Larsen and Toubro Ltd* v *Prime Displays P Ltd*, (2003) 114 Comp Cas 141 Bom, privileged documents were not permitted to be used in proof of debt. The documents had come into being during discussions between the company and its professional legal advisors as to the matters in dispute.

49 At p. 132. Followed by the Bombay High Court in *Focus Advertising (P) Ltd* v *Ahoora Block (P) Ltd*, (1975) 45 Comp Cas 534 Bom, where though all the conditions of a creditor's petition were satisfied, the bulk of creditors were opposed to it.

A time-barred claim cannot sustain a winding up petition.[50] Money paid for allotment of shares and no shares being allotted, nor money refunded, the applicants' petition for winding up filed at a time when the claim to refund had become time-barred was held to be not maintainable.[51] For refund of money lost because of misrepresentations in the prospectus adequate remedies are available under S. 62 of the Companies Act. It is hardly necessary for the allottee to come in under jurisdiction for winding up.[52]

An arbitrator's award can be the basis of a petition even if it has not been made a rule of the court.[53] There have been contrary decisions also.[54] Where there was a pending petition against an award for its setting aside, it was held that the petition for winding up should wait for the outcome of the petition against the award.[55] The court can take up the petition again after the award becomes an evidence of an established debt.[56] An arbitrator has no jurisdiction to order winding up.[57] The existence of an *arbitration agreement* does not oust the jurisdiction of the court.[58]

An employee's claim for compensation for premature termination of employment is not a debt unless it is first ascertained by a court and converted into a decree.[59] Where an incentive or bonus for the preceding year had been calculated and paid and an equal amount of working and calculation was necessary for determining the rate for the subsequent year and accounting being again necessary, it was held that this could appropriately and properly be

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50 *K. C. Pangunni* v *Official Liquidator Wandoor Jupiter Chits*, (1981) 51 Comp Cas 453 Ker. Acknowledgement extends time and the fact of a debt being mentioned in the company's balance- sheet amounts to acknowledgment. *Darjeeling Commercial Co Ltd* v *Pandam Tea Co Ltd*, (1983) 54 Comp Cas 814 Cal. Land sold by company under deception and taking advance, refusing to refund, held inability; limitation from the date of final refusal. *Ajai Johri* v *Shingal Land & Finance Ltd*, (1985) 58 Comp Cas 350 Del. Debt becoming time barred by the time of the order does not matter. *Modern Dekor Painting Contracts (P) Ltd* v *Jenson & Nicholson India Ltd*, (1985) 58 Comp Cas 255 Bom. Where the balance confirmation letters were signed by the responsible executive of the company for three consecutive years, the question of time-bar did not arise. *Electro-Flame Ltd* v *Mittal Iron Foundry Ltd*, AIR 1998 AP 203.

51 *Ashok Kumar* v *Shinghal Land & Finance (P) Ltd*, (1995) 17 Corpt LA 111 Del: (1995) 82 Comp Cas 430, the court could as well have taken the view, which would have been more consistent with authorities, that application money is in the nature of trust deposit. *See* notes under "Allotment of shares" *supra; see* also *Sham Lal Gupta* v *Hamco Industries (P) Ltd*, AIR 1995 P&H 6, another decision on the same set of facts.

52 *Prashant Khusalchand Shah* v *Rinku Polychem Ltd*, AIR 1998 Bom 203.

53 *Dalhousie Jute Co Ltd* v *Mulchand*, (1983) 53 Comp Cas 607 Cal; *Kalyani Spg Mills* v *Shiva Trading Co*, (1983) 53 Comp Cas 632 Cal. See also *C. A. Galiakotwala Co (P) Ltd, Re*, (1984) 55 Comp Cas 746 Bom, counter-awards.

54 *Punjab Recorders Ltd* v *Magnetic Information Technology Ltd*, AIR 1995 P&H 29, petition not allowed on the basis of an award not made rule of the court.

55 *Civicons Engineers & Contractors* v *Auro Foods Ltd*, (1999) 22 SCL 370 Mad.

56 *Haryana Telecom Ltd* v *Sterlite Industries (India) Ltd*, (1999) 97 Comp Cas 675 P&H.

57 *Haryana Telecom Ltd* v *Sterlite Industries (India) Ltd*, (1999) 99 Comp Cas 683 SC.

58 *J G Finance Co Ltd* v *Jamna Auto Industries Ltd*, [2000] 1 Comp LJ 139 P&H. *Prime Century City Development P Ltd* v *Ansal Buildwell Ltd*, (2003) 113 Comp Cas 68 Del, the court can exercise its jurisdiction according to its discretion in spite of the fact that its jurisdiction has been ousted by the arbitration agreement. The court said that there was no actual possibility of clash of jurisdictions. Another similar decision is *Hewlett Packard India Ltd* v *BPL Net Com Ltd*, (2002) 110 Comp Cas 575 Kant.

59 *B. R. Somashkarappa* v *Vignam Industries Ltd*, (1990) 68 Comp Cas 264 Kant.

conducted not under the summary procedure of Section 433, but in a regular suit.[60] Where the Industrial Tribunal directed the company to pay an amount to the dismissed employee by way of an interim relief but the company did not pay, and he filed a petition for winding up, the court directed the company to pay instead of ordering winding up.[61]

*(b) Decreed Debt*

Secondly, a company shall be deemed to be unable to pay its debts if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part.[62]

Even in the case of a decretal debt, question of *bona fide* dispute may be raised and the Court may, instead of passing winding up order, allow the petition to stand over on an undertaking by the company to file a suit for setting aside the decree.[63] Thus, for example, in *Steel Equipment & Construction Co, Re*:[64] A company, having been sued on a debt, agreed to a consent decree but failed to satisfy it. In a winding up petition presented on that ground, the company claimed that the debt comprised in the decree was *ultra vires* and had already filed a suit to set aside the decree. The Calcutta High Court held that "the petition shall be adjourned till the disposal of the suit".

Where the decree-holders were the executors of the deceased owner and the real beneficiaries of the decree were not before the court and thus there was a chance of payment not passing over to them and raising of claims against the company over again, the court refused winding up order at the instance of such decree holders.[65]

In the case of a consent decree and the failure of the company to pay according to the decree, the creditor becomes entitled to an order *ex debito justitiae*. The question of company having any defence and the question of examining the solvency of the company are ruled out.[66]

Subject to these considerations a decree-holder is entitled to press for winding up as a legitimate mode for the execution of his decree and is not bound first to resort to execution proceedings.[67]

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60 *Sanjay Khanna* v *Discovery Communications India*, (2003) 114 Comp Cas 229 Del.

61 *Karam Chand Thaper* v *Amar Nath De*, (2002) 108 Comp Cas 581 Cal.

62 S. 434(*b*).

63 *Bows* v *Hope Life Insurance Guarantee Co*, (1865) 11 HL Cases 389: 13 WR 790, cited by the Calcutta High Court in *O. P. Mehta* v *Steel Equipment & Construction Co*, [1967] 1 Comp LJ 172, 182. A winding up court has a larger power to go behind a decree *Bajrangbali Engineering Co Ltd, Re*, [1990] 1 Comp LJ 243: AIR 1989 Cal 356.

64 (1963) 38 Comp Cas 82: [1967] 1 Comp LJ 172.

65 *Bajrangbali Engg Co Ltd* v *Amar Nath Sircar*, (1995) 83 Comp Cas 435 Cal.

66 *Bandedker (S.R.)* v *R. Bandekar (Sirigao) Mines (P) Ltd*, (1997) 88 Comp Cas 673 Bom.

67 *All India General Transport Corpn Ltd* v *Raj Kumar Mittal*, (1978) 48 Comp Cas 604; *Tube Investment of India Ltd* v *Everest Cycles Ltd*, (1984) 55 Comp Cas 165 Gau. Commercial insolvency may be presumed from the company's silence in spite of statutory notice, *Associated Forest Products (P) Ltd* v *KTC (Singapore) plc*, (1993) 1 Cal LJ 382.

*(c) Commercial Insolvency*

Lastly, if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts.[68] In reference to the concept of "unable to pay debts" it has been observed that though it is not necessary that there should be a statutory demand or any demand at all, the court would not be easily satisfied that a company is unable to pay its debts from the mere non-payment of a debt which was never demanded of it.[69] In determining this the court shall take into account the contingent and prospective liabilities of the company. "What has to be ascertained is not whether if all assets were converted into cash, the company would be able to discharge its debts, but whether in a commercial sense the company is solvent." A perusal of the balance-sheet of the company must show that its assets are sufficient to meet its liabilities. If it is not so, the company may be regarded as commercially insolvent. The expression "commercial insolvency" was explained by SIR JAMES in *European Life Assurance Society, Re*.[70] "Not in any technical sense but plainly and commercially insolvent that is to say, that its assets are such and existing liabilities are such, as to make it reasonably certain—as to make the court feel satisfied—that the existing and probable assets would be insufficient to meet the existing liabilities." Thus in *Coimbatore Transport Ltd* v *Governor General in Council*,[71] a company was ordered to be wound up as it was unable to pay its taxes in spite of demands, nor was it able to furnish security. Where the assets of a company were taken over by the State and in reply to the creditors' claims and petitions, the company was only telling them that it was trying to retrieve those assets and there was nothing to show any benefit to the creditors in the continuity of the company, the court ordered winding up.[72] Another illustration is *Sree Shanmaugar Mills* v *Dharmaraja Nadar*:[73]

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68 S. 434(*c*). Particulars of the debt must be given and there should be an averment that the company was unable to pay its debts, *Kalra Iron Stores* v *Faridabad Fabricators (P) Ltd (No 2)*, (1992) 73 Comp Cas 337 Del.

69 *A Company (No 0067980 of 1995) Re*, (1996) 2 BCLC 48 Ch D.

70 9 Eq 122 (1869) at 128. Followed in India in *Cine Industries & Recording Co Ltd, Re*, AIR 1942 Bom 231: 44 Bom LR 387; *Vanaspati Industries Ltd* v *Firm Prabhu Dayal*, AIR 1950 EP 142; *State of A.P.* v *Hyderabad Vegetable Products*, AIR 1963 AP 243. *Gujarat State Financial Services Ltd* v *Megabyte Consultancy Services P Ltd*, (2003) 115 Comp Cas 165, the burden is on the petitioner to show such a state of the company.

71 AIR 1949 Mad 73. *See* also *Bachharaj Factories* v *Hirjee Mills*, AIR 1955 Bom 355, where as against liabilities of Rs 1,41,50,000 assets were only Rs 60,00,000 the Court declared the company to be not only commercially but hopelessly insolvent; *Netravali* v *Chitale Agri Pro Ltd*, [1968] 1 Comp LJ 212 and *Globe New Patent Iron & Steel Co, Re*, (1875) 20 Eq 337, where failure to pay a bill of exchange on maturity was held as evidence of insolvency. *State Bank of India* v *Hegde and Golay Ltd*, (1987) 62 Comp Cas 239 Kant, bank loans and interest remaining unpaid.

72 *Shree Laxmi Traders Ltd, Re*, (1987) 62 Comp Cas 49 Bom. The possibility of a company being able to realise by the sale of its assets an amount exceeding its liabilities is not sufficient to hold that the company is commercially solvent. The test is whether the company shall be able to meet its current liabilities and whether the existing assets would be sufficient to meet the future demands which the company remains a going concern. *Alliance Credit and Investments Ltd* v *Khaitan Hostambe Spinels Ltd*, (1997) 3 Comp LJ 200 All. A cheque was issued by the company by way of repayment of a deposit. The cheque bounced. The company admitted liability and asked for one month time, which was granted but even then could not

> A company resisted a petition on the ground that while its liabilities amounted only to Rs 8,72,414, its assets were of the value of Rs 10,79,130. It was found that these assets included building and machinery, excluding which only a sum of Rs 3,00,000 would be available to discharge the debts.

The court held that the value of such assets without which the company could not carry on business, should not be taken into account. The proper test is whether in a commercial sense the existing liability would be paid by it while it continued to carry on as a company. However, the company is entitled to regard its uncalled capital as money available for the discharge of its debts. Moreover, "where at the relevant time there is reasonable hope of tiding over the difficulty and emerging into a region in which the company might reasonably expect to carry on at a profit", it may not be ordered to be wound up on this ground.[74]

Thus, where past losses were not yet fully wiped out, but the company had made some profit during the year of the petition,[75] and where the company's losses were decreasing every year and it was on the way to make profits, winding up order was refused.[76]

Even where assets are less than liabilities, it does not necessarily follow that the company is insolvent. Where a company was not only able to, but also did meet its claims as and when they arose, winding up was not allowed, although its assets were only worth 6 lakhs as against liabilities of 8.5 lakhs.[77]

The court can also take into account the public interest. The Bombay High Court had to face a case[78] in which a company's business came to a standstill owing to paucity of working capital. The court explained the extent to which public interest has entered into the management of companies and thought it

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pay. It was held that the circumstances created a presumption of inability to pay debts, making the company liable to be wound up. *Arvind Investment Consultant* v *Presto Finance Ltd*, (1997) 14 SCL 256 Guj.

73 AIR 1970 Mad 203. Putting off a creditor under one pretence or the other is a sign of insolvency. *John Paterson & Co* v *Pramod Kumar Jalan*, (1983) 53 Comp Cas 255 Cal.

74 *Sudhiya* v *Bihar National Insurance Co*, AIR 1941 Pat 603. *See* also *Bukhtiarpur Bihar Light Rly Co Ltd* v *Union of India*, AIR 1954 Cal 499; *Bengal Luxmi Cotton Mills Ltd* v *Mahalakshmi Cotton Mills Ltd*, AIR 1955 Cal 273; *J. D. Swain Ltd, Re*, [1965] 2 All ER 761: [1961] 1 Comp LJ 37. *See* also *Steel Equipment & Construction Co, Re*, (1963) 38 Comp Cas 82: [1967] 1 Comp LJ 172, where the Calcutta High Court held that the mere fact that a disputed decree has remained unsatisfied is not a proof of insolvency. "The burden of proof for proving insolvency is on the applicant." *See* also *Krishnaswami* v *Stressed Concrete Construction*, AIR 1964 Mad 191; *Anant Sadashiv Netravali* v *Chitale Agri Products Ltd*, (1968) 38 Comp Cas 292, an insolvent company not heard to say that it had a case pending before the SC.

75 *Cinco Laboratories (P) Ltd, Re*, (1973) 43 Comp Cas 550 Pat.

76 *Registrar of Companies* v *Suraj Bachat Yojna*, (1973) 43 Comp Cas 343 P&H.

77 *Registrar of Companies* v *Janta Lucky Scheme & Investment Co*, (1973) 43 Comp Cas 314 P&H; *Rishi Enterprises, Re*, (1992) 73 Comp Cas 271 Guj, the court allowed the company time to pay. Where there was a complicated dispute between parties which involved a detailed analysis of the financial liability (if any) of the company, a petition to wind up the company was held to be not proper. *Amadues Trading Ltd, Re, The Times*, April 1, 1997: 1997 Palmer in Company, May p. 4.

78 *Bhalchandra Dharmajee Makaji* v *Alcock, Ashdown & Co Ltd*, (1972) 42 Comp Cas 190 Bom.

improper to destroy a company which had worked for nearly 87 years and had acquired experience and expertise in the manufacture of structurals, boat building and ship repairing, and held that the best order to make is to appoint a special officer to collect, realise, preserve and maintain the assets of the company and also to make the necessary investigations.

The section thus splits the concept of inability to pay debts into three points. The Madras High Court has expressed the opinion that these sub-grounds are not mutually exclusive. Consequently, if a creditor has obtained a decree he can claim winding up on any of the points and need not confine himself to the category of decree-holders only.[79]

### 6. Just and equitable

The last ground on which the Tribunal can order the winding up of a company is when "the Tribunal is of opinion that it is just and equitable that the company should be wound up".[80] This gives the Tribunal a very wide discretionary power to order winding up whenever it appears to be desirable. The Tribunal may give due weight to the interest of the company, its employees, creditors and shareholders and general public interest should also be considered.[81] "Though the court is not bound to construe this clause *(ejusdem generis)* as only covering grounds of a like nature with those specified in clauses 1 to 5, yet it will require grounds of a like magnitude before acting under the clause."[82] "For a long period *ejusdem generis* dominated interpretations of the just and equitable provision. But the rule has been entirely abandoned and the words are to be treated as conferring a discretionary power which is of the widest character and the courts are left to work out for themselves the principles on which such orders should be granted.[83] There must be a really strong ground for liquidating a company. Moreover, the Court may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the

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79 See *Thai Mills Ltd* v *N. Perumalsamy*, (1980) 50 Comp Cas 422 Mad. *See* also *Shree Ram Chemicals (P) Ltd, Re*, (1983) 53 Comp Cas 729 AP, where a creditor's petition was converted into a scheme of compromise; *Sarabhai Machinery* v *Haryana Detergents*, [1986] 1 Comp LJ 246 P&H, where the company deposited the principal amount in the court but not the interest due on it, the court nevertheless ordered winding up. *Delhi Cloth & General Mills Co* v *Stepan Chemicals Ltd*, (1986) 60 Comp Cas 1046 P&H. The mentioning of a debt in a company's balance-sheet is an acknowledgment for the purposes of this right and also for the period of limitation. *Dainik Finance* v *Agriculture Industries*, (1986) 60 Comp Cas 180 P&H; *Krishko International* v *Adwait Steel & Metals (P) Ltd*, (1993) 76 Comp Cas 328 Delhi, pending criminal proceedings, the company not showing that its defence would be prejudiced if winding up proceeding was not stayed, no stay granted. Following, *Star Paper Mills Ltd* v *Behari Lal*, AIR 1990 Delhi 241; *Sheriff* v *State of Madras*, AIR 1954 SC 397.

80 S. 433*(f)*. It is also a remedy of the last resort. *Gadadhar Dixit* v *Utkal Flour Mills P Ltd*, (1989) 66 Comp Cas 188 Ori.

81 *See*, for example, *Veeramachineni Seethiah* v *Venkatasubbiah*, AIR 1949 Mad 675; *Cine Industries & Recording Co Ltd, Re*, AIR 1942 Bom 231: 44 Bom LR 387.

82 *Cowasjee* v *Nath Singh Oil Co Ltd*, (1921) 59 IC 524.

83 B. H. McPherson, *Winding up on the Just and Equitable Ground*, (1964) 27 MLR 288. Followed in *Jivabhai M. Patel* v *Extrusion Processes P Ltd*, [1966] 2 Comp LJ 74.

petitioner and he is acting unreasonably in seeking to have the company wound up, instead of pursuing that other remedy.[84]

It is not desirable nor possible to categorise facts that render it just and equitable to wind up a company. "The tendency to create categories or headings is wrong; the general words of the sub-section should remain general and not be reduced to the sum of particular instances."[85] But the circumstances in which the courts have in the past dissolved companies on this ground can be resolved into general categories. And they are as follows:

*(i) Deadlock*

Firstly, when there is a deadlock in the management of a company, it is just and equitable to order winding up. The well-known illustration is *Yenidje Tobacco Co Ltd, Re*:[86]

> *W* and *R*, 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 and, therefore, the articles provided that any dispute would be resolved by arbitration, but one of them dissented from the award. Both then became so hostile that neither of them would speak to the other except through the secretary. Thus there was a complete deadlock and consequently the company was ordered to be wound up although its business was flourishing.[87]

"But the 'just and equitable' clause should not be invoked in cases where the only difficulty is the difference of view between the majority directorate and those representing the minority."[88] The Madras High Court observed on the

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84 S. 443(2). See *Jivabhai M. Patel* v *Extrusion Processes P Ltd*, supra, where though the petition was allowed, the Bombay High Court explained this principle. *Lokenath Gupta* v *Credits P Ltd*, (1968) 38 Comp Cas 599, Cal where despite serious allegations, the court refused this remedy because the alternative remedies were not exhausted. Winding up being a remedy of last resort, compelling circumstances would be needed for the power to be exercised. *Daulat Makanmal Luthria* v *Solitaire Hotels*, (1993) 76 Comp Cas 215 Bom, a tourism company not ordered to be wound up because inspite of difficulties it was at the threshold of commencing business operations.

85 D. D. Prentice, *Winding Up on the Just and Equitable Ground: The Partnership Analogy*, (1973) 89 LQR 107, 108, quoting Lord WILBERFORCE in *Ebrahimi* v *Westbourne Galleries Ltd*, [1972] 2 WLR 1289: [1972] 2 All ER 492, 496.

86 [1916] 2 Ch 426: [1916-17] All ER Rep 1050.

87 Expressly approved by the Privy Council in *Lock* v *John Blackwood Ltd*, 1924 AC 783: [1924] All ER Rep 200 PC; applied: *Davis & Collett Ltd, Re*, [1935] All ER Rep 315: 1935 Ch 693: 5 Comp Cas 467 Ch D; *Lundie Bros, Re*, [1966] 1 Comp LJ 30: [1965] 2 All ER 672: *Expanded Plugs Ltd, Re*, [1966] 1 All ER 877: [1966] 2 Comp LJ 115. Considered: *Jivabhai M. Patel* v *Extrusion Processes Ltd*, [1966] 2 Comp LJ 74. *See* also *Raghunath Prasad* v *Hind Overseas P Ltd*, [1970] 1 Comp LJ 213 where the Cal HC held that if a company can be described as a partnership in the guise of a private company, there is no escape from the proposition that the grounds provided for the dissolution of a partnership shall apply. *Chua Kien How* v *Goodwealth Trading (P) Ltd*, (1993) 1 SCR 486 Malaysia, the only two directors could not agree with each other and could not overrule each other either and the dispute between them as to who was the majority shareholder was the deadlock between them as to the management of the company.

88 *Veeramachineni Seethiah* v *Venkatasubbiah*, AIR 1949 Mad 675.

facts of a case that "where nine or ten directors belonging to different communities unanimously and solidly take one view as against the minority of three holding another view and the company has been earning profits and has accumulated a goodwill, the mere incompatibility of good relations between the rival factions in the directorate is not sufficient for ordering winding up".[89] Similarly, the Calcutta High Court has held that "winding up cannot be ordered on the grounds of friction and disputes between directors; the scramble for power is at the bottom of it all".[90] The courts, however, do not insist on a paralysing deadlock. Indeed, it has been said that "the authorities show that there need not be a deadlock".[91] A justifiable lack of confidence resting on a lack of probity in the conduct of a company's affairs is sufficient to found a winding up order.[92]

*(ii) Loss of Substratum*

Secondly, it is just and equitable to wind up a company when its main object has failed to materialise or it has lost its substratum. A good illustration is *German Date Coffee Co, Re*:[93]

> 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 and also for working other patents of similar kind. The German patent was never granted and the company embarked upon other patents. But, on the petition of a shareholder, it was held that "the substratum of the company had failed, and it was impossible to carry out the objects for which it was formed; and, therefore, it was just and equitable that the company should be wound up".[94]

Similarly, where a company's business had come to a standstill owing to a banker having seized and sold all its assets in the execution of a decree,[95] and where the company's main business of supplying electricity in a particular area was taken over by the State and the company had put the compensation money in fixed

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89 *Ibid. Vasant Holiday Homes P Ltd* v *Madan Prabhu*, (2003) 116 Comp Cas 172 (Bom), where disputes amongst directors had affected their rights and the company was also running at a loss, this was held to be not sufficient to establish a right to seek a winding up order which is a remedy of the last resort. *Cochin Malabar Estates & Industries Ltd* v *P.V. Abdul Khader*, (2003) 114 Comp Cas 777, company not shown to be commercially insolvent, 0.02% shareholder could have sought his redressal elsewhere.

90 A. N. RAY J (as he then was) in *Hind Overseas Ltd. Re*, [1968] 2 Comp LJ 95, where the learned Judge makes an exhaustive review of all English and Indian authorities.

91 See *J. M. Patel* v *Extrusion Processes Ltd*, [1966] 2 Comp LJ 74, at 78.

92 LORD SHAW OF DUNFERMLINE in *Loch* v *John Blackwood Ltd*, 1924 AC 783: [1924] All ER Rep 200 PC.

93 (1882) 20 Ch D 169: [1881-5] All ER Rep 372.

94 *See* also *Haven Gold Mining Co, Re*, (1882) 20 Ch D 151: [1881-5] All ER Rep 585, where a company failed to acquire gold mines it was formed to work.

95 *Davco Products Ltd* v *Rameshwarla*, AIR 1954 Cal 195; *S. Sundaresan* v *Plasto-o-Fibre Industries (P) Ltd*, (1993) 76 Comp Cas 38 Mad, a complete failure. *Chua Kien How* v *Goodwealth Trading (P) Ltd*, (1993) 1 SCR 486 Malaysia, the place which the company wanted to develop as its restaurant was lost, it dispensed with restaurant staff which showed that it had no intention to carry on the restaurant business in general nor had done anything in the last six months to secure any premises.

deposits and did no business for seventeen long years, although it had a long list of objects,[1] winding up was ordered in either case.[2] Where after the filing of the petition on the ground of loss of the main business, the company had embarked upon other subsidiary objects mentioned in its memorandum, the court ordered winding up, because subsequent developments, cannot be taken into account.[3]

However, a temporary difficulty which does not knock out the company's bottom should not be permitted to become a ground for liquidation. For example, in *Steam Navigation Co, Re*:[4]

> A steamship company was incorporated with the principal object of acquiring a firm's business of plying steamers. This business was acquired, but very soon afterwards grave differences arose between the company and the firm. As a result the company had to return seven out of nine steamers acquired from the firm. Subsequently losses were also incurred, yet an application for winding up on the ground of failure of substratum was rejected, as the original objects had not become impossible to attain. The company had bought other steamers and there was nothing to prevent further purchases.[5]

Thus, it is a question of fact in each case whether the substratum of the company is gone or not. In *Seth Mohan Lal* v *Grain Chambers Ltd*,[6] SHAH J (later CJ) of the Supreme Court observed:

> The substratum of a company can be said to have disappeared only when the object for which it was incorporated has substantially failed, or when it is impossible to carry on the business of the company except at a loss, or the existing and possible assets are insufficient to meet the existing liabilities.

In that case owing to a long drawn out litigation the business of a company had come to a standstill and a part of its business was banned by legislation, SHAH J (later CJ) held that "we cannot on that ground direct that the company be wound up. The company could always restart business with assets it possessed."[7] Similarly, in a case before the Calcutta High Court:[8]

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1 *A. Ramachandran* v *Narasaraopet Electric Corpn Ltd*, (1972) 42 Comp Cas 182 AP.

2 *See* also *Lawang Tahang* v *Goenka Commercial Bank Ltd*, (1960) 64 CWN 828.

3 *Rajan Nagindas Doshi* v *British Burma Petroleum Co*, (1972) 42 Comp Cas 197 Bom.

4 (1901) 10 Bom LR 107.

5 *See* also *Murlidhar* v *Bengal Steamship Co*, AIR 1920 Cal 722: 59 IC 542; *Bukhtiarpur Bihar Light Rly Co Ltd* v *Union of India*, AIR 1954 Cal 499.

6 [1968] Comp LJ 275, 285: AIR 1968 SC 772: (1968) 38 Comp Cas 543. *See* also *Bilasrai Juharmal, Re*, AIR 1962 Bom 133: (1962) 32 Comp Cas 215.

7 *Ibid*., at p. 286. *See* also LORD CAIRNS, LJ in *Suburban Hotel Co, Re*, (1866-67) 2 Ch App 737 at p. 750. *See* also *Virendra Singh* v *Nandlal & Sons*, (1980) 50 Comp Cas 54 MP, where the company being insolvent, its directors were busy transferring property to themselves without proper valuation. The court ordered winding up on the ground of loss of substratum; *Bombay Gas Co* v *Hindustan Mercantile Bank Ltd*, (1980) 50 Comp Cas 202 Bom, receiving compensation on merger. *See* also *Syndicate Bank* v *Printersall (P) Ltd*, (1981) 51 Comp Cas 5 Kant, nobody left to take interest in the company.

8 *Bengal Flying Club, Re*, [1966] 2 Comp LJ 213; *Mridula Bhaskar* v *Ishwar Industries Ltd*, (1985) 58 Comp Cas 442 Del, the court refused winding up order only on account of family disputes.

By reason of the acquisition of its assets, a club could not carry on its normal activities.

The court refused a winding up order on the petition of a creditor as it appeared that other club activities were going on. Even where a company had lost its business through nationalisation, the court refused an order on the ground that negotiations for compensation could be better conducted by the directors than by the liquidator.[9] Where the railway business of a company was taken over by the Central Government and with the compensation money and in accordance with its memorandum the company started the business of transporting goods, the Registrar's petition to have it wound up on the ground of loss of substratum was rejected. The Calcutta High Court advised the Registrar that he should have taken into consideration the facts that the company had no creditors, that the shareholders had expressed the intention that the business should be continued and that the company had at its disposal an enormous amount of capital.[10] Where, on the other hand, a substantial minority of shareholders was opposed to the employment of the compensation money to other objects, the court ordered winding up so as to enable the shareholders to walk away with the compensation money which may fall to their share.[11]

*(iii) Losses*

Thirdly, it is considered just and equitable to wind up a company when it cannot carry on business except at losses. It will be needless, indeed, for a company to carry on business when there is no hope of achieving the object of trading at a profit.[12] But a mere apprehension on the part of some shareholders that the assets of the company will be frittered away and that loss instead of gain will result has been held to be no ground.[13] Similarly, the Bombay High Court observed in *Shah Steamship Navigation Co, Re*[14] that "the Court will not be justified in making a winding up order merely on the ground that the company has made losses; and is likely to make further losses."

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9 *Eastern Telegraph Co Ltd, Re*, [1947] 2 All ER 104: (1948) 18 Comp Cas 46. *See* also *Bukhtiarpur Bihar Light Rly Co Ltd* v *Union of India*, AIR 1954 Cal 499; *Lokenath Gupta* v *Credits (P) Ltd*, [1968] 1 Comp LJ 253, at p. 255, where the court also pointed out that "mere mismanagement or misconduct or even misappropriation on the part of directors is no ground for winding up."; *George* v *Athmimattam Rubber*, AIR 1968 SC 772. The mere sale of a company's main plantations does not amount to knocking out the substratum. *Malabar Industrial Co* v *A. J. Anthrapper*, (1985) 57 Comp Cas 717 Ker.

10 *K. G. Ananthakrishnan* v *Burdwan Kutwa Rly Co*, (1978) 48 Comp Cas 211 Cal. Winding up being a remedy of last resort was refused where the company was of socio-economic importance (tourism) and was picking up from its debris. *Daulat Makanmal Luthria* v *Solitaire Hotels*, (1993) 76 Comp Cas 215 Bom.

11 *Nagavararpu Krishna Pd* v *Andhra Bank Ltd*, (1983) 53 Comp Cas 73 AP. Where a company was being operated in total violation of the provisions of the Companies Act, it was ordered to be wound up, *Harikumar Rajah* v *Sovereign Dairy Industries Ltd*, (1999) 32 CLA 335 Mad.

12 A winding up on this ground was ordered in *Bachraj Factories* v *Hirjee Mills*, AIR 1955 Bom 355. *See* also *Bristol Joint Stock Bank, Re*, (1890) 44 Ch D 703; *Davis & Co* v *Burnswick*, [1936] 1 All ER 299; *Registrar of Companies* v *M. K. Bros Ltd*, (1977) 47 Comp Cas 314 All, where the whole of the capital had been wiped out in losses, the Registrar's petition succeeded.

13 See *Mahanmandai Shastra Prakashik Samiti Ltd, Re*, (1917) 15 All LJ 193.

14 (1901) 10 Bom LR 107.

(*iv*) *Oppression of Minority*

Fourthly, it is just and equitable to wind up a company where the principal shareholders have adopted an aggressive or oppressive or squeezing policy towards the minority. The decision of the Madras High Court in *R. Sabapathi Rao* v *Sabapathi Press Ltd*,[15] is an illustration in point. The Court observed:

> 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 outvote 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.

Similarly, where more than seventy per cent of a company's funds were being used for objects wholly removed from anything within the memorandum and ninety-three per cent of the shareholders wished to dissociate themselves from the new objects, the company was ordered to be wound up.[16] In *Loch* v *John Blackwood Ltd*,[17] the Privy Council ordered the winding up of a company because the managing director refused to hold meetings or to pay dividends, perhaps, with a view to squeezing out the minority by purchasing their shares at an under value.

(*v*) *Fraudulent Purpose*

It is just and equitable to wind up a company if it has been conceived and brought forth in fraud or for illegal purposes. Thus in *Universal Mutual Aid and Poor Houses Association* v *Thopa Naidu*[18] the Madras High Court observed:

> Where the main object of a company is the conduct of a lottery, the mere fact that some of its objects were philanthropic will not prevent the company from being ordered to be wound up as being one formed for an illegal purpose.

But "the mere fact of there having been a fraud in promotion, or fraudulent misrepresentation in the prospectus, will not be sufficient to found a winding up order, for the majority of shareholders may waive the fraud".[19] Similarly, a fraud against third parties would not provide a ground for winding up.[20]

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15 AIR 1925 Mad 489. *See* also *Sabapathi Press Ltd* v *Sabapathi Rao*, AIR 1930 Mad 240.

16 *Tivoli Free, Re*, [1972] VR 445; Current Law, Sept. 1972, D 30.

17 1924 AC 783: [1924] All ER Rep 200 PC.

18 AIR 1933 Mad 16: 139 IC 644.

19 *Oriental Navigation Co* v *Bhanaram Agarwala*, AIR 1922 Cal 365: 69 IC 241. *S Palaniappan* v *Tirupur Cotton Spinning & Weaving Mills Ltd*, (2003) 114 Comp Cas 288 Mad, allegations of fraud in sale of the company's assets and issue of further capital, the court said that the CLB (now Tribunal) could have been approached for remedy against such conduct. Winding up is not ordered unless an equally effective alternative remedy is exhausted.

20 *Haven Gold Mining Co, Re*, (1882) 20 Ch D 151: [1881-5] All ER Rep 585.

*(vi) Incorporated or Quasi-Partnership*

It has been observed that "there is little in common between the giant corporation and the family or one-man company. To apply the same legal requirements to such different organisations is productive of inconvenience and injustice."[21] In order to avoid such "inconvenience and injustice" the Act treats them differently in several respects. But even in matters in which the Act treats them alike, the courts have had to distinguish them. One such matter is the interpretation of the "just and equitable" clause in reference to the winding up of a small private company. The principle that seems to emerge from a long line of cases culminating in the House of Lords' decision in *Ebrahimi* v *Westbourne Galleries Ltd*,[22] is that where a private company is in essence or substance a partnership, it may be ordered to be wound up under the just and equitable clause as interpreted in accordance with the partnership principles.[23] The underlying mutual duties and rights of co-partners survive even when they become co-members. As Lord WILBERFORCE observed:[24]

> There is room in company law for recognition of the fact that behind the company, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not strictly submerged in the company structure.

*Yenidje Tobacco Co Ltd, Re*,[25] is itself an application of the partnership principles, for the company in that case was ordered to be wound up not merely because of the deadlock between the two member-directors, but because they had forfeited mutual confidence beyond repair.

According to Lord WILBERFORCE[26] a private company can be treated as an incorporated partnership if it possesses one or probably more of the following elements:

> (*i*) An association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (*ii*) an agreement, or understanding, that all, or some (for there must be sleeping members) of the shareholders shall participate in the conduct of the business; and (*iii*) restriction on the transfer of the members' interest in the

21 R. S. Nock, *The Ford Foundation Workshop on Company Law, July 1969*, (1970) 11. The Journal of the Society of Public Teachers of Law, 1, 7.

22 [1972] 2 WLR 1289: [1972] 2 All ER 492.

23 The decision has provoked a lot of favourable academic discussion. *See*, in particular, M. R. Chesterman, *The "Just and Equitable" Winding up of Small Private Companies*, (1973) 36 Mod LR 127; D. D. Prentice, *Winding Up on the Just and Equitable Ground: The Partnership Analogy*, (1973) 89 LQR 107; *Minority Shareholder's Oppression*, (1973) 89 LQR 338; N. A. Bastin, *Minority Protection in Private Companies*, (1973) New LJ 473; Trebilock, *A New Concern for the Minority Shareholder*, (1973) 17 McGILL LJ 106; L. H. Leigh, *Just and Equitable Winding Up*, (1972) 88 LQR 468; Kenneth Polak, *Companies Winding Up on Just and Equitable Ground*, 1972 Comp LJ 225.

24 [1972] 2 WLR 1289, 1294: [1972] 2 All ER 492; adopted by the Supreme Court in *Needle Industries (India) Ltd* v *Needle Industries Newey (India) Holding Ltd*, (1981) 3 SCC 333 at 366: (1981) 51 Comp Cas 743: AIR 1981 SC 1298.

25 [1916] 2 Ch 426: [1916-17] All ER Rep 1050.

26 *Ebrahimi* v *Westbourne Galleries Ltd*, [1972] 2 WLR 1289: [1972] 2 All ER 492, 500.

company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.[27]

"To this there might be also added the characteristics that the company's profits will be distributed in the form of salaries rather than 'the financially extravagant method of paying dividends'."[28] In *Atul Drug House Ltd, Re*[29], the Gujarat High Court suggested that the partnership analogy will apply only when a private company is a domestic concern. The court accordingly refused to apply the analogy to a private company whose shares were held by two different families. The decision seems to be somewhat unreal, for even a partnership may consist of different families.[30] A Division Bench of the Calcutta High Court in *Ragunath Prasad Jhunjhunwala* v *Hind Overseas (P) Ltd*,[31] ordered the winding up of a private company consisting of two groups. The court found that the original idea was to start a partnership venture. This was shown by their correspondence and a banking account opened by them. The shareholding of the two groups was not equal, but it was clear that the members of one group were functioning as working partners and those of the other as financial. But on appeal to the Supreme Court this decision was reversed.[32] The court laid emphasis upon the fact that the *Ebrahimi* principle would apply when the company is in substance a partnership. In this case, on the other hand, the idea of forming a partnership was abandoned at the very initial stage. The concern came into existence directly as a company. It had divergent interests in it and not merely the interests of a family or two. The exclusion from directorship in such cases cannot be a proper ground for putting the company to an end.

Once it is proved that a private company is analogous to partnership, it may be ordered to be wound up when there is an abuse of power or breach of good

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27 The articles of the company must carry provisions which speak of the parties' intention to maintain a structure of relations analogous to those of a partnership. *Gadadhar Dixit* v *Utkal Flour Mills (P) Ltd*, (1989) 66 Comp Cas 188: [1988] 2 Comp LJ 45 Ori. A whimsical conduct cannot be permitted to be used as a ground for wrecking a company. *B. V. S. S. Mani* v *Kowtha Business Syndicate (P) Ltd*, (1989) 65 Comp Cas 305 AP.

28 D. D. Prentice, *Winding Up on the Just and Equitable Ground: The Partnership Analogy*, (1973) 89 LQR 107, 114. The in-quote is from PLOWMAN J in *Westbourne Galleries, Re*, [1971] Ch 799, 808: [1971] 1 All ER 561. Where a company was in the nature of a partnership and was formed on the basis that a certain person would be a director, his removal from his position as a director was held to be a ground for winding up. *S. Sundaresan* v *Plasto-o-Fibre Industries (P) Ltd*, (1993) 76 Comp Cas 38 Mad. The company was otherwise also in a state of hopelessness. The court distinguished the matter from *G. Kasturi* v *N. Murali*, (1992) 74 Comp Cas 661, it was a family dispute between the directors and editors of the "Hindu" which had wider public representation.

29 (1971) 41 Comp Cas 352 Guj. The principle of this case was applied in *Kiran Sandhu* v *Saraya Sugar Mills*, (1998) 91 Comp Cas 146 All.

30 Re-affirmed, *Navnitlal M. Shah* v *Atul Drug Houses Ltd*, (1977) 47 Comp Cas 136 Guj.

31 (1971) 41 Comp Cas 308 Cal. Overruling the decision of A. N. RAY J (as he then was), (1971) 41 Comp Cas 279. The learned Judge reviews all the English authorities at pp. 290-303. *See* also *Fildes Bros Ltd, Re*, [1970] 1 WLR 592, 596-597: [1970] 1 All ER 923.

32 *Hind Overseas P Ltd* v *R. P. Jhunjhunwala*, (1976) 46 Comp Cas 91: [1976] 2 SCR 226: AIR 1976 SC 565.

faith which partners owe to each other.[33] Breach of articles will be sufficient to lead to a dissolution. For example, in *American Pioneer Leather Co, Re*:[34]

> The articles of a small private company, consisting of only three members two of whom were directors, provided that any member willing to withdraw would offer his interest to the other members and in the event of their refusal to purchase, would be entitled to have the company wound up. The company was accordingly ordered to be wound up when the other members refused to purchase the shares of the petitioner.

Partners have the right to participate in the management of the business. If this right is denied to any director of an incorporated partnership, it would afford a ground for dissolution.[35] Entitlement to management participation in a small private company is an obligation so basic that if it is broken, the association must be dissolved. Three shareholders of a company had an equal holding with power to nominate directors. One of them sought to change his nominee which was not accepted by the others. It was held to be just and equitable to dissolve the company.[36]

Where the conduct of those in control is in accordance with the company's articles, the court would be slow to interfere. *Cuthbert Cooper & Sons Ltd, Re*[37] is an illustration of a situation of this kind, though after the decision of the House of Lords in *Ebrahimi* v *Westbourne Galleries Ltd*,[38] it seems to have lost its authority. The facts were:

> Half of the capital of a private company belonged to a father and the other half to his two elder sons. His three younger sons were employed in the company. The father died bequeathing his shares equally between his younger sons. The senior ones not only refused to accept the juniors as members, but also removed them from the company's employment and refused to supply them with copies of the company's accounts.

Even so it was held that the circumstances did not warrant an order for dissolution. "The conduct complained of ... was in all respects in accordance with the company's articles and was not shown to be *mala fide*."[39]

This decision has been adversely commented upon by the House of Lords in *Ebrahimi* v *Westbourne Galleries Ltd*.[40] It failed to take account of the fact that co-partners can have rights, expectations and obligations apart from articles and "which are not necessarily merged in the company structure". Secondly, there are circumstances in which even the exercise of legal rights as laid down in the

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33 *See* Lindley, ON PARTNERSHIP, 588-589 (13th Edn, 1971).

34 [1918] 1 Ch 556: 118 LT 695.

35 *Davis & Collett Ltd, Re*, [1935] All ER Rep 315: 1935 Ch 693: 5 Comp Cas 467 Ch D; *Zinotty Properties Ltd, Re*, [1984] 1 WLR 1249: [1984] 3 All ER 754, where not only there was exclusion from directorship, the member was kept deprived of any information about the vital matters of the company, which was founded on their mutual trust.

36 *A & BC Chewing Gum, Re*, [1975] 1 WLR 579: [1975] 1 All ER 1017.

37 [1937] Ch 392.

38 [1972] 2 WLR 1289: [1972] 2 All ER 492.

39 M. R. Chesterman, *'Just and Equitable' Winding Up*, (1973) 36 Mod LR at 135.

40 (1972) 2 WLR 1289: [1972] 2 All ER 492.

articles may amount to breach of faith, for it may go "outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company".[41] "Articles are not the whole story; if something done in accordance therewith infringes some extraneous agreement or understanding between the parties of the quasi-partnership company, it may provide grounds for a winding up."[42] The recognition of this fact is the chief contribution of the decision of the House of Lords in the *Westbourne Galleries* case.[43] Even before this, PLOWMAN J in *Lundie Bros Ltd, Re*, ordered the winding up of a private company when a member was removed from his post as a working director. *Westbourne Galleries Ltd, Re*,[44] again presented the same kind of story before PLOWMAN J:

> *E* and *N* started business together as dealers in Persian and other carpets. *N* provided the greater part of the capital. Subsequently they incorporated a private company, holding equal shares. Still subsequently, *N*'s son joined the company taking equal number of shares both from *E* and *N*. All the three were wholetime directors. They received remuneration as directors rather than dividends as members. *N* did not treat *E* as his equal. *E* complained that *N* imported carpets from Persia and sold them to the company at artificially high prices and that the company was paying for his antique business. *N* and his son, acting as majority shareholders, removed *E* from directorship. Thus his investment became useless as he could neither transfer it nor receive any dividends on it.

Even so PLOWMAN J held that he was not entitled to any relief against oppression, because he had suffered as a director and not as a member. The learned Judge, however, held that the conduct of the majority in excluding him from participation in the management only because he was perpetually complaining was an abuse of power and a breach of good faith, which entitled him to a winding up order. The Court of Appeal reversed that aspect of the decision but the House of Lords restored it. Lord WILBERFORCE, who delivered the leading speech, was of the opinion that the principles in this area should be developed as part of company law and not that of partnership law. Such principles may be parallel to those of partnership law and may be applied to private companies possessing partnership features.[45]

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41 *Wondoflex Textiles (P) Ltd, Re*, [1951] VLR 458.

42 M. R. Chesterton, (1973) 36 Mod LR at 135.

43 (1972) 2 WLR 1289.

44 [1970] 1 WLR 1378: [1970] 3 All ER 374. See *S. S. Rajakumar* v *Perfect Castings Ltd*, (1968) 38 Comp Cas 187 Mad, where the court refused to order winding up when a director was removed from office even though the members of the small private company had orally agreed that the company would function as a partnership.

45 Serious disputes between members making it impossible for business to be carried on could have the same effect. *R. P. Shah* v *Engineers' Enterprises (P) Ltd*, (1977) 47 Comp Cas 294 Bom. Henry E. Markson, *Winding Up: The Partnership Analogy*, 1978 New Law Journal 115; *See* also *A & BC Chewing Gum, Re*, [1975] 1 WLR 579, 590-91: [1975] 1 All ER 1017, breach of agreement. Where the relations registered an irretrievable breakdown, the court ordered winding up giving the option to one family group to buy out the other. *Krishan Lal Ahuja* v *Suresh Kumar Ahuja*, (1983) 53 Comp Cas 60 Del; *Moti Films (P) Ltd* v *Harish Bansal*, (1983) 54 Comp Cas 856 Del, where also the court found no evidence of mutual cooperation between family members. *S. Sundaresan* v *Plast-o-Fibre Industries (P) Ltd*,

Following this case, the High Court of Delhi has pointed out that what matters is not whether a member has been expelled or not, but whether there has been breach of mutual understanding. Thus where the understanding was that parity of shareholding was to be maintained, it was held that an attempt by one group to take-over the company by increasing its shares would enable the court to exercise its powers.[46]

### *Public Interest*

Winding up can also be ordered under this section when public interest demands it. A type of conduct which comes in conflict with public interest is indicated in a Court of Appeal decision in England.[47] The company in question had no proper records; it pretended to be an impartial adviser in matters of investment when, in fact, it was only a share-vending company; the American companies in which the clients were advised to invest their moneys were such whose share could not be easily traded and the company was also violating its investment agreement. The court was of the view that public interest demanded winding up of a company which was wasting the capital resources of the country. It was not material that the company had already suspended its business, because, if the company was permitted to remain alive, it may again start befooling small investors.[48] Where the company's business was unlawful because of lack of authorisation under the Financial Services Act, 1986 [English] and there was no evidence of the possibility of grant of such authorisation in the future, the court ordered winding up.[49] Another company was ordered to be wound up in public interest because the company posed danger to the investing public and was also technically insolvent.[50]

The sanction of winding up being too severe was not inflicted on a company which had committed inadvertent breaches of Air Traffic Licencing Regulations. The court said that even deliberate breaches might not have justified the extreme penalty of winding up.[51]

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(1993) 76 Comp Cas 38 Mad, removal of a director of a private company in breach of understanding, held a good ground. This would not be so where the company is a big one, *G. Kasturi* v *N. Murali*, (1992) 74 Comp Cas 661. Providing directorship to the daughter of the deceased managing director of the company, not wrong in the circumstances, *Anisha K. Shah* v *Fostenex (P) Ltd*, (1995) 17 Corpt LA 5 Mad: AIR 1995 Mad 67: (1995) 82 Comp Cas 514.

46 *Bhaskar Stoneware Pipes (P) Ltd* v *R. N. Bhaskar*, (1988) 63 Comp Cas 184 Del. Above all, the matter being entirely in the discretion of the court, an order may be passed where neither the one group of shareholders nor the other have been guilty of any prejudicial conduct, if it is otherwise in the fitness of things. *A Company, Re, (No 00370 of 1987)*, [1988] 1 WLR 1068. See the Supreme Court decisions in *Industrial Credit and Investment Corpn of India* v *Srinivas Agencies*, (1996) 4 SCC 165: (1996) 86 Comp Cas 255 SC, where the factors governing the grant of leave to a secured creditor have been recounted. See *Kiran Sandhu* v *Saraya Sugar Mills Ltd*, (1998) 91 Comp Cas 146 All, where none of the just and equitable grounds were available.

47 *Walter L Jacob & Co Ltd, Re*, 1989 BCLC 345 CA.

48 Another example of the same kind, *A Company, Re, (No 001951 of 1987)*, 1988 BCLC 182 CLD.

49 *Market Wizard Systems Ltd, Re*, [1998] 2 BCLC 282 Ch D.

50 *Secretary of State for Trade and Industry* v *Metric Components plc*, Palmer in company, June 2000 at p. 5.

51 *A Company Re, (No 5669 of 1998)*, [2000] 1 BCLC 427 Ch D, affirmed by the Court of Appeal in *Time Travel (UK) Ltd, Re*, March 2000, CA.

An order of winding up may be refused when it would operate against public interest. Where a company was running profitably and had a muster-roll of 700 workers who opposed winding up, a creditor's petition for winding up was rejected.[52]

*(vii) Default in filing balance-sheet, etc*

According to Section 433(*g*)[53], if the company has made a default in filing with the Registrar its balance-sheet and profit and loss account or annual return for any 5 consecutive financial years, the company may be wound up by the Tribunal.

*(viii) Acts of company against Sovereignty and integrity of India*

A company may be wound up if it has acted against the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality. [S. 433(*h*)]. For winding up a company for its acts against sovereignty and integrity of India, it is necessary that the application under this clause should be made by the Central Government or a State Government.

*(ix) Winding up under circumstances of S. 424-G*

A company may be wound up by the order of the Tribunal if it is of the opinion that the company should be wound up under the circumstances specified in Section 424-G as a sick industrial company.

*Existence of alternative remedy*

The remedy of winding up is a remedy of last resort. It may not be allowed where an equally effective alternative remedy is available. Allegations of misuse of funds, fraudulent transactions, removal of a director under a forged resignation, failure to supply essential documents to shareholders, increase in remuneration of directors without general body approval, illegal allotments of shares, could have been taken care of by a petition under Section 398 against mismanagement of the company's affairs. A petition for winding up was not entertained.[54]

**Who can apply [S. 439]**

An application to the court for the winding up of a company is made by a petition.[55] A petition may be presented by any one of the following:

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52 *Manjulabai* v *Jayant Vitamins Ltd*, (1991) 71 Comp Cas 443 MP.

53 Companies (Second Amendment) Act, 2002 has substituted new Section 433 in which three new grounds (*g*), (*h*) and (*i*) have been added on which a company may be wound up.

54 *M. Mohan Babu* v *Heritage Foods India Ltd*, (2002) 108 Comp Cas 771 AP; *K. Mohan Babu* v *Heritage Foods India Ltd*, (2002) 108 Comp Cas 793 (AP), internal squabbles among directors, not a ground for winding up. It could have been resolved through other forums. The petitioner must show that he had exhausted other remedies or that the other remedies would not have been helpful. *Takshila Hospital* v *Jagmohan Mathur*, (2003) 115 Comp Cas 343 Raj, need for resorting to alternative mechanism emphasised. *K. Venkateswara Rao* v *Phoenix Share & Stock Brokers P Ltd*, (2003) 115 Comp Cas 818 Bom, no proof of allegations of lack of probity, etc.

55 A petition can be filed through a special power of attorney and not through a general power. *Shantilal Khushaldas & Bros (P) Ltd* v *C. S. Shah*, (1993) 77 Comp Cas 253 Bom. Petition

### 1. *Petition by Company*

The company may itself present a petition for winding up. Petition by the company will be particularly necessary when the only ground for winding up is that the company has passed a special resolution to that effect. There must be a valid resolution to enable the company to take this step. Thus, where a judge passed an order for winding up on the ground that the majority of the shareholders at a meeting were in favour of winding up, it was held that that was not, in the absence of a valid special resolution, a sufficient ground for compulsory winding up.[56] Again, the petition must be presented by the company itself. Where, for example, in *Patiala Banaspati Co, Re*:[57]

> An application for winding up of a company was made by the managing director of the company. Rejecting the petition the court said, "the petition by the company must have behind it the decision of the general meeting. The managing director or directors cannot constitute the company for the purpose."

Where a winding up petition was filed on behalf of the company by a person who was not authorised by the board of directors, the petition was held to be incompetent.[58]

### 2. *Creditor's Petition* [S. 439(2)]

A creditor may apply for winding up.[59] The word "creditor" includes a secured creditor, debenture-holder[60] and a trustee for debenture-holders. Accordingly "a secured creditor is as much entitled as of right to file a petition as an unsecured creditor".[61] "Winding up is equally good whether it is obtained by a secured creditor or an unsecured creditor."[62] It is not even necessary for a secured creditor to apply that he should give up his security.[63] But where a petition is brought by a contingent or prospective creditor, it shall not be admitted unless the leave of the court is obtained for its admission. Such leave is not to be granted unless the court is satisfied that there is a *prima facie* case for winding up the company and reasonable security for costs has been given.[64] The

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would lie in the Bench of the High Court in whose jurisdiction the registered office of the company is situate and not in the Principal Bench of the High Court, *Vimal Kumar* v *Bhilwara Wooltax Ltd*, (1993) 1 Raj L W 554: (1993) 2 Raj LR 289.

56 *Oriental Navigation Co* v *Bhanaram Agarwala*, AIR 1922 Cal 365: 69 IC 241.

57 AIR 1953 Pepsu 195.

58 *BOC India Ltd* v *Zinc Products & Co (P) Ltd*, (1996) 86 Comp Cas 358 Pat.

59 A joint petition by several creditors paying single court fee has been held to be valid, *A. V. Krishna* v *Karnataka Leasing & Commercial Corpn Ltd*, (1995) 83 Comp Cas 764 Kant.

60 For the right of the debenture-holder, see *Narotamdas T. Toprani* v *Bombay Dyeing and Mfg. Co Ltd*, [1986] 3 Comp LJ 179 Bom.

61 *Karnataka Vegetable Oils & Refineries Ltd* v *Madras Industrial Investment Corpn*, AIR 1955 Mad 582.

62 JESSEL MR in *Moor* v *Anglo-Italian Bank*, (1897) 10 Ch D 681. Where a part of the claim of the secured creditor was satisfied out of the sale proceeds of the security (goods pledged), he was allowed to file a petition, being still a creditor. *Vyasa Bank Ltd* v *Universal Investment Trust Ltd*, [1990] 1 Comp LJ 353 Delhi.

63 *India Electric Works, Re*, [1969] 2 Comp LJ 169.

64 S. 439(8). Where a contingent creditor's petition, filed after obtaining leave was dismissed on a

Calcutta High Court has observed that a creditor would not ordinarily be heard to urge that winding up order should be made because the substratum of the company was gone, not for the reason that he was technically and as a matter of law barred from taking that ground at all, but for the reason that it was not proper ground for the creditor to urge except in very special circumstances.[65] Sometimes a creditor's petition is opposed by other creditors. In such cases the court may ascertain the wishes of the majority of the creditors. But their opinion does not bind the court. The question will ultimately depend upon the state of the company. If the company is commercially insolvent and the object of trading at a profit cannot be attained, winding up order would follow as a matter of course *(ex debito justitiae)*.[66]

A creditor who is pursuing his ordinary remedy of a civil suit for the enforcement of his claim can also make the same claim as a ground for winding up. The court may order the stay of his suit but cannot disqualify him on that ground.[67] The pendency of an application filed by the creditor before the Debt Recovery Tribunal did not affect the jurisdiction of the court (now Tribunal) to admit the creditor's petition for winding up.[68]

A foreign creditor can also apply for winding up. A company did not pay its foreign commission agent. He asked for winding up. The company's defence that Reserve Bank permission was necessary did not appeal to the court. It was a part of the company's duty to make necessary arrangements.[69] A guarantor is a prospective creditor and has a right to apply for winding up.[70] An individual note holder holding beneficially through a depository was held to be a creditor for the purpose of filing a petition.[71] The court (now Tribunal) also added that "securities" for the purposes of the Act need not only be those which are marketable in India.

Where the claim of a creditor is enforceable at the time of the petition, it does not matter if it ceases to be enforceable by the time of the order.[72]

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technical ground, he was allowed to proceed again without having to obtain a fresh leave. *Pioneer Tubwell Industries (P) Ltd* v *SIP Resins Ltd*, [1990] 1 Comp LJ 110 Cal.

65 *Bengal Flying Club, Re*, [1966] 2 Comp LJ 213, following *Bukhtiarpur Bihar Light Rly Co Ltd* v *Union of India*, AIR 1954 Cal 499. A shareholder of a private company, who broke out from the only other shareholder, was incidentally a lender to the company also and filed a creditor's petition for winding up on the ground of breakdown of relations and the same was not allowed. *A Company (No 003028 of 1987) Re*, 1988 BCLC 282 CLD.

66 *Ibid.* This ruling of the Cal HC is opposed to that of the Madras HC in *Karnataka Vegetable Oils & Refineries Ltd* v *Madras Industrial Investment Corpn*, AIR 1955 Mad 582 which followed the English authority of *Moor* v *Anglo-Italian Bank*, (1879) 10 Ch D 681.

67 *Central Bank of India* v *Sukhani Mining Industries*, (1977) 47 Comp Cas 1 Pat.

68 *Viral Filaments Ltd* v *Indus Ind Bank Ltd*, (2003) 113 Comp Cas 85 Bom.

69 *Eurometal Ltd* v *Aluminium Cables and Conductors (P) Ltd*, (1983) 53 Comp Cas 744 Cal.

70 *Kermeen Foods (P) Ltd, Re*, (1985) 58 Comp Cas 156 Guj.

71 *Essar Steel Ltd* v *G. Emerging Market Fund*, (2003) 116 Comp Cas 248 Guj.

72 *Diwan Chand Kapoor* v *New Rialto Cinema (P) Ltd*, (1987) 62 Comp Cas 810 Del. *Anil Pratap Singh* v *Onida Sawak Ltd*, (2002) 112 Comp Cas 701 (Del) time-barred debt, petition not allowed.

An unpaid worker is not a creditor for this purpose. The union of workers has also no *locus standi* to file a petition because there are alternative remedies under industrial laws.[73]

An unregistered firm, being not competent to file a suit, was not allowed to file a petition unless the partners also joined it.[74]

### 3. *Contributory's Petition*

On the commencement of the winding up of a company, its shareholders are called contributories.[75] Any contributory or contributories may present a petition for winding up.[76] Where the ground of winding up is the reduction in membership below the statutory minimum, any contributory or contributories may apply.[77] But when the application is founded on any other ground, it will be requisite that the shares in respect of which the petitioner is contributory were originally allotted to him or he has been the registered holder[78] for at least six months during the eighteen months immediately before the commencement of the winding up, or the shares have devolved on him through the death of a former holder. In a recent case:[79]

> A transfer had been executed, stamped and dated in June 1967; the company did not register it until October, 1968. A petition presented by the shareholder in December, 1968 for winding up was held demurrable as she had not held her shares for six months as required by the Act.

But where a company had been ordered to allot shares and had failed to do so, it was held that the person in whose favour the order had been made was qualified to apply.[80]

A question in this connection used to concern the courts in the past. Suppose, there is a contributory holding fully paid-up shares so that his liability is nil. Similarly, suppose, the company has no or insufficient assets so that the contributories will get no return of capital in the winding up. In such circumstances, a contributory's petition would be rejected. The rule was that

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73 *Mumbai Labour Union* v *Indo French Industries Ltd*, (2002) 110 Comp Cas 408 Bom.

74 *Deb Paints P Ltd* v *Universal Lime Industries*, (2002) 110 Comp Cas 429 Cal.

75 S. 426. *Naresh Kumar Agarwal* v *Davender Kumar Mittal*, (1996) 62 Delhi LT 595, the court will not go into inquiring whether the petitioner was shareholder to a certain extent. *Shakuntala Bali* v *Eastern Linkers (P) Ltd*. (1995) 60 Delhi LT 497, established shareholding through legal decision, cannot be reopened.

76 S. 439(1) *(c)*. Where a joint petition was filed by a contributory and a creditor, only the latter petition was taken up; contributory-director was not able to establish a cause by the fact that he was removed from membership. *B. P. Gupta* v *Standard Enamel Works (P) Ltd*, (1987) 62 Comp Cas 36 Del.

77 S. 439(4)*(a)*.

78 S. 439(4)*(b)*. Shares must be registered in the contributory's name. The Mad HC in *Nagoslakshmi* v *Mannar Guddi Transports*, [1968] 1 Comp LJ, declined an applicant on whom shares had only devolved and had not been registered in his name.

79 *Gattopardo Ltd, Re*, [1969] 2 All ER 344: [1969] 1 WLR 619. *Vasant Holiday Homes P Ltd* v *Madan V. Prabhu*, (2003) 116 Comp Cas 172 Bom, where this requirement was not proved by the contributory who petitioned for winding up. *Naranbhai R. Patel* v *Ol, Gujarat State Textile Corpn Ltd*, (2003) 114 Comp Cas 642 Guj, claim for advocate's fee filed after six years, not entertained.

80 *Patent Steam Engine Co, Re*, (1878) 8 Ch D 464.

"if he presents a petition, he must allege and prove, at least to the extent of a *prima facie* case, that there are assets of such amount as that in the winding up he will have a tangible interest".[81] The rule was followed by some High Courts in India also.[82] But now there is a clear provision in the Act which declares that "a contributory shall be entitled to present a petition for winding up, notwithstanding that he may be the holder of fully paid-up shares or that the company may have no assets at all, or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities".[83] Hence, at present, "want of assets may be an element in determining whether the petition is *bona fide*, but, except to that extent, it will not be a relevant consideration for determining whether winding up should be ordered or not".[84]

But in England the rule has been re-affirmed by BUCKLEY J in a case,[85] where he said:

> In my judgment it remains a rule of this court that where a fully paid shareholder petitions for compulsory winding up he must show, on the fact of his petition, a *prima facie* probability that there will be assets available for distribution amongst the shareholders.

Following this, PLOWMAN J rejected a contributory's petition on the ground that the company was "hopelessly insolvent".[86]

A shareholder filed a petition for a winding up order on the ground that he had been misled by representations in the company's prospectus. The court returned his petition with the remark that an alternative remedy was available to him under Section 62 of the Act.[87]

### 4. *Registrar's Petition* [S. 439(5)]

The Registrar of Companies is also entitled to present a petition for winding up on any of the grounds of winding up by the court, except the first, namely, that the company has passed a special resolution. But he shall not present a petition on the ground of the company's inability to pay its debts "unless it appears to him either from the financial condition of the company as disclosed

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81 Buckley on COMPANIES ACTS, 9th Edn, 321. For English authorities, see *The Patent Artificial Stone Co, Re*, 34 LJ Ch 330; *Lancashire Brick & Tile Co, Re*, 34 LJ Ch 331; *Rica Gold Washing Co, Re*, (1879) LR 11 Ch D 36; *Diamond Fuel Co, Re*, (1879) 13 Ch D 400; *Iron Colliery Co, Re*, (1882) 20 Ch D 442. For a criticism of this rule *see* Gwyneth Pitt, *Winding Up on the Just and Equitable Ground*, (1977) New Law Journal 619 discussing *Chesterfield Catering Co Ltd, Re*, [1976] 3 All ER 294, where the petition of the executors of the deceased shareholder was rejected only on the ground that there would be no surplus assets, though the company which ran a club was for all intents and purposes dead and though the executor stated that he was not able to administer the estate unless the affairs of the moribund company were sorted out.

82 *See*, for example, *Bharat Bank* v *Lajpat Rai Sawhney*, AIR 1950 EP 328; *Imperial Oil Soap & General Mills Ltd* v *Ram Chand*, AIR 1916 Lah 78(2).

83 S. 439(3).

84 For authorities see *Sri Nataraja Textile Mills Ltd* v *S. V. Angidi Chettair*, [1954] 1 MLJ 468; *Cine Industries & Recording Co Ltd, Re*, AIR 1942 Bom 231: 44 Bom LR 387.

85 *Othery Construction Co, Re*, [1966] 1 All ER 145, 147: [1966] 2 Comp LJ 46.

86 *Expanded Plugs Ltd, Re*, [1966] 1 All ER 877: [1966] 2 Comp LJ 115.

87 *Prashant Kushalchand Shah* v *Rinku Polychem Ltd*, (2000) 100 Comp Cas 170 Bom.

in its balance-sheet[88] or from the report of a special auditor appointed under Section 233-A or an inspector appointed under Section 235 or 237, that the company is unable to pay its debts". In all cases, however, the Registrar has to obtain sanction of the Central Government to the presentation of a petition and the latter shall not grant the sanction unless the company has been afforded an opportunity to make its representation, if any.[89]

5. *Central Government's Petition*

The Central Government is also authorised by the Act, in certain cases, to present a petition for winding up. Section 243 enables the Government to petition for winding up where it appears from the report of inspectors appointed to investigate the affairs of a company under Section 235 that the business of the company has been conducted for fraudulent or unlawful purposes as explained in sub-clauses (*i*) and (*ii*) of clause (*b*) of Section 237.[90] The Government may authorise any person to act on its behalf for the purpose.[91]

6. *Central Government or State Government's petition*

If a case falls under Section 433(*h*) (anti-national acts), the Central Government or the State Government may apply to the Tribunal for winding up of a company [S. 439(1)(*g*)].[92]

**Petition where company under voluntary winding up [S. 440]**

*Conversion of voluntary winding up into winding up by Tribunal*

A petition for an order of winding up by the Tribunal may be presented where the company is already under voluntary liquidation. Such a petition may be presented by any one of those specified in S. 439 or by the Official Liquidator. The Tribunal will make such an order only when convinced that the liquidation already under process cannot be continued with due regard to the interests of creditors or contributories or both. In a case of this kind, the court (now Tribunal) found that the conduct of the creditors' meeting was totally unsatisfactory. The manner of appointment of liquidator justified serious complaints by creditors. The applicant might have a genuine sense of injustice if the voluntary liquidator continued to function. The need of investigation of the affairs of the company could have been better fulfilled by the official liquidator. Winding up by court (now Tribunal) was ordered.[93]

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88 Such condition was evident in *Registrar of Companies* v *Navjivan Trading & Finance (P) Ltd*, (1978) 48 Comp Cas 402 Guj.

89 S. 439 (6). It has been held by the Calcutta High Court in *Standard Brands Ltd, Re*, (1980) 50 Comp Cas 75 Cal, that the petition must be presented within three years from the date of sanction, otherwise it would become time-barred, S. 137 of the Limitation Act being applicable.

90 S. 439(1) (*f*). See under INVESTIGATION, *ante*.

91 S. 243.

92 Companies (Second Amendment) Act, 2002 has inserted a new clause (*g*) in S. 439(1).

93 *Inside Sport Ltd, Re*, [2000] 1 BCLC 302 Ch D.

**Powers of Tribunal [S. 443]**

After hearing a winding up petition,[1] the court (now Tribunal) may dismiss it with or without costs: [2]or adjourn the hearing [3] or make any interim order[4] or make an order for winding up[5] or any other order it thinks fit.[6] The court can also issue a conditional order of winding up. In a case before the Orissa High Court,[7] a company could not pay its creditors for over two years in spite of statutory notices, the reasons being that the business had suffered closure on account of adverse circumstances. The company was, however, making sincere efforts, to revive itself. The court ordered winding up but stayed the operation of the order for six months to enable the company to pay the petitioner, if it could, failing which the order would come into force. In a similar case before the Calcutta High Court,[8] keeping in view the improving industrial climate in the State and the future prospects of the company, winding up was stayed enabling the company to pay the decreed debt by instalments and to relapse to winding up in case of default. The court (now Tribunal) may conduct an inquiry into the

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1 The Supreme Court held by a majority in *National Textile Workers' Union* v *Ramakrishnan*, (1983) 1 SCC 228: (1983) 53 Comp Cas 184 that the workers have a right to be heard and file appeals. They may not be served with a notice to appear, but they may appeal of their own motion. The court would be very slow to order winding up and would explore all possible avenues of keeping the company alive, where winding up would throw a large number of workers out of employment. *Indian Turpentine & Resin Co* v *Pioneer Consolidated Co of India Ltd*, (1988) 64 Comp Cas 169 Del. Disputes about ownership may also be examined if they are not so mixed up with the propriety of exclusion from management that they cannot be isolated. *A Company, Re, ex p. SP*, 1989 BCLC 579 CLD.

2 See *A Company (No 0067980 of 1995) Re*, (1996) 2 BCLC 48 Ch D, a solicitor who filed a petition without belief that the company was unable to pay its debts, was ordered to pay the whole of wasted costs incurred by the company.

3 *Central Bank of India* v *Maekenzies Ltd*, (1977) 47 Comp Cas 306 Bom, where many adjournments were allowed. *National Transport and General Co P Ltd, Re*, (1990) 69 Comp Cas 791 P&H where an order staying proceedings was withdrawn because it was being abused.

4 Which would necessarily include the appointment of a receiver, *State Bank of India* v *Poddar Mills Ltd*, [1989] 2 Comp LJ 189 Bom.

5 S. 443(1). The court may put off proceedings but no such order was made only on the ground that a petition under Ss. 397 and 398 was pending for prevention of oppression and mismanagement. *A. K. Puri* v *Devi Das Gopal Kishan Ltd*, (1995) 17 Corpt LA 1: AIR 1995 J&K 24. The company sought an adjournment of the petition presented by the Secretary of State in public interest. The company wanted to adduce fresh evidence. The court granted it on strict conditions as to costs. *A Company, Re, (005445 of 1996)*, [1998] 1 BCLC 98.

6 Exercising this power in the case of a family private company (father and two sons) where a son died and his shares were transmitted to his widow's name who neither received any dividend nor was given remuneration by making her a member of the board of directors, the court, on her petition for winding up, directed that she should be made a director in her husband's position and given like remuneration, *Anisha K. Shah* v *Fostenex (P) Ltd*, (1995) 17 Corpt LA 5 Mad: AIR 1995 Mad 67: (1995) 82 Comp Cas 514. *Altos India Ltd* v *Bharat Telecom Ltd*, (2001) 103 Comp Cas 6 P&H, order of sale of the company's assets in the interest of all concerned even before an order of winding up was passed.

7 *Misrilal Dharma Chand (P) Ltd* v *B. Patnaik Mines (P) Ltd*, (1978) 48 Comp Cas 494 Ori.

8 *Unique Cardboard Box Mfg Co, Re*, (1978) 48 Comp Cas 599 Cal. *See* also *Bombay Metropolitan Transport Corpn Ltd* v *Employees*, (1990) 69 Comp Cas 465, winding up order against a public utility company refused. *Maharashtra General Kamgar Union-Intervenor, Ibid.*

solvency of the company before ordering admission and advertisement of the petition.[9]

The court (now Tribunal) passed a decree in favour of the creditor on consent terms, the managing director guaranteeing the payment. It was not a fraudulent preference within the meaning of Section 531. Neither the company nor the managing director could pay. The creditor could proceed against the managing director.[10]

Where the allegations made by the petitioners regarding the policy of low dividends and high directors' remuneration constituted a conduct of the three companies' affairs that was unfairly prejudicial to the non-director shareholders, the court said that by far the most likely form of relief they would obtain from the court would be an order that the respondents purchase the petitioners' shares in the companies. The making of a winding up order on a contributories' petition invoking the just and equitable ground was a remedy of last resort. Since the court would set a fair price for the petitioners' shares.[11]

While passing a winding up order, the court (now Tribunal) may direct that workers' grievances should be redressed.[12]

**Commencement of Winding Up [S. 441]**

Winding up commences not from the date of the order, it shall be deemed to commence from the time of the presentation of the petition.[13] But where, before the presentation of the petition, a resolution has been passed by the company for winding up, the winding up shall be deemed to have commenced at the time of the passing of the resolution.[14] Where there were more than one petitions, winding up was deemed to have commenced from the date of the earliest of the creditor's petition. The agreement to sell the company's property executed after that date became void.[15] The principle of relation back does not apply to the passing to the Tribunal the custody of the company's property. Such custody is

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9 *Air Wings (P) Ltd* v *Victoria Air Cargo*, (1995) 17 Corpt LA 114: AIR 1995 Kant 69. Advertisement is compulsory; where two petitions are pending both must be advertised. An order without advertisement is liable to be set aside. *Falcon Gulf Ceramics Ltd* v *Industrial Designs Bureau*, AIR 1994 Raj 120. The court postponed order of advertisement and allowed time to company to raise funds, *Karnataka Leasing and Commercial Corpn Ltd* v *Lalitha Holla*, (1995) 83 Comp Cas 127 Kant. *NEPC Agro Food Ltd* v *Hindustan Thompson Associates Ltd*, (2002) 111 Comp Cas 169 Mad, the court appointed a chartered accountant for ascertaining the amount due to the petitioning creditors.

10 *Pratibha Inderjit Kapur* v *Nilesh Lalit Parekh*, (2002) 111 Comp Cas 177 Bom.

11 *A Company (No. 004415 of 1996), Re*, (1997) 1 BCLC 479 Ch D.

12 *Maharashtra State Financial Corpn* v *Orkay Industries Ltd*, [1999] 1 Comp LJ 388 Bom.

13 S. 441(2).

14 S. 441(1). Vesting of property in the court, however, does not relate back. *Arya Varta Plywood* v *Rajasthan State J & J Corpn*, [1990] 1 Comp LJ 222 Del, under S. 435 the High Court ordering a winding-up can transfer the proceedings to a District Court subordinate to it, or according to convenience, from one District Court to another [S. 436]. Proceedings commenced in a wrong District Court may be ordered to be continued. [S. 437] These powers can be exercised at any stage of the proceedings. [S. 438]

15 *Y. S. Spinners Ltd* v *Official Liquidator, Shri Ambica Mills Ltd*, (2000) 100 Comp Cas 547 Guj.

reckoned from its actual date.[16] The process of winding up takes effect from the date of the order.[17]

**Rehabilitation Fund**

The Companies (Second Amendment) Act has brought in new Sections 441-A, 441-B, 441-C, 441-D, 441-E and 441-F into the Act for levy by way of cess and formation of a Fund. These sections provide for levy and collection for the purposes of rehabilitation or revival or protection of assets of a sick industrial company, a levy by way of cess at a rate not less than 0.005% and not more than 0.1% on the value of annual turnover of every company or on its gross receipts, whichever is more. Every company shall pay the cess to the Central Government within three months from the close of the financial year. The proceeds of cess levied and collected shall be first credited to the Consolidated Fund of India and the Central Government may, if Parliament by appropriation made by law in this behalf so provides, pay to the Tribunal such sums of money as it thinks fit out of such proceeds for being utilised for the purposes of the Fund. Further, a Fund to be called the Rehabilitation and Revival Fund for the purposes of rehabilitation or revival or protection of assets of a sick industrial company shall be formed. If any cess payable by a company is not paid within the stipulated time, it shall be deemed to be in arrears and the same shall be recovered by the Tribunal in the manner as may be prescribed. The Tribunal may also impose a penalty not exceeding ten times the amount in arrears.

According to new Section 441-A every company shall furnish in such form as may be prescribed by the rules made by Central Government, the details of its turnover and gross receipts with the payment of cess. According to new Section 441-E, every company shall furnish such statistical and other information in such form and within such period as may be prescribed by rules made by the Central Government. According to new Section 441-F, if a company fails to pay cess to the Central Government, the same shall be recovered by the Tribunal in the manner prescribed by rules made by the Central Government.

**Rescission of Order [S. 443]**

The Tribunal has power under Section 443 to rescind any of its orders including a winding up order. A company was wound up by mistake caused by similarity of names. The company was allowed to seek rescission of the order and removal of the order from the Registrar's Register of Companies.[18] In a similar earlier case where a wrong address was mentioned by the petitioner company and a winding up order was passed against a company who was

16 *Aryavrata Plywood* v *Rajasthan State I&I Corpn*, (1991) 72 Comp Cas 5 Delhi.

17 *Vasantha Ramanan* v *Official Liquidator*, (2003) 114 Comp Cas 747 Mad.

18 *Calmex Ltd, Re*, [1989] 1 All ER 485 CLD. The exercise of this power would depend upon circumstances. *G.I. Swamy* v *Good Luck Agencies*, [1989] 1 Comp LJ 215, following *Sudarshan Chits (India) Ltd* v *O. Sukumaran Pillai*, (1985) 58 Comp Cas 633 SC. A winding up order was readily recalled where the debt of the petitioning creditor was paid off and no other creditor either asked for winding or opposed the recalling of the order. *G.T. Swamy* v *Goodluck Agencies*, (1990) 69 Comp Cas 819 Kant.

completely unaware of the proceedings, the order was set aside, but the company's action against the petitioning company for compensation for loss caused was not allowed. The court said, after reviewing a number of cases on the neighbourhood principle, that there was no duty owed to a litigant to give his correct address.[19] Where the merits of the case became ignored because the company's application for amendment of its pleadings was not allowed, the order of winding up was set aside.[20] The order of winding up was also revoked where the company paid off the petitioner and efforts were on for revival of the company.[21]

The Tribunal may revoke the order of admission of a petition where there is an extraordinary situation like abuse of the process, but not when the company is asking for it on the ground of a bona fide dispute. That can be taken up at the hearing.[22]

**Stay of Proceedings before Order [S. 442] (Omitted by the Second Amendment of 2002)**

Even before any order is made by the court, the company, any creditor or contributory may ask the court that proceedings against the company pending before the Supreme Court or any High Court should be stayed or those pending before any other court should be restrained, the court may pass an order as it thinks fit. The power of the court is extensive and covers all kinds of proceedings, whether of civil, criminal or revenue nature. But it will be used only in circumstances of real need.[23] The proceedings of secured creditors pending before the Bombay High Court were ordered to be transferred to the Gujarat High Court, where a winding up petition was pending, this being necessary for the court to salvage the company after getting a complete view of its affairs.[24] The power under this section is effective up to the winding up order. Thereafter Section 446 takes over the matter. The court does not have the power under the section to stay proceedings before the Debt Recovery Tribunal.[25] The company's application for stay of a creditor's suit was not allowed though he had also filed an appeal against the dismissal of his winding up petition.[26]

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19 The cases surveyed included: *Donoghue* v *Stevenson*, 1932 AC 562; *Anns* v *Merton London Borough Council*, 1978 AC 728, 751; *Governors of Peabody Donation Fund* v *Sir Lindsay Parkinson*, 1985 AC 210, 239; *Dorset Yatch Co Ltd* v *Home Office*, 1978 AC 1004, 1027; *Leigh & Sullivan Ltd* v *Aliakmon Shipping Co Ltd*, 1986 AC 785, 815; *Yuen Kun Yeu* v *Attorney-General of Hong Kong*, [1987] 3 WLR 776.

20 *Indian Express News Papers (Bom) Ltd* v *Henkel Chemicals India Ltd*, (1999) 20 SCL 333 Bom.

21 *Someswara Cements & Chemicals Ltd* v *Power Mak Industries*, [2000] 1 Comp LJ 173 AP.

22 *Sree Aravind Steel (P) Ltd* v *Trichy Steel Rolling Mills Ltd*, (1992) 73 Comp Cas 607 Mad.

23 *Official Liquidator, Golcha Properties Ltd* v *Dharti Dhan P Ltd*, (1977) 47 Comp Cas 420 SC; *Vocation (Foreign), Re*, [1932] 2 Ch 196; *J. Burrows (Leeds ) Ltd, Re*, [1982] 2 All ER 882 Ch D, proceedings before a magistrate restrained.

24 *Vallabh Glass Works* v *ICI Corpn*, (1987) 62 Comp Cas 101 SC.

25 Constituted under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. *Allahabad Bank* v *Canara Bank*, [2000] 2 Comp LJ 170 SC. Criminal proceedings cannot also be stayed, *Bombay Leasing (P) Ltd* v *Gresoil (India) Ltd*, (2000) 103 Comp Cas 666 Bom.

26 *Ranbaxy Laboratories Ltd* v *Jerath Electronics & Allied Industries P Ltd*, (2003) 114 Comp Cas 638 HP.

This section has been deleted by the Companies (Second Amendment) Act, 2002.

**Appointment of Provisional Liquidator [S. 450]**

After the presentation of a petition but before the winding up order the Tribunal may appoint the Official Liquidator to be the provisional liquidator of the company. He becomes the Official Liquidator as soon as the winding up order is passed. Before making such appointment the Tribunal should inform the company so as to enable it to make its representation. This is necessary because the appointment of a provisional liquidator is likely to cause a serious setback to the name of the company and its business, if ultimately, the Tribunal does not pass a winding up order.[27] Where, however, the circumstances too obviously demand protection of the company's property, the Tribunal may record its reasons in writing and appoint a provisional liquidator without giving an opportunity to the company to explain its position.[28] The business of a *nidhi* company came to a standstill. It was unable to collect any more deposits, nor able to pay back the existing deposits. A straight away order of winding up would have caused panic among depositors. The court (now Tribunal) appointed a provisional liquidator without formally ordering winding up thinking that he would effectively realise assets for paying back depositors.[29]

The object of appointment is protection and preservation of the company's assets. But the power is not limited to that contingency alone. The Tribunal may make an appointment in any proper case.[30]

The Tribunal can appoint the official receiver as a provisional liquidator in respect of a company that is already in the process of voluntary winding up if such an appointment is necessary to ensure that a full investigation is carried out of the company's affairs in order to protect the public. The official receiver has wider reach than voluntary liquidators when it comes to matters of investigation.[31]

**Consequences of winding up order**

The Tribunal has forthwith to cause intimation of the winding up order to be sent to the Official Liquidator and the Registrar.[32] It is also the duty of the petitioner and of the company to file with the Registrar, within thirty days, a

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27 Provisional liquidator was not appointed where the company was trading profitably. *Sree Aravind Steel (P) Ltd* v *Trichy Steel Rolling Mills Ltd*, (1992) 73 Comp Cas 607 Mad; Additional provisional liquidator was not appointed because he would have been a needless burden on resources, *BCCI (SA), Re*, (1992) BCLC 579 Ch D. Provisional liquidator was refused where in a group of family companies due care was taken of the interest of the widow of one member of the family who was a managing director in one company and director in others by giving her parallel position in the companies on the same remuneration, *Anisha K. Shah* v *Fostenex (P) Ltd*, (1995) 17 Corpt LA 5 Mad: AIR 1995 Mad 67: (1995) 82 Comp Cas 514.

28 *Brunton and Co Engineers Ltd, Re*, (1988) 63 Comp Cas 299 Ker.

29 *St Marys' Finance Ltd* v *R. G. Jayaprakash*, (2000) 37 CLA 170 Ker.

30 *Pundra Investment & Leasing Co P Ltd* v *Petron Mechanical Industries P Ltd*, (2000) 23 SCL 220 Bom.

31 *A Company (No 007070 of 1996), Re*, (1997) 2 BCLC 139.

32 S. 444. This has to be done in a period not exceeding two weeks.

certified copy of the order.[33] The Registrar should then make minutes of the order in his books relating to the company and notify in the Official Gazette that such an order has been made.[34]

Secondly, winding up order is deemed to be a notice of discharge to the officers and employees of the company, except when the business of the company is continued.[35] Thirdly, the order operates in favour of all the creditors and of all the contributories of the company.[36]

Fourthly, on a winding up order being made in respect of a company, the Official Liquidator, by virtue of his office, becomes the liquidator of the company.[37]

**Legal Proceedings [S. 446]**

Lastly, after the order, no suit or legal proceeding can be commenced against the company except by leave of the Tribunal and subject to such terms as the Tribunal may impose.[38] If a suit or proceeding is pending at the date of the order, it shall not be proceeded with except with the leave of the Tribunal.[39]

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33 S. 445. In computing the period of one month, the time requisite for obtaining a certified copy of the order shall be excluded. There is penalty for default.

34 S. 445(2). Under S. 448 the Central Government attaches Official Liquidators to High Courts. S. 452 permits them to function under the style of Official Liquidator of the particular company.

35 S. 445(3). The employment being conditional on the continued existence of the company, it ceases when the company is wound up. *T. N. Farrer Ltd, Re*, [1937] Ch 352: [1937] 2 All ER 505; *National Transport and General Co (P) Ltd, Re*, (1990) 69 Comp Cas 791 P&H, directors exercising the power of issuing further capital was held to be a nullity so that the allottees of such shares could not be regarded as contributories. *Mehtab Chand Golcha* v *Official Liquidator*, (1981) 51 Comp Cas 103 Raj. Business continued by order, no appeal. Liability to compensate employees may remain because this is not discharge due to unavoidable circumstances within the meaning of S. 25-FFF of the Industrial Disputes Act, 1947. *K. Shanmugham* v *Official Liquidator*, (1992) 75 Comp Cas 181 Mad, not agreeing with *Palai Central Bank Employee' Union* v *Official Liquidator, Palai Central Bank*, (1965) 35 Comp Cas 279: (1965) 2 Comp LJ 110 where winding up order was held to be an unavoidable circumstance.

36 S. 447.

37 S. 449. S. 453 provides that a receiver cannot be appointed of assets in the hands of a liquidator except by or with the leave of the Tribunal. Expenses incurred by him with the leave of the court are a charge on the income in his hands. *Wandoor Jupiter Chits P Ltd, Re*, (1992) 74 Comp Cas 215 : [1992] 2 Comp LJ 101 Ker. The object of the section is to avoid any competition between the receiver appointed by the Civil Court and the official liquidator appointed by the company court. The latter cannot be replaced by any one else in his possession of the company's assets. *ICICI* v *Sidco Leathers Ltd*, (1999) 96 Comp Cas 527.

38 S. 446. The provision is mandatory and also applies to attachment proceedings. *Tarubala Saha* v *Nath Bank Ltd*, (1972) 42 Comp Cas 588 Cal.

39 S. 446(1). See *G. S. Setty & Sons* v *Y. C. W. Mills*, [1970] 1 Comp LJ 184. Once a leave is granted, no further leave for execution of decree will be necessary. (1990) 69 Comp Cas 644 P&H. *See* also *Bareja Knipping Fastners Ltd* v *Swastika Trading Co*, (1990) 69 Comp Cas 552 P&H, suit for price of goods delivered. *Devassy* v *Official Liquidator*, (1997) 2 Ker LT 80, managing director issued cheques which bounced, trial under S. 138 of the Negotiable Instruments Act, 1881 cannot be stayed and transferred to company court. *Orkay Industries Ltd* v *State of Maharashtra*, (1998) Vol 100 (2) Bom LR 158 Bom, where the company is in winding up, the provisions of S. 138 to 142 of the Negotiable Instruments Act, 1881 as to liability of the company for dishonoured cheques cannot take precedence over the provisions of the Companies Act.

This is necessary for the purpose of preserving the limited assets of the company in the best way for distribution among all the persons who have claims on them. "The object of winding up provisions is to put all unsecured creditors upon an equality and pay them *pari passu*;[40] and to prevent the assets of the company from being frittered away in vexatious litigation.[41]

The expression "legal proceedings" in S. 446 means only those proceedings which have a bearing on the assets of a company in winding up or some relationship with the issues in winding up. It does not mean each and every civil proceeding which has no bearing on the winding up proceeding or criminal offences where the company was liable to be prosecuted.[42]

The Tribunal in granting leave considers all the circumstances of the case and decides as to whether leave to sue the company should not be granted so that the assets of the company may be preserved for the benefit of the creditors."[43] For example, the attachment of the property of a company in winding up effected on behalf of the Provident Fund Commissioner has been held to be ineffective.[44] Similarly, property attached in execution of decree obtained before, but actually sold after winding up order without leave of the court, (now Tribunal) the sale being void, the liquidator was allowed to recover the sale proceeds.[45] As interpleader suit by a person indebted to the company for an order whether he should pay to the company or to the other claimant, has been held to be a proceeding for which sanction of the court (now Tribunal) is necessary.[46] Kerala High Court held that eviction proceedings are not covered by the expressions used by Section 446. They are completely unrelated to winding up and, therefore, leave of the court (now Tribunal) is not necessary.[47] There are, however, rulings to the effect that leave of the court (now Tribunal)

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40 The amount realised by a creditor during the pendency of winding up had to be repaid to the liquidator. *Bombay Castwell Engg (P) Ltd, Re*, (1984) 55 Comp Cas 75 Bom.

41 *H. Lal Sharma* v *Chemical Vessels Fabricators*, (1989) 65 Comp Cas 506; following *Joshi Trading Co (P) Ltd* v *Essa Ismail Sait*, (1980) 50 Comp Cas 801 Ker. *Vasantha Ramanan* v *Official Liquidator*, (2003) 114 Comp Cas 747 Mad, proceedings without leave are of no effect, execution of an arbitrator's award requires leave. Leave granted by the Registrar of the court is of no effect. It has to be that of the winding up court (now Tribunal).

42 *Ion Exchange Finance Ltd* v *Firth India Steel Co Ltd (In Liquidation)*, (2001) 103 Comp Cas 666 Bom.

43 *Suresh Chand* v *The Bank of Calcutta Ltd*, (1950) 54 CWN 832. For instances of cases on the subject see *Palghat Warrier Bank* v *Padmanabhan*, AIR 1951 Mad 348; *Jiwan Lal* v *Radha Nathdas*, AIR 1971 Oudh 322; *Maneklal Mansukhbai* v *Saraspur Mfg Co Ltd*, AIR 1927 Bom 167; *Hansraj* v *Dehra Dun Mussorrie Electric Tramway Co*, AIR 1929 All 353; *Hukumchand* v *Radhakissen*, AIR 1925 Cal 916; *South Indian Mills* v *Shivlal Motilal*, AIR 1917 Mad 260; *Rawat Raj Kumar Singh* v *Benares Bank Ltd*, AIR 1941 All 154; *Sunil Chandra Banerjee* v *Krishna Chandra Nath*, AIR 1949 Cal 689. Leave may be obtained before or after the institution of proceedings, *Vyasa Bank Ltd* v *Official Liquidator, Sreeniwas Cotton Mills Ltd*, (1992) Mah LJ 1239.

44 *Ananta Mills Ltd* v *City Deputy Collector, Ahmedabad*, (1972) 42 Comp Cas 476 Guj.

45 *R. Ranganathan* v *Veerakumar Trading Chit Funds*, (1976) 46 Comp Cas 637 Mad.

46 *Televista Electronics (P) Ltd* v *Mass Communications & Marketing (P) Ltd*, (1980) 50 Comp Cas 1 Del. *See* also *United India Gen Fin (P) Ltd, Re*, (1980) 50 Comp Cas 847 Del.

47 *Joshi Trading Co (P) Ltd* v *Essa Ismail Sait*, (1980) 50 Comp Cas 801 Ker; *H. Lal Sharma* v *Chemical Vessels Fabricators*, (1989) 65 Comp Cas 506.

may be necessary where proceedings are for the eviction of a tenant.[48] Where the debt of a company was guaranteed by the managing director, and the action was against both the company and the managing director, it was held that the action could go on against the managing director, but as against the company, leave was necessary.[49] Where the company is bound by an agreement to refer a dispute to arbitration, the Tribunal would have the discretion to say whether the matter should be decided by arbitration or otherwise.[50] A secured creditor being outside winding up, his proceedings to enforce his security are not affected.[51]

The Supreme Court held in *Kondaskar* v *ITO (Companies Circle), Bombay*[52] that an income-tax officer can commence assessment proceedings without leave of the court.[53] But leave would be necessary for effecting recovering even of the amount of tax deducted by the company at source, which was still lying with the company.[54] Where a sum of money is due to the company, the payer cannot deduct tax at source without leave.[55] If any suit or proceeding is pending in any court that may be transferred to and disposed of by the winding up court (now Tribunal).[56] The provision, however, does not apply to appeals and cases pending before the Supreme Court or a High Court.[57] The Madras High Court refused to grant permission to a worker to file his claim before a labour court, for that would waste the time of the liquidator

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48 *Nirmala R. Bafna* v *Khandesh Spg and Wvg Mills Ltd*, (1992) 2 SCC 322: (1992) 74 Comp Cas 1 SC ; *Faizabad Distilleries (P) Ltd* v *Salim Tailor*, (1993) 76 Comp Cas 127 All.

49 *Ramanlal Amratlal* v *ESL*, (1981) 51 Comp Cas 1 Guj.

50 *Maruti Ltd* v *B. G. Shirke & Co.* (1981) 51 Comp Cas 11 P&H. *See* also *Timber (P) Ltd, Re*, (1981) 51 Comp Cas 18 P&H, arbitration proceeding transferred to winding up court.

51 *Maksudpur Refrigeration Industries, Re*, (1977) 47 Comp Cas 67 Pat. No stay may be allowed where it is demanded as a part of delaying tactics. *Official Liquidator* v *Dharti Dhan (P) Ltd*, (1977) 2 SCC 66: (1977) 47 Comp Cas 420. The court may in its discretion require even a secured creditor to pass through the leave of the court particularly where there are complications like *pari passu* claims of others. *Cotton Corpn of India* v *Radhakrishna Mills*, (1993) 76 Comp Cas 637 Mad, or where he has instituted proceedings at an inconvenient place, *Central Bank of India* v *Elmot Engg Co (P) Ltd*, (1994) 4 SCC 519: (1994) 81 Comp Cas 11 Bom. The court ordered the transfer of proceedings to Bombay which was set aside by the SC on appeal, *Central Bank of India* v *Elmot Engg Co*, (1994) 4 SCC 519: (1994) 81 Comp Cas 13 SC : AIR 1994 SC 2358. A secured creditor was permitted to continue the realisation proceedings in another High Court subject to the condition that he would pay workmen's dues after realisation. *Industrial Credit & Investment Corpn of India* v *Hyderabad District Coop Central Bank*, (1995) 16 Corpt LA 227 AP. *Khalid Mukhtar* v *Bucheye Batteries P Ltd*, (2003) 114 Comp Cas 70 All, the proceedings for recovery against a guarantor of the company, being not a part of the company's winding up, were allowed, leave was not necessary.

52 (1972) 1 SCC 438 : (1972) 42 Comp Cas 168 : AIR 1972 SC 878.

53 Overruling *Colaba Land & Mills Co Ltd, Re*, (1968) 38 Comp Cas 26 Bom.

54 *ITO* v *Official Liquidator, National Conduits P Ltd*, (1981) 51 Comp Cas 174 Del. The court cannot conduct a probe into the assessment proceedings. *State of Kerala* v *Palai Central Bank*, (1987) 62 Comp Cas 742 Ker.

55 *Haryana State* v *Maruti Ltd*, (1992) 75 Comp Cas 663 P&H.

56 S. 446(3). If a suit pending in another court is continued without leave of the winding up court and a decree is passed, it is voidable at the option of the liquidator. See *Bhagwati Devi* v *Dhanraj Mills*, [1970] 1 Comp LJ 71. Also see *Punjab National Bank* v *Punjab Finance (P) Ltd*, (1973) 43 Comp Cas 350 Punj.

57 S. 446(4) and see *Punjab Finance (P) Ltd* v *Malhara Singh*, (1975) 45 Comp Cas 361 Punj.

in having to defend suits at so many places.[58] The Calcutta High Court faced a case in which 23 suits were filed by DGSD on behalf of the Union of India. The Calcutta High Court ordered their transfer to the winding up court. The balance of convenience lay in bringing all those chronic type of cases before the winding up court (now Tribunal).[59]

It would not be necessary to obtain sanction of the Tribunal for prosecuting the company's officers under the Employees' Provident Fund Act.[60] Leave would be necessary for prosecuting the company under Section 58-C for violating rules relating to acceptance of deposits.[61] The Tribunal can have even criminal matters transferred before it.[62] The Tribunal has jurisdiction to decide—

1. any suit or proceeding by or against the company;[63]
2. any claim made by or against the company;[64]

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58 *R. Chidambaranathan* v *Gannon Dunkerly & Co*, (1973) 43 Comp Cas 500 Mad. Consent decree against a company can be challenged only by the company itself and not by a shareholder or director personally. *Vivek Kumar* v *Pearl Cycle Industries*, (1983) 54 Comp Cas 77 Delhi. Leave was refused where the claim against the company was waived and that against the guarantor was time-barred. *Syndicate Bank* v *Panchkula Malt Co*, (1990) 67 Comp Cas 472 P&H.

59 *United Provinces Commercial Corpn, Re*, (1983) 53 Comp Cas 441 Cal. *Lok Vikas Urban Cooperative Bank Ltd* v *Lok Vikas Finance Corpn Ltd*, (2003) 114 Comp Cas 355 Raj, secured creditor's application to remain outside winding up for sale of assets, other creditors and contributories not likely to be affected, sale of assets permitted subject to certain conditions and also subject to confirmation. *Shivalik Agro Poly Products Ltd* v *Disco Electronics Ltd*, (2003) 114 Comp Cas 398 Del, sale by the secured creditor (corporation) not affected by the restraint order or appointment of provisional liquidator in winding up proceedings to which it was not a party.

60 *Manekchowk & Ahmedabad Mfg Co, Re*, (1983) 53 Comp Cas 519 Guj.

61 *B. N. Chikarmane* v *Swashraya Benefit (P) Ltd*, (1983) 53 Comp Cases 519 Guj. The managing director against whom an arrest warrant had been issued by a District Forum in connection with a company offence was held entitled to seek his protection under S. 446. *Narayanakutty* v *Official Liquidator*, (1998) 30 Corpt LA 146 Ker.

62 *Khosla Fans (India) (P) Ltd, Re*, (1983) 53 Comp Cas 858 P&H. Leave was not granted where tenants instead of vacating, as ordered, were trying to involve the liquidator into litigation. *United Provinces Commercial Corpn, Re*, (1986) 59 Comp Cas 362 Cal. Eviction proceedings against company require leave. *LIC* v *Asia Udyog*, (1984) 55 Comp Cas 187 Del. Leave not necessary for executing a decree obtained with leave. *Janta Works (P) Ltd, Re*, (1984) 56 Comp Cas 229 Bom.

63 See *Official Liquidator* v *Kerala SEB*, (1990) 67 Comp Cas 577 Ker, claim against the company for compensation for loss caused by an employee's conduct. *See* also *Maruti Ltd* v *H.M. Tractor and Automobiles Corpn*, (1990) 69 Comp Cas 59 P&H, where entries in the books of the company showing the respondent to be indebted to the company, affirmed by officers on oath and not controverted by the respondent were held to be good evidence of the indebtedness. Summary eviction proceedings against trespassers on the company's premises were allowed, *Pushpa Devi Jhunjhunwala* v *Official Liquidator*, (1993) 1 Cal LJ 447. Squatters were not allowed to claim possession by adverse title, the official liquidator is deemed to be in possession, *Yogamaya Ghosh* v *Official Liquidator*, (1993) 1 Cal LJ 485.

64 A claim for goods supplied can be so decided. *Star Engg Works* v *Official Liquidator*, (1977) 47 Comp Cas 30 Guj. Whether a person in occupation of the company's premises is a trespasser and, if so, liable to be evicted, can be decided under S. 446, *Vidyadhar Upadhaya* v *Shri Shri Madan Gopal Jew*, (1990) 67 Comp Cas 394 Cal. Tenancy matters pending before special tribunals can be left to be decided by such tribunals. *S. P. Bhargava (Dr)* v *Harayana Electric Steel Co*, (1994) 2 Punj LR 406; *Deutsche Bank* v *S. P. Kala*, (1992) 74 Comp Cas 577 Bom, court competent under S. 446 to pass orders against guarantor of the company's debts.

3. any application made for compromise or arrangement with creditors under Section 391;
4. any question of priorities or any question whatsoever, whether of law or fact, which may relate to, or arise in the course of the winding up.[65]

**Debt Recovery Tribunal**

After coming into force of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the establishment of the Debts Recovery Tribunal (DRT) and in view of the clear provisions of Sections 17, 18 and 34 of that Act, neither it is necessary to apply for leave to prosecute the suits transferred to DRT in terms of Section 446(1) of the Companies Act nor it is open to the company court (now Tribunal) to transfer the suit to itself for trial in winding up proceedings in terms of Section 446(2) of that Act.[66]

## PROCEDURE OF WINDING UP BY TRIBUNAL

**Appointment of liquidator [S. 448]**

As soon as the winding up order is passed, an Official Liquidator may be—

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*MS Fashions Ltd* v *BCC sa (No 2)*, (1993) 3 All ER 769 CA leave to proceed against the debtor where the guarantor could not pay the whole amount due. *Beni Carbon Co Ltd* v *Raj Kumar Goel*, (1993) 2 Punj LR 681, eviction with leave of court, execution of decree not allowed to be resisted on the grounds rejected by the Rent Controller. *UCO Bank* v *Concost Products Ltd*, (1996) 23 Corpt LA 256 Cal, recovery proceedings before Debt Recovery Tribunal have to be transferred to the winding up court. The company court can pass necessary orders for transfer or otherwise after considering all the interests which S. 446 is designed to safeguard. See *Mayur Syntex Ltd* v *Punjab & Sind Bank*, (1997) 27 Corpt LA 206 Del. A Bombay based secured creditor was allowed to continue his proceedings in Bombay though the company was being wound up in AP, *Industrial Credit & Investment Corpn of India Ltd* v *Hyderabad District Coop Central Bank*, (1997) 27 Corpt LA 244 AP. After the winding up order, the assets of the company become vested in the company court and, therefore, the court's permission under S. 446 is necessary for initiating proceedings under the Debts Recovery Act. The permission can also be taken after initiation of proceedings. *Industrial Finance Corpn of India* v *Rama Fibres Ltd*, (1998) 29 Corpt LA 362 P&H. *State Bank of Hyderabad* v *Pennar Paterson Ltd*, (2003) 114 Comp Cas 66 SC, Debt Recovery Tribunal directed the liquidator to cooperate with the Commission appointed by it in the matter of recovery of a bank loan, no leave necessary. *Bank of Nova Scotia* v *RPG Transmission Ltd*, (2003) 114 Comp Cas 764 Del, case before Debt Recovery Tribunal, no interference.

65 S. 446(2). The executing court is subject to the jurisdiction of the winding up court. *Faqir Chand Gupta* v *Tanwar Finance (P) Ltd*, (1981) 51 Comp Cas 60 Del. The period of limitation for the purposes of S. 446 begins to run from the date of the order or the appointment of the provisional liquidator. *K. P. Ulahaman* v *Wandoor Jupiter Chits (P) Ltd*, AIR 1989 Ker 41: (1989) 65 Comp Cas 178; *Maruti Ltd* v *Parry & Co Ltd*, (1990) 66 Comp Cas 309: [1989] 3 Comp LJ 384 P&H; *Maruti Ltd* v *P R Sasidharan*, (1989) 68 Comp Cas 5 P&H. The proper mode of realisation of the security by a secured creditor can be prescribed by the court at the application of the official liquidator. *Sushum Overseas Marketing (P) Ltd* v *ROC*, [1990] 1 Comp LJ 293 Delhi. *O. Narayanan Kutty* v *Official Liquidator, Kerala*, AIR 1998 Ker 278, proceedings against the promoter and subsequently managing director commenced before consumer forum stayed for disposal by company court. *KTC Tyres (India) Ltd* v *Kavitha Auto Parts*, (1997) 2 Ker LT 705, the official liquidator can only enforce those claims which are not barred at the commencement of winding up proceedings. *Anand Finance P Ltd* v *Amrit Dasarat Kakade*, (1997) 90 Comp Cas 350 Del: (1996) 61 Delhi LT 305, payment order under S. 446(2) has the effect of a decree. It can be enforced by filing a certified copy before the proper officer.

66 *Rohtas Industries Ltd (In Liquidation), In re*, (2001) 103 Comp Cas 383 Pat.

(*a*) appointed from a panel of professional firms of chartered accountants, advocates, company secretaries, cost and works accountants or firms having a combination of these professions, which the Central Government shall constitute for the Tribunal; or

(*b*) a body corporate consisting of professionals approved by the Central Government; or

(*c*) a wholetime or part-time officer appointed by the Central Government.[67]

The official liquidator conducts winding up and performs such other duties as the Tribunal may impose.[68]

*Provisional liquidator*

The Tribunal may also appoint a provisional liquidator after a petition is presented but before making a winding up order.[69] Before making such appointment, the Tribunal should give reasonable opportunity to the company to make its representation.[70]

The appointment of a provisional liquidator is made before the order of winding up. Supposing that an order of winding up is not ultimately passed, such an appointment even then would be capable of causing a great damage to the company. It may put others on their guard and shake up their confidence in the company. Therefore, that part of the proceedings in which the need for the appointment is debated should better be conducted *in camera*. But as soon as the proceedings cross that sensitive stage, they should be brought back to the open Tribunal.[71] The power of the Tribunal is discretionary and is generally exercised when liquidation is more or less certain.[72] The precautions which have to be observed were pictorially stated by ROMILLY MR in the following words:[73]

> Where there is no apposition to the winding up, I appoint a provisional liquidator as a matter of course on the presentation of the petition. But where there is an opposition to it, I never do, because I might paralyse all the affairs of the company and afterwards refuse to make a winding up order at all.

Where the company's assets are in danger of being diverted or misapplied,[74] or where the company was in a state of non functioning and the debts were accumulating,[75] a provisional liquidator can be justifiably appointed, but not where a winding up petition is nothing but a part of the family struggle for power.[76]

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67 S. 448(1), *substituted* by the Companies (Second Amendment) Act, 2002.

68 S. 451(3).

69 S. 450(1) and (2).

70 Where no such opportunity is afforded, reasons in writing should be recorded. S. 450(2).

71 *Rondon and Norw Rich Investment Services Ltd, Re*, 1988 BCLC 226 CLD.

72 *High Field Commodities Ltd, Re*, [1984] 3 All ER 884.

73 Reproduced in *Kailash Pd Mishra* v *Madwin Laboratories (P) Ltd*, (1988) 63 Comp Cas 810: [1986] 1 Comp LJ 291.

74 *Waryam Singh* v *Bhatinda Transport Co Ltd*, (1963) 33 Comp Cas 897 : [1963] 1 Comp LJ 17 Punj ; *Darshan Anilkumar Patel* v *Gitaneel Hotels (P) Ltd*, (1994) 81 Comp Cas 805 Bom.

75 *Brunton & Co Engineers Ltd, Re*, (1988) 63 Comp Cas 299 Ker.

76 *Mridula Bhaskar* v *Ishwar Industries Ltd*, (1985) 58 Comp Cas 442 Del.

It becomes the duty of the Official Liquidator to conduct the proceedings in winding up the company and perform such duties as the Tribunal may impose.[77] The acts of a liquidator shall be valid notwithstanding any defect in his appointment or qualifications that may afterwards be discovered.[78]

*Statement of Affairs* [S. 454]

Within twenty-one days[79] of the date of the winding up order or where a provisional liquidator is appointed, from the date of that appointment, a statement as to the affairs of the company has to be submitted to the Official Liquidator.[80] The statement has to be submitted and verified by the director, manager, secretary or other chief officer of the company or such persons as the Official Liquidator, subject to the direction of the Tribunal, may require.[81] The statement should show the following particulars:[82]

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77 S. 451(1).

78 S. 451(3). But this does not validate acts done by a liquidator after his appointment has been shown to be invalid. [ Proviso to S. 451(3) ]

79 Time may be extended up to three months by the Official Liquidator or the Tribunal.

80 S. 454(1). Default is punishable. See *Official Liquidator* v *Jagannath Das*, (1968) 2 Comp LJ 12. Where the director who was sought to be prosecuted was not in office at the relevant date, the court said that it was the duty of the official liquidator to lay before the court some material which would show that he was in a position to make the statement. That was not done. The complaint was discharged. *Official Liquidator* v *Koganti Krishna Kumar*, (1993) 3 Andh LT 542: (1997) 89 Comp Cas 672 AP. The time-limit applies only to persons who were the directors of the company at the relevant date. It does not apply when ex-directors are being called upon to submit the statement, *Official Liquidator, AP* v *Koganti Krishna Kumar*, (1997) 89 Comp Cas 672 AP.

81 S. 454(2). See *Registrar of Companies* v *Orissa China Clay Refinery Co*, [1968] 38 Comp Cas 205 Ori, where the seizure of books by the vigilance police was held to be an extenuating circumstance in imposing penalty upon guilty officers. Where winding up followed about ten years after the directors had lawfully retired and had no books to prepare the statement that was held to be a sufficient cause justifying the default. *Official Liquidator* v *K. K. Nair*, (1975) 45 Comp Cas 278 Ker, where some books are available the statement should be prepared out of them to the extent possible. *Official Liquidator* v *Nihal Singh*, (1977) 47 Comp Cas 254 Delhi. Persons who have retired from directorship more than a year before the commencement of winding up can be ordered by the court to submit the statement. *Sipso Agencies (P) Ltd* v *Gajraj Singh*, (1978) 48 Comp Cas 30 Delhi, so also those who have resigned. *Registrar of Companies* v *Bihar Investment Trust Ltd*, (1978) 48 Comp Cas 579 Pat; *Lakshmi Narayan Arora* v *Registrar of Companies*, (1980) 50 Comp Cas 536 Pat; not allowed to be demanded from a person who retired some eight years before winding up, though the court agreed that he was within the range of persons who could be called upon to prepare the statement; *Devinder Kishore Mehra* v *Official Liquidator*, (1980) 50 Comp Cas 699 Del, a person ousted from management some eight years before. The prosecution has to prove that the officer in question was in a position to prepare the statement but did not do so. Where the books were with the Revenue Authorities and though they had returned some of them to the official liquidator, he did not inform the directors. The benefit of doubt was given to them. *Official Liquidator* v *Indira*, (1983) 54 Comp Cas 644 (Ker). A director cannot defend himself by showing that he was only a nominal director. *Kothari (Mad) Ltd* v *Myleaf Tobacco Devt Co Ltd*, (1985) 57 Comp Cas 690; *Official Liquidator* v *Agro Chemicals Ltd*, (1984) 56 Comp Cas 380 Guj, the position of absentee director. *Globe Associates P Ltd, Re*, (1987) 61 Comp Cas 814 Del, the default in filing the statement is of continuing nature and, therefore, the offence is not wiped out by the expiry of any period of limitation. The directors are under a statutory duty to submit the statement without any notice and therefore failure can attract penalty proceedings straightaway on failure. *Official Liquidator* v *Ved Prakash Gupta*, (1994) 80 Comp Cas 675 P&H. Where the directors sought to be prosecuted showed that the assets of the company had already been

(*a*) the assets of the company, showing separately cash in hand and at bank and negotiable securities;

(*b*) its debts and liabilities;

(*c*) names and addresses of the company's creditors indicating the amount of secure or unsecured debts;

(*d*) the debts due to the company and the names and addresses of the persons from whom they are due and the amount likely to be realised;

(*e*) such other information as may be required.

*Statement of affairs to be filed on winding up of a company* [Section 439-A]

This new section has been inserted by the Companies (Second Amendment) Act, 2002. Where the petition has been filed by the company, it has to file a statement of affairs along with the petition for winding up. Where the company opposes a petition for winding up even then it has to file a statement of its affairs with the Tribunal. The statement of affairs must be accompanied by—

(*a*) the last known addresses of all directors and company secretary of the company;

(*b*) the details of location of assets of company and their value;

(*c*) details of all the creditors and debtors with their addresses;

(*d*) the details of workmen and employees and any amount outstanding to them;

(*e*) any other details which the Tribunal may direct.

*Report by Official Liquidator* [S. 455]

As soon as practicable after receiving this statement, but within six months[83] of the order, the Official Liquidator is required to submit a preliminary report to the Tribunal showing—

1. the amount of issued and paid-up capital and the estimated amount of assets and liabilities;
2. if the company has failed, the causes of the failure; and
3. whether, in his opinion, further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the conduct of its business.

The report is a privileged document as regards its contents.[84]

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taken over by a financial corporation and already sold, this was a reasonable excuse for not being able to file the statement, *Official Liquidator* v *Surjit Singh*, (1995) 2 Punj LR 447. Theft of account books for which first information report had been launched was held to be a good excuse, *Pawanta Sahib Cement Works* v *Anil Saini*, (1994) 2 Punj LR 303. *Official Liquidator of Essen Computers Ltd* v *Rajendra A. Shah*, (2002) 108 Comp Cas 559 Guj, the director who had to file the statement showed that records were not available and the company's banks caused delay in furnishing accounts. This was held to be a reasonable excuse. The fine imposed upon the director was reduced. Sub-s. (4) provides that reasonable expenses may be allowed to the person called upon to submit the statement.

82 S. 454(1).

83 The court may extend this time or may order that no statement need be submitted. S. 455(1).

84 *Bottomley* v *Brougham*, [1908] 1 KB 584.

**Custody of company's property [S. 456]**

The liquidator, including the provisional liquidator, has to take into his custody or under his control all the property, effects and actionable claims to which the company is or appears to be entitled. Such property can be recovered with the order of Chief Presidency Magistrate or District Magistrate. What steps or what force would be necessary lies in the judgment of the Magistrate. The property is supposed to be in the deemed custody of the Tribunal. Machinery taken on lease is not the company's property. It is the lessor's property and he has the right to take it away before or during winding up.[85] Property taken on hire-purchase is not the property of the company till the last instalment of the hire money is paid.[86]

Where in case of a company under liquidation the Debt Recovery Tribunal (DRT) exercised its power under Section 19(18)(*e*) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and appointed a Commissioner for preparation of an inventory of properties of the company in liquidation, prior permission of the Company Judge (now Tribunal) was held to be not necessary.[87]

**Powers of Liquidator [S. 457]**

The liquidator shall have powers, with the sanction of the Tribunal—

1. to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;[88]
2. to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;[89]
3. to sell the immovable and moveable property and actionable claims of the company; he may make the sale by public auction or by private contract and shall have the power to transfer the whole in one lot or in parcels;[90]

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85 *Foremost Industries India* v *Credit Capital Finance Corpn Ltd*, (1997) 89 Comp Cas 670 Del.

86 *Model Financial Corpn Ltd* v *Montana International Ltd*, [2000] 2 Comp LJ 229 AP.

87 *State Bank of Hyderabad* v *Pennar Patterson Ltd*, (2003) 114 Comp Cas 66 SC.

88 In computing the period of limitation for suits on behalf of the company, the period from the date of the commencement of winding up to the date of the order and one year from the date of such order is excluded [S. 458-A]. The extension is available only for suits on behalf of the company and not on behalf of secured creditor. *Gleitlager (India) (P) Ltd* v *Killick Nixon Ltd*, (1977) 47 Comp Cas 79 Bom.

89 This has been held to include the power to ratify acts which, when in being, the company would have had power to perform. Summons for the arrest of a ship on behalf of a company which was without directors at the time, were ratified by the liquidator. The ratification was held to be binding. *Alexander Ward & Co* v *Samyang Navigation Co*, [1975] 1 WLR 673 HL.

90 *Industrial Finance Corpn* v *Official Liquidator, High Court, Calcutta*, (1993) 3 SCC 40: [1993] 77 Comp Cas 305 SC : (1993) 3 Comp LJ 137, instructions of court as to sale ; *United Bank of India* v *Bharat Electrical Industries Ltd*, (1993) 76 Comp Cas 317 Cal, confirmation of sale at a low price as against the original reserve price ; *N. Babu Janardhanam* v *Golden Films P Ltd*, (1993) 78 Comp Cas 455 Mad, confirmation of court necessary even when the sale is with the approval of the court. *Virendra Singh Bhandari* v *Nandlal Bhandari & Sons P Ltd*, (1995) 17 Corpt LA 226 (MP), the official liquidator can lease out the premises of the company only with the approval of the court. *Haryana Electro Steel Ltd* v *Haryana Financial Corpn*, AIR 1995 P&H 37, applying for permission to sell property under wrong the S. 446

3(*i*). to sell whole of the undertaking of the company as a going concern;[91]

4. to raise on the security of the assets of the company any money requisite;

5. to do all such other things as may be necessary for winding up the affairs for the company and distributing its assets.

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instead of S. 457—did not make a difference in substance ; limitation for setting aside sale is three years and a director has no locus standi to apply for setting aside, only the liquidator can apply. *Industrial Credit and Investment Corpn of India* v *Official Liquidator*, 1994 Supp (2) SCC 721 : AIR 1994 SC 167, court supervision of terms of auction by official liquidator; *Syndicate Bank* v *Field Star Cycle Industries (P) Ltd*, (1995) 83 Comp Cas 687 Kant, for court confirmation of sale, the petitioning creditor must be notified. *Narendra Kumar Nikhat* v *Nandi Hasbai Textile Mills*, (1998) 7 SCC 673: AIR 1998 SC 1988, sale by auction not confirmed, bidder's earnest money forfeited, balance allowed to be refunded. *AP State Financial Corpn* v *Nagarjuna Paper Mills Ltd*, (1997) 89 Comp Cas 557 AP, advertisement for sale without indicating the advantageous features of the property, readvertisement ordered. *Babulal M Kapadia* v *Bank of India*, (1997) 88 Comp Cas 515 Bom. a guarantor of a company's debts was held to have *locus standi* to challenge the validity of sale of assets by the receiver though the sale was with court's sanction. On facts, however, he was not allowed to do so because he participated in the proceedings throughout from the appointment of the receiver till actual sale. *Ayala Holdings Ltd, (No 2), Re*, (1996) 2 BCLC 467 Ch D, a creditor of the company has the right to question the validity of an assignment of assets made by the liquidator. The assignment was set aside because the liquidator had failed to endeavour to negotiate better terms with other firms interested in the matter and proceeded with the assignment even after an objection had been made. The liquidator was also removed and the matter of renegotiations was left to the new liquidator. *Vaz Forwarding Ltd* v *State Bank of India*, (1996) 85 Comp Cas 603 Bom, property under lease is heritable and remains under the company's right even during winding up. In this case the lease carried the right of assignment also. The assignment made by the liquidator was held to be valid. *Nani Gopal Paul* v *T. Prasad Singh*, (1995) 3 SCC 579: (1995) 2 Comp LJ 408 SC; *Lica P Ltd* v *Official Liquidator, (No 2)*, (1996) 85 Comp Cas 792 SC, duty of the liquidator to realise proper value and power of the court to set aside if the price realised is not natural. *Jainsons Exports India* v *Binatone Electronics Ltd*, (1996) 22 Corpt LA 239 Del, company court has inherent power to recall an order for sale of property which was obtained by misrepresentation. *Bengal Potteries Ltd, Re*, (1996) 1 Cal WN 71, unless a sale is confirmed, the court retains the discretion to order a fresh auction; the successful bidder in an unconfirmed sale acquires no vested right. *Glovanola Binny, Re*, (1996) 2 Ker LT 828, even in the absence of fraud or irregularity, it is open to the company judge to exercise his discretion in cases where the court comes to the conclusion that there is every possibility of getting higher price. *Sahajanand Cotton Traders* v *Official Liquidator of Shri Yamuna Mills Co Ltd*, (2000) 26 SCL 110 Guj, resale ordered after new advertisement, *A P State Financial Corpn* v *Emgee Rubber P Industries*, [2000] 1 Comp LJ 175 AP, the secured creditor directed to keep the liquidator about sale process; *Allahabad Bank* v *A. R. C. Holdings Ltd*, (2000) CLC 1780, SC, one more chance given to the company to be sold as a going concern. *Divya Mfg Co P Ltd* v *Union Bank of India*, (2000) 6 SCC 69: AIR 2000 SC 2346: 2000 JT (SC) 524: (2000) 38 CLA 206 SC, sale set aside, resale ordered, there was proof of underbidding. *Union Bank of India* v *Official Liquidator*, (2000) 3 SCC 274: (2000) 101 Comp Cas 317 SC, court as the custodian of the company's interests exercises protective discretion. *Allahabad Bank* v *Bengal Paper Mills Co Ltd*, AIR 1999 SC 1715: (1999) 4 SCC 383: (1999) 96 Comp Cas 804 SC, recovery of property already sold ordered, and direction for resale. *Allahabad Bank* v *Bengal Paper Mills Co Ltd*, (1999) 96 Comp Cas 804 SC, confirmed sale set aside. *Bhadohi Woollens Ltd Re*, AIR 2001 All 18, earnest money of auction-purchaser of the company's property, allowed to be forfeited on default in payment even of the instalment. His defence that the property was under encroachments was not allowed because he had purchased the property after due inspection on as it is basis. *Bysana Anjaneyulu* v *Trilinga Technical & Management Consultant P Ltd*, (2003) 114 Comp Cas 37 AP, confirmed sale set aside because of a subsequent higher bid. The court said that the highest price available must be accepted at any stage of the proceedings.

91 New sub-clause (*ca*) added to the Section 457(1) by the Companies (Second Amendment) Act, 2002.

The Tribunal may, by order, provide that the liquidator may exercise these powers without its sanction.[92]

Then there are certain powers which he can exercise without the sanction of the Tribunal. Section 457(2) provides that the liquidator shall have power—

1. to do all acts in the name and on behalf of the company and to execute all deeds, receipts and other documents and for that purpose he may use, when necessary, the company's seal;
2. to inspect the records and returns of the company or the files of the Registrar without payment of any fee;
3. to prove and claim in the insolvency of any contributory for any balance against his estate and to receive dividends in the insolvency;
4. to draw, accept and endorse any negotiable instruments on behalf of the company;
5. to take out, in his official name, letters of administration to any deceased contributory and to do, in his official name, any other act necessary for obtaining payment of any money due from a contributory or his estate;
6. to appoint an agent to do any business which the liquidator is unable to do himself.[93]

The Companies (Second Amendment) Act, 2002 has given certain additional powers to the liquidator—(1) the liquidator can appoint security guard to protect the property of the company and to make out an inventory of the assets; (2) to appoint valuer, etc. to assess the value of the company's assets within 15 days after taking into custody of property, assets or actionable claims; (3) within 15 days from the date of receiving valuation report invite bids for sale of assets through an advertisement [sub-s. (2-A)].

The liquidator can issue a notice to the persons detailed in S. 454(2) requiring them to submit a verified statement of affairs. He can take the help of the Tribunal for this purpose.

The liquidator may call any person for recording any statement for investigating the affairs of the company being wound up and it shall be the duty of every such person to give all the information and answer all such questions relating to winding up of the company as the liquidator may require.

The liquidator will have to maintain a separate bank account for each company for depositing the sale proceeds of the assets and recovery of debts and also will have to maintain proper books of accounts in respect of all receipts and payments and submit half yearly returns to the Tribunal. [Sub-section (2-G)].

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92 S. 458, but the exercise of the powers shall be subject to the control of the court.

93 Official Liquidator, being a principal officer of the company can be called upon to file income-tax returns. *ITO* v *Official Liquidator*, (1977) 47 Comp Cas 54 AP. S. 459 contains provisions for legal assistance to liquidator. It says that the liquidator may, with the sanction of the court, appoint an advocate, attorney or pleader entitled to appear before the court to assist him in the performance of his duties. He should better have the fees and charges of the liquidator fixed by the court while sanctioning the appointment. See *Regional Edward Negus, Re*, (1989) Comp Cas 443 : [1989] 2 Comp LJ 170, 175 Bom.

The liquidator may appoint one or more chartered accountants, company secretaries, cost accountants or legal practitioners entitled to appear before the Tribunal under Section 10-GD to assist him in the performance of his duties. The appointment must be with the sanction of the Tribunal. [S. 459].[94]

An advertisement inviting bids for sale of property has to contain the following details:[95]

(*a*) name, address of registered office of the company and its branch offices, factories and plants and the place where assets of the company are kept and available for sale;

(*b*) last date for submitting bids which shall not exceed ninety days from the date of advertisement;

(*c*) time during which the premises of the company shall remain open for inspection;

(*d*) the last date for withdrawing the bid;

(*e*) financial guarantee which shall not be less than one-half of the value of the bid;

(*f*) validity period of the bids;

(*g*) place and date of opening of the bids in public;

(*h*) reserve price and earnest money to be deposited along with the bid;

(*i*) any other terms and conditions of sale which may be prescribed.

Sub-section (2-G) provides that the liquidator shall:

(*a*) maintain a separate bank account for each company under his charge for depositing the sale proceeds of the assets and recovery of debts of each company;

(*b*) maintain proper books of account in respect of all receipts and payments made by him in respect of each company and submit half yearly return of receipts and payments to the Tribunal.".

The exercise of all the above powers is subject to the control of the Tribunal and any creditor or contributory may apply to the Tribunal with respect to the exercise of any power.[96] The liquidator may also apply to the Tribunal for directions in relation to any particular matter arising in the winding up.[97] He

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94 Newly substituted section by the Companies (Second Amendment) Act, 2002.

95 S. 457 (2-F).

96 S. 457(3). Tenancy rights are not a property of the company for the purposes of winding up. The company remains a tenant until its dissolution. *Nirmala R. Bafna* v *Khandesh Spg and Wvg Mills Ltd*, (1992) 2 SCC 332: (1992) 74 Comp Cas 1 SC. An application can be made by a creditor or contributory but not by a person who, for example, says that he was denied an opportunity to purchase the property of the company. *Mahomed* v *Mortis*, [2000] 2 BCLC 536 CA.

97 S. 460(4). *Remu Pipes Ltd* v *Industrial Finance Corpn of India*, (2002) 108 Comp Cas 385 AP, the property of the company is vested in the court (now Tribunal) and not in the liquidator. The liquidator can be directed to take possession of property and to organise its sale. The liquidator may even be directed to undertake private negotiations for sale.

should have regard to any directions which may be given by resolutions of creditors or contributories.[1] And for this purpose he may summon general meetings of the creditors or contributories.[2] He shall, however, be bound to summon such meetings as the creditors or contributories may by resolution direct or when one-tenth in value of the creditors or contributories request him to do so.[3] A person aggrieved by an act or decision of the liquidator may apply to the Tribunal.[4]

The liquidator has to present to the Tribunal twice a year an account of his receipts and payments as liquidator.[5] The moneys received by him as liquidator have to be paid into the public account of India in the Reserve Bank.[6]The Tribunal gets the accounts to be audited.[7] The liquidator has to send a copy of the printed accounts to every creditor and contributory.[8] A copy is also filed with the Registrar.[9] Where the liquidation is that of a Government company, a copy must be sent to the Central Government if it is a member or to any State Government if that is a member or to both where both are members.[10]

The Central Government has the power to take cognizance of the conduct of liquidators of companies.[11] If it appears that a liquidator is not faithfully performing his duties or is not observing the requirements of the Act or if any complaint has been made by any creditor or contributory, the Central Government shall inquire into the matter and take necessary action.[12] The Central Government may require him to answer any inquiry or may apply to the court to examine him on oath,[13] and may also direct a local examination to be made of the books and vouchers of the liquidator.[14]

**Committee of inspection [S. 464]**

The Tribunal may order the appointment of a committee of inspection to act with the liquidator. The liquidator has then, within two months, to summon a meeting of the creditors for determining the membership of the committee. Within fourteen days of the creditors' meeting he shall call a meeting of the contributories to consider the creditors' suggestions with respect to the membership

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1 S. 460(1).
2 S. 460(3).
3 S. 460(3)(*b*).
4 S. 460(6).
5 S. 462(1).
6 S. 552, as prescribed by official liquidator's Account Rules and Companies (Court) Rules; rules 287 to 291 and 293 to 297.
7 S. 462(3).
8 S. 462(5).
9 S. 462(4).
10 S. 462 (4A).
11 S. 463.
12 S. 463(1).
13 S. 463(2).
14 S. 463(3).

of the committee. In case there is a conflict of opinion, the liquidator should apply to the Tribunal for a final decision.

The committee shall not consist of more than twelve members.[15] It shall have the right to inspect the liquidator's accounts.[16] The quorum for a meeting of the committee shall be one-third of the total number of its members, or two, whichever is higher.[17] A member may resign by notice in writing delivered to the liquidator.[18] His office shall become vacant if he is adjudged an insolvent, or compounds or arranges with his creditors or is absent from five consecutive meetings of the committee without leave of absence.[19] The vacancy is then filled at a meeting of the creditors or contributories, as the case may be.[20]

The committee may meet at such times as it may from time to time appoint. The liquidator or any member of the committee may call a meeting as and when he thinks necessary.[21]

**General powers of Tribunal**

*Power to Stay Winding Up* [S. 466]

Even after making a winding up order the Tribunal can stay the proceedings either altogether or for a limited time and on such terms and conditions as may be thought fit. An application for this purpose can be made by the liquidator or any creditor or contributory. The application must show a sufficient cause for the purpose. The Tribunal can exercise this power even when the company is in voluntary liquidation.[22] Where a scheme was prepared for revival of a company by the Industrial Development Bank of India and all the financial institutions consented to it, the Tribunal rescinded the winding up order after considering the scheme in detail. Since the company had remained closed for many years, there was no evidence of any existing employee whose interest had to be taken care of.[23]

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15 S. 465(1).
16 S. 465(2).
17 S. 465(4). The committee acts by a majority of its members. *See* S. 455(5).
18 S. 465(6).
19 S. 465(8).
20 S. 465(9).
21 S. 465(3).
22 *Voluntary Liquidator, Dimples (P) Ltd,* v *Registrar of Companies,* (1978) 48 Comp Cas 98 Delhi; *V. B. Purohit* v *Gadag,* (1984) 56 Comp Cas 360 (Kant). See *Richa Jain* v *ROC* and *Registrar of Companies* v *Sahu Minerals and Properties Ltd,* (1990) 69 Comp Cas 248 Raj, the court approved a reasonable scheme of arrangement suspending winding up proceedings, *National Steel and General Mills* v *Official Liquidator,* [1989] 2 Comp LJ 214 Del: (1990) 69 Comp Cas 416, members can apply to court under S. 391 for sanctioning the scheme. Members do not cease to be members for all purposes. *Nilkanta Kolay* v *Official Liquidator,* (1996) 22 Corpt LA 30 Cal, winding up order and sale of factory not set aside, purchaser had made huge investments to restart factory, application was made by the managing director after long delay and was apparently lacking bona fide.
23 *Union of India* v *Shivalik Cellulose (P) Ltd,* (1991) 72 Comp Cas 545 Delhi.

*Settlement of List of Contributories* [S. 467]

The Tribunal has the power to cause the assets of the company to be collected and applied in discharge of its liabilities. For this purpose, the Tribunal has the power to make a list of such shareholders (called 'contributories') as are liable to contribute to the assets of the company. If this requires rectification of the register of members, the court may do so in all cases where rectification is required in pursuance of the Act. The Tribunal may, after ascertaining the sufficiency of the company's assets, proceed to make calls on all or any of the contributories requiring them, within the limits of their liability, to pay any money which the court considers necessary to satisfy the debts and liabilities of the company, and the expenses of winding up and for the adjustment of the rights of the contributories.[24] The Tribunal's order, subject to any right of appeal, is conclusive evidence of the money due from the contributory.

*Adjustment of Rights of Contributories* [S. 475]

The Tribunal has the power to adjust the rights of the contributories among themselves and distribute any surplus among the persons who are entitled to it.

*Power to Arrest Absconding Contributory* [S. 479]

After making a winding up order and on proof of a probable cause to believe that a contributory, in order to evade payment of calls or to avoid examination respecting the affairs of the company, is about to quit India or otherwise to abscond or to conceal his books or property the Tribunal may order his arrest and detention until such time as is necessary, or the seizure of his books, papers or property until such time as may be necessary.

*Saving of Existing Powers* [S. 480]

The powers conferred by the Companies Act on the Tribunal are in addition to the already regular and existing powers of instituting proceedings against any contributory or debtor of the company or the estate of any contributory or debtor for the recovery of any call or other sums.

*The right of Set-off* [S. 469]

Where, apart from his liability as a shareholder, any other money is due from a contributory to the company, the Tribunal may order him to pay the same. Suppose the company also owes some money to such a contributory. Does he have the right to claim that the two debts should be mutually set off? Not in all cases, but a limited right to set-off is given by the Act in the following cases:[25]

1. In the case of an unlimited company, a contributory may set off his debt against any money due to him from the company on any independent dealing or contract with the company. But no set-off is allowed for any

24 S. 460.
25 S. 473.

money due to him as a member of the company in respect of any dividend or profit.

2. If, in the case of a limited company, there is any director, managing agent, secretaries and treasurers or manager whose liability is unlimited, he shall have the same right of set-off, as is described in point(1) above.
3. In the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by set-off against any subsequent call. This is the one case where set-off is allowed for money due on a call.[26]

Where a director was found liable to contribute to the assets of the company, he was not allowed to set off that liability against any debt owed to him by the company.[27]

*Delivery of Property* [S. 468]

If any contributory, trustee, receiver, banker, agent, officer or other employee of the company is in possession of any money, property, books or papers of the company, the Tribunal may require him to deliver the same to the liquidator. The purpose is to provide a summary procedure for quick collection of the company's assets avoiding expensive and dilatory litigation. Hence, the Tribunal can in its discretion order restoration of the company's property on the basis of evidence showing prima-facie title and need not embark into detailed enquiry.[28] The Tribunal may also summon before it any officer of the company or person known or suspected to have in his possession any such property of the company, or known or suspected to be indebted to the company or any person whom the court deems capable of giving information concerning the promotion, formation, trade, property or other affairs of the company.[29] Any such person may be examined on oath.[30] This is called "private examination". He cannot

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26 S. 469(3). See *T. N. Bank Subsidiary Co, Re*, AIR 1940 Mad 266; *Official Liquidator of Industrial Bank of India Ltd* v *Kesho Das*, AIR 1919 Lah 242. Set-off is, however, always allowed to debtors. See *Official Liquidator* v *Lakshmikutty*, (1975) 45 Comp Cas 679 Kant. The maker of a promissory note who had already made part payment was obliged to pay only the balance. *Efficient Financiers P Ltd, Re*, (1976) 46 Comp Cas 411 Kant and *Gokul Chit Funds* v *Vareed*, (1977) 47 Comp Cas 264 Ker.

27 *Anglo-French Coop Society, Re*, (1882) 21 Ch D 492 followed in *Manson* v *Smith*, (1997) 2 BCLC 161 CA.

28 *Bala Financiers P Ltd* v *Vjir Singh*, (1989) 65 Comp Cas 651, 653 P&H. *See* also *Maruti Ltd* v *P. R. Sasidharn*, (1990) 68 Comp Cas 5 P&H salaries paid to employes in good faith were not permitted to be recovered, though they were not sanctioned by the board of directors. The purpose of the section is to enable the liquidator to get maximum possible information about the assets of the company and, therefore, the court permitted the liquidator to share that information with the company's subsidiaries though he had obtained the same from the main creditor, PNB, under a promise of secrecy. *Esal (Commodities) Ltd, Re*, 1989 BCLC 59 CA; *Rome* v *PNB (No 2)*, [1990] 1 All ER 59 CA.

29 S. 477(1).

30 S. 477(2). Where the directors did not submit the statement of affairs and the information with the liquidator was not sufficient to enable him to take action for realising the assets of the company and recovering debts due to it, private examination of the directors was ordered. *Official Liquidator* v *Ganesh Narain Podar*, (1991) 70 Comp Cas 588 Raj. It has been held that any honest person who finds himself to be involved, however innocently, in a major fraud,

refuse to answer questions only on the ground that the information given by him might be used against him in the pending misfeasance proceedings.[31] He may, however, refuse to answer incriminating questions. The Tribunal has the power to order examination on the application not only of the liquidator, but also of any creditor or contributory.[32] The Tribunal may require him to produce any books and papers in his custody relating to the company. If he claims any lien on them, the production shall be without prejudice to the lien and the Tribunal shall have the power to decide the question.[33] Where he fails to appear before the Tribunal, it may cause him to be apprehended and brought before it for examination.[34] If, on examination, he admits that he is indebted to the company or has any property in his possession, the Tribunal may order him to pay the amount or deliver the property to the liquidator.[35]

Recovery of a debt cannot be ordered under this section. A regular civil suit would have to be filed. The debtor was also disputing liability in this case.[36]

*Power to order Deposit in Reserve Bank* [S. 471]

The Tribunal has the power to require any contributory, purchaser or other person from whom any money is due to the company to pay the money into the public account of India in the Reserve Bank instead of the liquidator. Section 472 then declares that all moneys, bills hundis, notes or other securities paid or delivered into the Reserve Bank in the course of winding up of a company by the Tribunal are to be in all respects subject to the orders of the court.

*Power to Exclude Creditors* [S. 474]

The Tribunal has the power to fix time or times within which creditors are to prove their debts or claims or to be excluded from the benefit of any distribution made before these debts or claims are proved.

*Public Examination* [S. 478]

Where the Official Liquidator has made a report to the Tribunal stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any officer of the company since its formation, the Tribunal may direct that the person or officer may appear before it and be

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which had catastrophic effects for thousands of depositors, naturally was expected to cooperate with those whose duty it was to investigate the matter. Where it was possible that the respondents might be potential defendants although the liquidators had not made even a tentative decision to bring proceedings against them. The court ordered that the respondents should provide the requisite information, *Bank of Credit and Commerce International SA (In Liq.) (No. 2)*, (1997) 1 BCLC 526 Ch D.

31 *Pravin Shankarchand Shah* v *D. B. Dalal*, (1967) 37 Comp Cas 317 Bom.

32 *Shankarlal Agarwalla* v *Satya Narayan Jugal Kishore*, (1967) 37 Comp Cas 146 Cal.

33 S. 477(3).

34 S. 477(4).

35 S. 477(5)(*b*). *See* also sub-sections (8) and (9). The orders of the court under this section are executable in the same manner as a decree for payment of money or delivery of property. An order so executed operates as a discharge from liability unless the court orders otherwise. *State of J&K* v *Hindustan Forests Co (P) Ltd*, (1997) 88 Comp Cas 21 and 54 P&H.

36 *Shivalik Chit fund and Machine Tools (P) Ltd* v *Agricultural Industries*, (1997) 89 Comp Cas 62: AIR 1996 HP 83.

publicly examined.[37] Examination shall relate to the promotion or formation of the company, or to the conduct of its business or the person's conduct and dealings as an officer.[38] The necessary conditions for exercising the power to order public examination are—

1. that the Official Liquidator has made a further report;
2. that such report contains a finding of fraud;
3. the finding of fraud must be against the person whose examination is sought;
4. the individual must be one who has taken part in the promotion or formation of the company or who has been an officer of the company.[39]

Thus even where the report of an Official Liquidator contains allegations of fraud, such as over-borrowing by the company on forged documents, the Tribunal will not order the examination of an officer unless the report attributes to him some specific acts of fraud.[40] If the allegations are of specific nature, it will not be necessary for the liquidator to offer any proof. A public examination would not have been necessary if proofs were already available. There could have been a direct action in that case. In a Delhi case[41], the allegations were that no receipts had been obtained for certain payments, that certain others were not at all shown in books of account and that there were also overpayments. It was held that these allegations were sufficiently specific to justify an order of public examination of the managing director. Where a director was not charged with fraud in the liquidator's report, but he filed an affidavit assuming responsibility for the act constituting the fraud, the court ordered him to stand public examination.[42]

"Public examination under the provisions of the Act does not amount to accusation and is not prohibited under Article 20(3) of the Constitution of India."[43]

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37 A receiver appointed by debenture-holders is an officer for this purpose and can be examined. *Hiralal Kalyanmalji Seth* v *Gendalal Mills Ltd*, (1975) 2 SCC 516 : (1976) 46 Comp Cas 142. The SEB, taking over an electricity supply co also collected its outstanding bills. The SEB was directed by the court to hand over the amount to the liquidator of the company. *Benaras Electric Light & Power Co* v *UPSEB*, (1983) 53 Comp Cas 597 Cal. The tenancy rights of the company taken over by the Board were held to have become vested in the Board. Where the whole undertaking has not been taken over, nor the company wants to remain in business, tenancy would have to be surrendered to the landlord. *Ravindra Ishwardas Sethna* v *Official Liquidator*, (1983) 4 SCC 269 : (1983) 54 Comp Cas 702. For another case on delivery of property see *Inderbir Kaur* v *Satbir Singh*, (1983) 53 Comp Cas 768 Del.

38 S. 478(1).

39 See Buckley, ON COMPANIES, 13th Edn 65. Adopted by the Calcutta High Court in *Lohar Valley Tea Co, Re*, (1964) 68 CWN 938. *See* also the Supreme Court decision in *Official Liquidator* v *K. Madhava Naik & Others*, [1965] 1 Comp LJ 161 SC.

40 *Official Liquidator* v *C. V. Raman*, [1966] 2 Comp LJ 124 Mad. *Official Liquidator* v *T. Sundaram*, (2003) 116 Comp Cas 88 (Mad), an order of examination was considered not necessary where the directors had not controverted the report of the liquidator.

41 *Shiv Dayal* v *Liberty Finance (P) Ltd*, (1980) 50 Comp Cas 529 Del.

42 *Central Tipperah Tea Co Ltd, Re*, [1966] 2 Comp LJ 82 Cal. Following *George Stapylton, ex parte*, 1896 AC 146 and *Lohar Valley Tea Co, Re*, (1964) 68 CWN 938. *See* also GAJENDRAGADKAR CJ in *K. Joseph Augusthi* v *M. A. Narayanan*, AIR 1964 SC 1552 at 1557 : (1963) 34 Comp Cas 546.

43 *Narayanlal* v *M. P. Mistry*, AIR 1961 SC 29 : (1960) 30 Comp Cas 644. Followed : *Official Liquidator* v *Raman*, [1966] 2 Comp LJ 124 and *Official Liquidator* v *Haridas Mundra*, [1970] 2 Comp LJ 46.

The Official Liquidator has to take part in the examination.[44] The Tribunal may put such questions to the person examined as it thinks fit.[45] The examination shall be on oath and he shall answer all questions as the Tribunal may put or allow to be put to him.[46] However, he should be given the opportunity to be heard and present his objections, if any, before any order for his examination is made.[47] He may apply to the Tribunal to be exculpated from any charges made or suggested against him. If he does so the Official Liquidator shall appear on the hearing of the application and call the Tribunal's attention to relevant matters.[48]

**Dissolution of company [S. 481]**

When the affairs of the company have been completely wound up or when, for want of funds, the liquidator cannot proceed with the winding up or if it is just and reasonable to do so, the Tribunal shall make an order that the company be dissolved from the date of the order, and the company shall stand dissolved. Within thirty days, the liquidator should file a copy of the order with the Registrar.[49]

## ENFORCEMENT OF ORDERS AND APPEALS

**Enforcement of orders [S. 482]**

An order of a winding up court is enforceable throughout the country through courts having jurisdiction in the area where an enforcement is sought to the same extent as if it were an order made by that particular court and the registered office of the company was situate in that jurisdiction. But that court cannot interfere with the order. If anybody is aggrieved with the merits of the order, his proceedings against the order must be in that very court which passed it.[50] The court through which an enforcement is sought must itself be a court having jurisdiction in company matters within the meaning of S. 2(H).[51]

**Appeals from orders [S. 483]**

This section will remain applicable up to the time that the Companies (Second Amendment) Act is enforced. Thereafter appeal system will change. The decisions of the Tribunal (National Company Law Tribunal) will be

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44 S. 478(2) and (3).

45 S. 478(4).

46 S. 478(5).

47 See *Lohar Valley Tea Co, Re*, (1964) 68 CWN 938.

48 S. 478(7).

49 The power can be exercised only after the affairs have been completely wound up. *Biswanath Khan* v *Prafulla Kumar Khan*, (1989) 66 Comp Cas 452 Cal: [1989] 3 Comp LJ 208 Cal. The power of the court is extensive enough to cover an order of dissolution without winding up. Accordingly, where the company had no assets left and there was no point in winding up, the court ordered direct dissolution, *Sarmon (P) Ltd* v *Sidha Syntex Ltd*, (1994) 2 Crimes 257.

50 *Raghbir Singh* v *District Magistrate, Delhi*, [1963] 2 Comp LJ 230 : (1964) 34 Comp Cas 25 Punj.

51 *Eastern Investment Co Ltd, Re*, [1905] 1 Ch 352.

appealed against before the Appellate Tribunal (National Company Law Appellate Tribunal). Further appeals would lie before the Supreme Court.

Appeals from orders or decisions in the matter of winding up can be filed in the same court which passed or delivered them. A winding up petition often sounds the death knell of the company. It is unlikely that a liquidator would pursue the company's counter-claims with the same diligence and efficiency as the directors would do. The company's appeal against a winding up order was allowed on this ground.[52]

The manner of filing appeals and the conditions subject to which they can be filed are to be the same as in other cases within its ordinary jurisdiction. Where a winding up petition or other petitions under Sections 397 and 398 are pending before the company court, and an interim injunction is passed in any other proceedings, the order is "in the matter of winding up" within the meaning of S. 483 and is, therefore, appealable. The words "in the matter of winding up" mean that the order or decision must be one pertaining to or within the scope of winding up jurisdiction. Every order which may reasonably be considered a judicial order, as distinguished from a merely administrative order, is appealable under the section.[53] A decision upon the right or liability of parties in the exercise of judicial discretion would be appealable.[54] Where during the pendency of a petition under S. 397 or 398 for relief against mismanagement or oppression, an interim injunction was granted and the appointment of a receiver was ordered, this was held to be appealable.[55] An order enabling the parties to compromise was held to be not appealable.[56] The transfer of a pending suit to the winding up court[57] and the disposal of a pending suit have been held to be appealable.[58] An order simply admitting a petition for winding up without order advertisement was held to be not appealable.[59]

Where a secured creditor brought the assets of the company to sale and the sale was confirmed in favour of the highest bidder, and after all this, a nominee of the company came out with a higher bid and preferred an appeal against the confirmation, the court (now Tribunal) set aside the confirmation and remanded

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52 *Bayoil SA Re*, [1999] 1 All ER 374 CA.

53 The distinction between an administrative and a judicial order was developed by the Supreme Court in *Shankerlal Agarwala* v *Shankerlal Poddar*, (1965) 35 Comp Cas 1 SC: AIR 1965 SC 507. Following this the Supreme Court held in *Shah Babulal Khimji* v *Jayaben D. Kania*, (1981) 4 SCC 8: AIR 1981 SC 1786 that an order refusing the appointment of a receiver for the suit property was appealable.

54 *Manohar* v *TR Mills (P) Ltd*, (1994) 3 Kar LJ 306, interlocutory order, held not appealable.

55 *C. S. Joseph Rev* v *L. J. Thomas*, (1987) 62 Comp Cas 504 Ker.

56 *Ashok Kumar Gupta* v *Metal Goods (P) Ltd*, (1993) 76 Comp Cas 23 All : (1992) 20 All LR 72 (Summary), relying upon *Notified Area Committee* v *Sri Ram Singhasan*, AIR 1970 All 561 where it was held that a special appeal lies only against a judgment finally deciding the case.

57 *B. P. Gupta* v *State Bank of India*, (1993) 78 Comp Cas 766.

58 *Ibid.*

59 *Miland Exports (P) Ltd* v *A. V. Venkatnarayana*, (1995) 83 Comp Cas 585 Kant. An appeal does not lie against an order admitting a winding up petition. *Achal Alloys* v *UCO Bank*, (1996) 1 Comp LJ 287 MP.

the case to the Company Judge with the remark that the highest price available must be accepted at any stage of the proceedings.[60]

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60 *Bysani Anjaneyulu* v *Trilinga Technical & Management Consultant P Ltd*, (2003) 114 Comp Cas 37 AP.

# 22

# *Voluntary Winding Up*

A company may be wound up voluntarily in the following two ways:

1. *By ordinary resolution*

A company may be wound up voluntarily by passing an ordinary resolution when the period, if any, fixed for the duration of the company by the articles, has expired. Similarly, when the event, if any, has occurred, on the occurrence of which the articles provide that the company is to be dissolved, the company may, by passing an ordinary resolution to that effect, commence its voluntary winding up.[1]

2. *By special resolution*

A company may at any time pass a special resolution providing that the company be wound up voluntarily.[2]

Winding up commences at the time when the resolution is passed.[3]

Within fourteen days of the passing of the resolution, the company shall give notice of the resolution by advertisement in the Official Gazette and also in some newspaper circulating in the district of the registered office of the company.[4]

The corporate state and powers of the company shall continue until the company is dissolved, but it shall stop its business, except so far as may be necessary for beneficial winding up.[5]

**Declaration of solvency [S. 488]**

Voluntary winding up is of two kinds, namely:

1. Members' voluntary winding up, and
2. Creditors' voluntary winding up.

If a declaration of solvency is made in accordance with the provisions of the Act, it will be a members' voluntary winding up and if it is not made, it becomes creditors' voluntary winding up. The declaration has to be made by a majority of the directors at a meeting of the board and verified by an affidavit. They have to declare that they have made a full inquiry into the affairs of the company and have formed the opinion that the company has no debts or that it will be able to

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1 S. 484(1)(*a*).

2 S. 484(1)(*b*). See *Neptune Assurance Co* v *UOI*, (1973) 1 SCC 310, RAY J (later CJ) at 331 : (1973) 43 Comp Cas 469.

3 S. 486.

4 S. 485(1). Sub-section (2) provides that if a default is made in publishing the resolution, the company and every defaulting officer shall be punishable with a fine extending up to 500 rupees for every day of the default.

5 S. 487. See *Hari Prasad Jayantilal & Co* v *ITO, Ahmedabad*, (1966) 2 SCR 732 : AIR 1966 SC 1481 : [1966] 1 Comp LJ 230. Retrenchment compensation to employees becomes payable from the date of the resolution unless the employees are retained for continuation of business. *P. N. Ganesan (P) Ltd* v *CIT*, (1992) 74 Comp Cas 780 Mad.

pay its debts in full within a certain period, not exceeding three years, from the commencement of winding up. The declaration, to be effective, must be made within the five weeks immediately before the date of the resolution and should be delivered to the Registrar for registration before that date. It should also be accompanied by a copy of the report of the auditors on the profit and loss account and the balance sheet of the company prepared up to the date of the declaration and should embody a statement of the company's assets and liabilities as at that date.[6] There is a penalty for making the declaration without having reasonable grounds for the opinion that the company will be able to pay its debts within the specified period.[7] If the company fails to pay the debts within that period, it will be presumed that reasonable grounds for making the declaration did not exist.[8] The liquidator should forthwith call a meeting of the creditors, because the winding up has then to proceed as if it were creditors' winding up.[9]

**Members' voluntary winding up[S. 489]**

A liquidator is appointed and his remuneration fixed by the company in general meeting of the shareholders.[10] The remuneration so fixed is not to be increased in any circumstances whatsoever, with or without the sanction of the court.[11] 'The liquidator is not to take charge unless his remuneration is so fixed.[12] Within ten days of the appointment, the company should give a notice to the Registrar.[13] The liquidator within 30 days of his appointment, has to publish in the Official Gazette, and deliver to the Registrar for registration, a notice of his appointment in the prescribed form.[14] If a vacancy occurs, the company may in general meeting fill the vacancy[15] and again, within ten days, a notice of the change must be given to the Registrar. The liquidator has also to inform the Registrar of his appointment within thirty days and publish the fact in the Official Gazette.

On the appointment of the liquidator all the powers of the board of directors shall come to an end except when the company or the liquidator sanction them to continue.[16]

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6 S. 488(2).
7 S. 488(3).
8 S. 488(4).
9 S. 495.
10 S. 490(1). In an exceptional case the court allowed the liquidator to recover his remuneration from the trust property which he was safeguarding as a part of his duty, the company having no means to pay him *Berkery Applegate Ltd. Re*, [1988] 3 All ER 71 Ch D.
11 S. 490(2).
12 S. 490(3).
13 S. 493.
14 S. 516. Failure to do so is punishable with fine extending up to Rs 500 for every day of default.
15 S. 492.
16 S. 491. The meeting is to be held in accordance with the provisions of the Act or as the Tribunal may require on application.

**Reconstruction in Winding Up [S. 494]**

Where the company in liquidation proposes to sell its business or property to another company, the liquidator may, with the sanction of a special resolution of the company, receive as a consideration for the transfer, shares or other like interest in the transferee company for distribution among the members of the transferor company. Also he may enter into any other arrangement under which the members of the transferor company may, instead of, or in addition to, receiving cash, shares, *etc.*, participate in the profits or other benefits of the transferee company. The interest of a dissenting member, if any, can be purchased by the liquidator at a price to be determined by agreement or by arbitration.[17]

**Duty to call Creditors' Meeting**

If the company has not been able to, or, in the opinion of the liquidator will not be able to pay its debts in full within the period stated in the declaration of solvency, he should immediately summon a meeting of the creditors and lay before them a statement of the assets and liabilities of the company[18] and, thereafter, the winding up shall proceed in the manner of creditors' voluntary winding up.[19]

Where the liquidation continues for more than a year the liquidator has to call a general meeting of the company at the end of the first year and at the end of each subsequent year.[20] He should lay before the meeting an account of his acts and dealings and the progress of the winding up during the year.[21]

**Final Meeting and Dissolution [S. 497]**

When the affairs of the company are fully wound up, the liquidator makes an account of the winding up showing how the winding up has been conducted and the property of the company disposed of. He then calls a general meeting of the company for the purpose of laying before it the accounts of the winding up. The meeting is to be called by advertisement in the Official Gazette and a local newspaper specifying the time, place and object of the meeting. Within a week after the meeting the liquidator sends a copy of the accounts and a return of the meeting to the Registrar and the

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17 Where the company defaulted in paying the amount settled in a scheme, and the court, which had approved the scheme, ordered sale of assets, it was held that Order 34 of CPC for setting aside the sale was not applicable as the sale was not in the execution of a decree, but under an order of the court under its power of supervision. *Bank of Baroda* v *Anand Finance Ltd*, (1980) 50 Comp Cas 279 Del.

18 S. 495(1). Sub-s. (2) provides a penalty for default extending up to five thousand rupees.

19 S. 498.

20 S. 496(1). The meeting must be held within three months from the end of each year or such longer period as the Central Government may allow.

21 A default shall entail punishment extending up to one thousand rupees. S. 496(2). He has also to file audited statements in terms of S. 551.

Official Liquidator.[22] If no quorum was present at the meeting, he makes a return stating the fact.[23]

The Registrar, on receipt of the accounts and the return, registers the documents. The Official Liquidator, to whom also a copy of the accounts and return is sent, is required to make a scrutiny of the books and papers of the company. The liquidator of the company and its past and present officers are under a duty to give the Official Liquidator all reasonable facility for the purpose.[24] The Official Liquidator reports to the Tribunal the result of his scrutiny. If the report shows that the affairs of the company were not conducted in a manner prejudicial to the interest of its members or to 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 reveals that the affairs were conducted in a manner prejudicial to the interests of the members or to public interest, the Tribunal shall direct the Official Liquidator to make further investigation into the affairs of the company.[25] The Tribunal may invest him with such powers as may be necessary for the purpose. When the Tribunal receives the report on further investigation, it may declare that the company stands dissolved or make such order as the circumstances discovered by the report may warrant.[26]

**Creditors' voluntary winding up [S. 499]**

The company calls a meeting of its creditors. The meeting may be held either on the same day on which a resolution for voluntary winding up is passed or the next day following that day. Notices of the meeting of creditors have to be sent by post to the creditors simultaneously with the sending of the notices of the meeting of the company.[27] Notice of the meeting should also be advertised in the Official Gazette and in two newspapers circulating in the district of the registered office or principal place of business of the company.[28] The board of directors have to lay before the meeting a full statement of the position of the company's affairs and a list of the creditors of the company and the estimated

22 The official liquidator referred to in S. 448(1)(c), who may be a wholetime or part-time officer appointed by the Central Government.

23 S. 497(4).

24 S. 497(6).

25 S. 497(6-A).

26 S. 497(5), (6), (6-A) and (6-B) as amended by the Amendment of 1965. The unclaimed property of the company, if any, becomes vested in the State and cannot be made the subject-matter of litigation without impleading the State. *Biswanath Khan* v *Prafulla Kumar Khan*, (1989) 66 Comp Cas 452 Cal: [1989] 3 Comp LJ 208 Cal.

27 S. 500(1). A creditor can attend in person or through proxy. It has been held that message of proxy received through fax and signed by the creditor or by someone authorised by him would be a proper proxy form and the creditor would have the right to attend the creditors meeting through such a proxy. *A Debtor (No 2021 of 1995), ex parte, Re,* (1996) 1 BCLC 538 Ch D; *I.R.C.* v *The Debtor,* (1996) 1 BCLC 538 Ch D.

28 S. 500(2).

amount of their claims.[29] A copy of any resolution passed at the creditors' meeting must be filed with the Registrar.[30]

Appointment of liquidator is made by nomination both by the members and creditors at their respective meetings.[31] If they nominate different persons, ordinarily, the creditors' nominee shall be the liquidator.[32] But any director, member or creditor may apply to the Tribunal for an order that the company's nominee or the official liquidator or some other person should be appointed. If no person is nominated by the creditors, the members' nominee shall be the liquidator. Likewise, if no nomination is made by the members, the creditors' nominee shall be the liquidator.[33]

The creditors may appoint a committee of inspection consisting of five persons.[34] The company may also add five members to the committee.[35] If the creditors do not accept the company's nominees, an application may be made to the Tribunal for settlement.[36] The committee of inspection, or, where there is no such committee, the creditors shall fix the remuneration of the liquidator, failing which, it shall be determined by the court.[37] On the appointment of the liquidator the powers of the board come to an end.[38] The procedure to be followed by the liquidator is just the same as in the case of members' voluntary winding up, except that in addition to the meetings of the members, the liquidator has also to call meetings of the creditors.[39]

**Provisions applicable to every voluntary winding up [S. 510]**

*Statement of Affairs* [S. 511-A]

A statement as to the affairs of the company has to be submitted to the liquidator. The statement has to be submitted and verified by the directors, manager, secretary or other chief officers of the company. The statement should show the following particulars:

1. the assets of the company, showing separately cash in hand and at bank and negotiable securities;
2. the debts and liabilities of the company;

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29 S. 500(3).

30 S. 501(1). *See* also sub-section (2).

31 S. 502(1).

32 S. 502(2).

33 S. 502(1), (2), (3), and (4). Within twenty-one days, the liquidator should get his appointment published in the Official Gazette and send a notice to the Registrar. S. 506 provides that except where appointed by the court, any vacancy in the office of the liquidator may be filled by the creditors.

34 S. 503(1).

35 S. 503(2).

36 *Ibid.*, proviso and *see* sub-sections (3), (4) and (5).

37 S. 504(1) and (2).

38 But the committee of inspection or the creditors may sanction the board's power to continue. S. 505.

39 *See* Ss. 507, 508 and 509.

3. names and addresses of the company's creditors, indicating the amount of secured or unsecured debts;
4. the debts due to the company and the names and addresses of the persons from whom they are due and the amount likely to be realised;
5. such other information as may be required.

### *Powers of Liquidator* [S. 512]

The powers of the liquidator in voluntary winding up are just the same as those of the official liquidator in a winding up by the Tribunal.[40] There is, however, this difference that in cases where the official liquidator has to obtain the sanction of the Tribunal, the liquidator in voluntary winding up shall have to obtain the sanction of the company, and in the case of creditors' voluntary winding up, he shall have to obtain the sanction of the Tribunal, or of the committee of inspection, or, in its absence, of the creditors. In addition to those powers, the liquidator shall have the following powers:

1. The power of the court of settling the list of contributories.[41]
2. The power of the court of making calls.[42] Sanction of the court is not necessary. His right to make a call is also not affected by the fact that the company had itself made a call which had become time-barred.[43]
3. The power of calling general meetings of the company.[44]

A voluntary liquidator is not, speaking strictly, an officer of the company, but even so he is in the position of an officer because he takes over the management of the company from its directors. He is, thus, entitled to a relief under Section 633 if the conditions are satisfied.

### *Arrangement when Binding* [S. 517]

Any arrangement entered into by a company about to be or being wound up and its creditors becomes binding upon the parties provided that it has been sanctioned by a special resolution of the company and acceded to by three-fourths in number and value of the creditors. Any creditor or contributory can prefer an appeal within three weeks and then the arrangement will be approved, varied or discarded depending upon the discretion of the Tribunal and the merits of the scheme.[45]

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40 Accordingly he has the power to initiate legal proceedings on behalf of the company with the sanction of shareholders or creditors as the case may be, *State of W.B.* v *Arun Kumar Bose*, (1993) 2 Cal LJ 56.

41 *See* S. 467.

42 *See* S. 470.

43 *T. M. Mathew* v *Industrial Bank Ltd*, (1972) 42 Comp Cas 55 Ker.

44 S. 512(1)(*e*).

45 See *Inland Revenue Commissioners* v *Adams & Partners Ltd*, [1999] 2 BCLC 730 Ch D, on appeal Daily Telegraph, Oct 31, 2000 CA, a scheme which proposed no dividend to unsecured creditors was held to be a valid scheme of arrangement, but not of compromise. It was sanctioned because it was approved by requisite majority.

*Costs of Voluntary Winding Up* [S. 520]

All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, are, subject to the rights of secured creditors, payable out of the assets of the company in priority to all other claims. Rents paid for premises which were necessary for winding up are expenses properly incurred, but not accumulated lease money for property which was retained out of sheer inaction.[46] The expenses incurred by the liquidator in proceedings against directors for preferential payments and wrongful trading were held to be costs, charges and other expenses incurred in the course of winding up. They had priority over preferential creditors irrespective of the success or failure of the proceedings.[47]

*Removal of Liquidator* [S. 515]

In the exercise of his powers, the liquidator shall be subject to the control of the Tribunal.[48] Any creditor or contributory may apply to the Tribunal with respect to any exercise or proposed exercise of the liquidator's powers. If the Tribunal finds that, from any cause whatever, no liquidator is functioning the Tribunal may appoint the official liquidator or any other person as the liquidator of the company. The Tribunal also has the power, on cause shown, to remove a liquidator and appoint some other person in his place.[49] In *Dr Hardit Singh* v *ROC*,[50] the Delhi High Court ordered the removal of a voluntary liquidator on the grounds that he had not deposited certain amounts as required by Section 553 of the Act, that he had been uncooperative and defiant regarding the recovery of the company's claims and that the process of liquidation was a collusive affair between the ex-managing director and the liquidator. The Madras High Court[51] rejected an application for removal as the move was not *bona fide*, but was motivated by malice on account of certain actions which were taken against the applicant by the liquidator and because the applicant was apprehensive that the liquidator would pursue the action to the finish. "The courts are loathe to interfere with the scheme of self determination by the members of a company. Vague allegations are not sufficient to secure the removal of a liquidator.[52] Where the liquidator made no response to a creditor's claim and proofs, nor even replied to his letters enquiring about the matter, this was held to be dereliction of duty sufficient to merit removal.[53]

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46 *Massey, Freehold Land & Brickmaking Co, Re*, 1870 LR 9 EQ 367; *Linda Marie Ltd, Re*, 1989 BCLC 46 Ch D.

47 *Floor Fourteen Ltd, Re*, [1999] 2 BCLC 666 Ch D.

48 *Registrar of Companies* v *Rowe & Pal*, (1972) 42 Comp Cas 188 Ori.

49 S. 515.

50 (1972) 42 Comp Cas 256 Delhi.

51 *Rangaswami* v *Mandhi Viswa Brahmana Sarvajana Sahaya Nidhi Ltd*, (1967) 37 Comp Cas 730 Mad.

52 *Registrar of Companies* v *Hardit Singh Giani*, (1978) 48 Comp Cas 152 Del.

53 *Amar Nath Krishan Lal* v *Hindustan Forest Co Ltd*, (1993) 77 Comp Cas 128 P&H.

A liquidator is not removable only on the ground that he was a shareholder or director or because the creditors or members in majority demand it.[54]

The following statement occurs in a judgment of ASTBURY J[55] as to the meaning of the expression "on cause shown".

> The words "on cause shown" have not quite the effect of "if the court shall think fit." JESSEL MR said in *Sir John Moore Gold Mining Co, Re*,[56] "they point to some unfitness of the person—it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up — some unfitness in a wide sense of the term." But, as pointed out by the Court of Appeal in *Adam Eyton Ltd, Re*,[57] this definition was not intended to be exhaustive, and if the court is satisfied on the evidence that it is desirable in the interest of all those interested in the assets that a particular person shall not manage the assets, the court has power to remove him, without there being shown any personal misconduct or unfitness.

The liquidator or any contributory or creditor may apply to the Tribunal to determine any question arising in the winding up of the company or to exercise all or any of the powers which the Tribunal may exercise if the company were being wound by the Tribunal.[58] In the exercise of this power the Tribunal stayed a voluntary winding up because the company was producing a socially needed commodity, cement; it had resources. both raw material and finance and the shareholders wanted to revive their company.[59]

The liquidator may make a report to the Tribunal stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company or by any officer after the formation of the company. The Tribunal may then direct the person to appear for public examination.[60]

**Position of liquidator: duties and liability**

In a winding up by the Tribunal, the liquidator is an officer of the Tribunal, and not an agent of the parties concerned.[61] In a voluntary winding up, he is not an officer of the Tribunal. He owes his appointment to the company in general meeting. In any case, the duties of liquidators of both kind are more or less of the same nature. In the conduct of winding up they have to

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54 *See* Charlesworth & Cain, COMPANY LAW, 606 (11th Edn, 1977), citing *M. Knight & Co Ltd* v *Montgomerie*, (1892) 19 R 501 and *Ker, Petitioner*, (1897) 5 SLT 126 OH.

55 *Rubber and Produce Investment Trust*, [1915] 1 Ch 382 at 387.

56 (1879) 12 Ch D 325, 331.

57 (1887) 36 Ch D 299 CA.

58 S. 518. The court attaches great weight to the demand of the liquidator for public examination than in other cases. The application of a contributory was rejected when it appeared that his only purpose was to know his own position as a guarantor of the company's debts. *Embassy Art Products Ltd, Re*, 1988 BCLC 1 Ch D.

59 *V. B. Purohit* v *Gadag*, (1984) 56 Comp Cas 360 Kant.

60 S. 519(1). The provisions of sub-ss. (2) to (11) of S. 478 shall apply in relation to any such examination. See *Satish Churn Law* v *H. K. Ganguly*, AIR 1962 SC 806 : (1962) 32 Comp Cas 97.

61 *Rolls Razor Ltd, (No 2), Re*, [1970] Ch 576, 586.

perform basically the same functions. They have to take into their custody the property of the company;[62] to keep proper books for recording proceedings at meetings:[63] to have their accounts audited;[64] to call meetings of committees of inspection;[65] to call meetings of members and creditors.[66] They are to keep the moneys received by him as such in a special account in any Scheduled Bank to be entitled "the Liquidation A/C of...." The Tribunal may, however, permit a liquidator to open any other account and to operate the same as directed for beneficial winding up. He should not hold the money for more than 10 days in his hands because he has then to pay interest @12% and incidental expenses and also take the risk of losing office. The bank in which such an account is opened becomes liable if through negligence any loss takes place to the liquidation account.[67]

The liability of a liquidator for breach of his duties involves the application of agency principles. Functionally, the liquidator is an agent of the company and not a trustee for shareholders or creditors. An individual shareholder or creditor cannot sue him for damages for delaying payments unless it is due to some deliberate misconduct towards a particular person. The proper remedy is to seek an order of the court in reference to his conduct.[68] Where, however, the failure to perform a statutory duty causes loss to an individual claimant, the liquidator may be held liable to him. For example, where the liquidator failed to contact a creditor whose name appeared in the books and the company was dissolved without paying him, the liquidator was held liable for his loss. The creditor could not submit his claim because he did not come to know of the winding up. The general advertisement inserted by the liquidator was considered by the court to be not sufficient.[69]

About the standard of care which the liquidator is expected to use, there is this comment by MAUGHAM J:[70]

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62 S. 456. He can get the orders of a magistrate under this section to recover possession of the company's property. A landlord seized the godown of the company. The goods disappeared from the godown. The landlord was forced to pay to the liquidator the value of the goods lost. *Dalbir Singh* v *Sakaw Industries (P) Ltd*, (1983) 54 Comp Cas 359 Cal. Where a property has been delivered by way of security the liquidator can demand from the security holder the surplus proceeds of the property. *Maharashtra SEB* v *Official Liquidator, Ernakulam*, (1982) 3 SCC 358 : (1983) 53 Comp Cas 248; *India Electric Works Ltd, Re*, (1983) 53 Comp Cas 573 Cal. Where the property of the company was in the nature of shares in another company and that other company made a rights issue without offering its proportion to the company, the liquidator can proceed to recover the company's due. *V. Radha Krishnan* v *P. R. Rama Krishnan*, (1993) 78 Comp Cas 694 Mad: (1995) 17 Corpt LA 63.

63 S. 461.

64 S. 462.

65 S. 464.

66 Ss. 495-497 and 508.

67 S. 553 and see *Madras Provincial Coop Bank* v *South Indian Match Factory*, [1944] 2 MLJ 295. S. 554 enjoins the liquidator not to keep the money in any private banking account. A liquidator defaulting in his functions can be directed by the court under S. 556 to make good the default.

68 *Knowles* v *Scott*, [1891] 1 Ch 717.

69 *Plusford* v *Devenish*, [1903] 2 Ch 625.

70 In *Home & Colonial Insurance Co, Re*, [1930] 1 Ch 103, 124-125: [1929] All ER Rep 231.

> [O]bservations of the learned judges[71] certainly do not encourage the proposition that the liquidator is a mere agent, liable only if negligence of a gross kind is established. I should hesitate a long while before deciding that a voluntary liquidator is personally liable, if notwithstanding every care on his part he admits a claim which is ill-founded. The statutory duties cast upon him involve the getting in of the property and applying such property in satisfaction of the liabilities *pari passu*, and subject thereto the distribution of the balance among the members.... The winding up rules recognise that the liquidator, who has to examine every proof of debt lodged with him and the grounds of the debts, may be wrong. The claim of the creditor may be based upon disputable matters of fact, as well as difficult questions of law. Moreover the duty of getting in the property of the company cannot be an absolute duty, since such property may be irrecoverable. I do not, therefore, accept the view that the liquidator in the matter of admitting proof is practically in the same position as an insurer so that, in any event, and under all circumstances, he is liable if a debt is subsequently shown to have been wrongly admitted.
>
> On the other hand, I think there can be no doubt that, in the circumstances of the case, a high standard of care and diligence is required from a liquidator in a voluntary winding up. He is of course paid for his services; he is able to obtain wherever it is expedient the assistance of solicitors and counsel, and, which is a most important consideration; he is entitled, in every case of serious doubt or difficulty in relation to the performance of his statutory duties, to submit the matter to the court, and to obtain its guidance.

Applying these principles to the facts of the case, the court held the liquidator to be liable because he had admitted and paid a very big claim without proper precautions and legal advice. The company had entered into an agreement for re-insuring marine risks with another company. The liquidator paid a large sum of money to that other company which he supposed to be due under the agreement but which subsequently turned out to be void. The dissolution was annulled on that ground. The liquidator was not allowed to recover back the payment from the other company and, therefore, he was held personally liable for the company's loss. He did not fulfil his duty of investigating the claim . He did not take legal advice. The articles of a company cannot give any protection to a liquidator. They do not constitute any contract between him and the company.

### *Body Corporate cannot be Liquidator* [S. 513]

A body corporate is not qualified to be appointed as a liquidator of a company in a voluntary winding up. Such an appointment is void. A body corporate which acts as a liquidator and its every director or manager is punishable with fine extending up to Rs 10.000.

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71 In *Windsor Steam Coal Co, Re*, [1929] 1 Ch 151, where negligence on the part of the liquidator was clearly established.

A proviso has been added by the Second Amendment of 2002 to the following effect:

Provided that, notwithstanding anything contained in any other law for the time being in force a body corporate consisting of such professionals as may be approved by the Central Government from time to time, shall be qualified for appointment as Official Liquidator under Section 448.

*Corrupt Inducement for becoming Liquidator* [S. 514]

A person giving any gratification to any creditor or member for the purpose of becoming liquidator or preventing a person from becoming a liquidator is punishable with fine extending up to Rs 10,000.

**WINDING UP SUBJECT TO SUPERVISION OF COURT [S. 522]**

This mode of winding up and this set of provisions [Ss. 522-527] have been deleted by the Companies (Second Amendment) Act, 2002.

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# 23

# *Conduct of Winding Up*

Whether a winding up is by the Tribunal or voluntary, in many respects it is conducted in accordance with uniform rules. The Act contains a number of provisions applicable to every mode of winding up.[1]

One of the foremost duties of a liquidator is to get in the company's assets for the purpose of satisfying its debts and liabilities. If any property of the company is in the custody of some person, the liquidator can, through an application to the Tribunal, recover possession of that property.[2] An important asset which is available for winding up is the uncalled capital, if any, of the company.

**Contributories [S. 428]**

To realise the uncalled residue of the company's capital, the liquidator has to call upon the shareholders, who are then called contributories, to pay the unpaid balance. A "contributory means a person liable to contribute to the assets of a company in the event of winding up and includes the holders of any shares which are fully paid up".[3] The liability extends to an amount which would be sufficient for payment of the company's debts and liabilities and the costs, charges and expenses of winding up and for adjustment of the rights of contributories among themselves. The extent of each member's liability is to pay the unpaid amount on his shares. In the case of a guarantee company, apart from the guarantee amount, if a member is a shareholder also, he would be liable to pay the unpaid amount on his shares. Where any sum is owing by the company to a member in his capacity as a member such as dividend, it will not give him the rank of a creditor as against other unpaid creditors [even if they are members] of the company. [S. 426] Of such persons the liquidator has to make two lists. *List A* which is for present members and *List B* for past members.

*Nature of Liability* [S. 429]

*List A* is drawn up from the company's register of members. Every person whose name appears in the register on the commencement of winding up is placed on the list. When a person knows that his name is entered in a company's register of shareholders and continues to have it there up to the commencement of winding up, he will be estopped from going against the register and disowning liability. The liability of a member of a company to be included in the list of contributories is not *ex contractu*, that is, it does not arise by virtue of his contract to take shares. His liability is *ex lege* which means that it arises by reason of the fact that his name appears on the register of members of the company. It is, therefore, no answer for the contributory against the claims of

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1 Chapter V of Part VII.

2 *See* powers of the Tribunal in 'Compulsory Winding Up'. [S. 468].

3 S. 428. The liability of the fully paid shareholder is nil. He is placed on the list for the purpose of distribution of assets and for other procedural purposes. *Aloie Estate* v *R. B. Seth*, (1970) 1 SCC 425: AIR 1971 SC 920: (1970) 40 Comp Cas 1116.

the company to say that, although his name appears on the register, he is not liable because the allotment to him was void."[4] The total absence of a contract is however, different from the contract being violable. Where shares were allotted to a person without any application from him, the liquidator was not permitted to place his name in the list of contributories.[5]

It should, however, be noted that "a contributory is not liable to pay one farthing of the uncalled share money until the Tribunal has made such an order and a call notice has then been served upon the contributory in accordance with the Tribunal's order".[6] The Tribunal will authorise a call to be made only when it is satisfied that the financial condition of the company is such that a call is necessary to discharge the liabilities of the company.[7] In the case of voluntary winding up a call can be made by the liquidator without sanction of the Tribunal.

But once a call has been made, the liability of the contributory to pay it becomes a statutory debt. A new liability to pay the unpaid balance commences. "It is settled in a long course of decisions that the members of a company in liquidation are liable in respect of unpaid calls even though the calls were made by the company before it went into liquidation and the suit of the company for its realization had become barred by time. The principle of these decisions is that Section 429 creates a new liability on the shareholders in respect of such calls, which is distinct from and independent of the rights which the company had against them before the winding up."[8]

If a person's name is not included in the list, he can call upon the liquidator to make good the default and if the liquidator does not do so within 14 days, the court can under Section 556 issue necessary directions. A notice given six years before the date of application to the court cannot be acted upon.[9]

If a contributory dies during winding up, his liability automatically falls on his legal representatives.[10] "Where a contributory dies before his name is

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4 See *R. Lakshmi Narasa Reddi* v *Official Receiver, Sree Films Ltd*, AIR 1951 Mad 890; *Yamuna Das Kanoujia* v *Behar Engineer & Contractors Ltd*, AIR 1944 Pat 226; *Peninsular Life Assurance Co Ltd, Re*, AIR 1936 Bom 24. In this case a contributory's defence that out of 250 shares shown against his name in the company's register, 200 shares were held by him as nominee of one of the directors, was rejected. *See* also *Hakim Rai* v *Official Liquidator of Peshawar Bank Ltd*, AIR 1915 Lah 320; *Samasundaran Pillai* v *Official Liquidator*, [1967] 2 Comp LJ 257 Mad.

5 *H. H. Manabendra Shah* v *Official Liquidator*, (1977) 47 Comp Cas 356.

6 See *Sonardih Coal Co Ltd, Re*, AIR 1930 All 617. Section 426(1) provides that the section shall not invalidate any provision in a policy of insurance or other contract under which the liability of the individual member on the policy or contract is restricted or only the funds of the company are made liable.

7 S. 470. See *Mohd Akbar* v *Associated Banking Corpn of India*, AIR 1950 Bom 386.

8 *Pokhar Mal* v *Flour & Oil Mills Co Ltd*, AIR 1934 Lah 1015. *See* also *East Bengal Sugar Mills Ltd, Re*, AIR 1941 Cal 143; *P. P. Ramabhadran* v *T. S. Manickam*, AIR 1941 Mad 565; *L. Gupta* v *V. B. Sarvate*, AIR 1956 Nag 204; *Pudukkottai Ceramics Ltd* v *Sethu*, AIR 1956 Mad 448; *S. P. Subbiah* v *Peria Karuppan Chettiar*, [1967] 1 Comp LJ 168. The liquidator cannot claim interest from the date of the company's time-barred call, but only from the date of the court's order. *S. P. Subbiah* v *Peria Karuppan Chettiar*, [1967] 1 Comp LJ 168.

9 *Gulzarilal Bhargava* v *Official Liquidator*, (1972) 42 Comp Cas 401, 405-406 Del.

10 *Sumitra Kuer* v *Sitamarhi Sugar Works Ltd*, AIR 1938 Pat 287.

entered in the list of contributories and an order is made by the court for payment of the balance, such balance is recoverable from his legal representatives and heirs. But in such a case, the proper procedure for the company or liquidator to enforce payment is to adopt proceedings for administration of the estate of the deceased and not seek an order for payment personally against the representative."[11] Where a contributory is adjudged insolvent, his assignee in insolvency shall take his place.[12] Where the contributory is a company which is ordered to be wound up, its liquidator shall become the contributory.[13]

**Liability of past members [S. 426]**

Past members are also liable as contributories in certain circumstances. The liability of a past member is subject to the following qualifications as laid down in Section 426:

1. A past member is not liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up.
2. A past member is not liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member. In other words, his liability is only for the liabilities incurred up to the date of his membership.
3. No past member is liable to contribute unless it appears to the Tribunal that the present members are unable to satisfy the contribution. The primary liability is that of the present shareholders to pay the unpaid balance. They should be required to pay in the first place and on their default the past members become liable to pay.

In *Paras Ram Brij Kishore* v *Jagraon Trading Syndicate*:[14]

> The liquidator of a company called upon the defendant to pay the uncalled amount on his shares. His shares had been forfeited before the winding up and, therefore, he was on *B List*. But the existing members had not been called upon to contribute to the full extent of the unpaid amount of their share money. It was held "that in the circumstances a past member cannot be liable to contribute till *List A* is exhausted".

A person whose shares have been forfeited is also liable as a past member, provided the liquidation commences within one year of the date of forfeiture and the above conditions are fulfilled.[15]

**Officers with unlimited liability [S. 427]**

Section 322 allows every limited company to provide by its memorandum that the liability of any of its directors or managers shall be unlimited. Any such

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11 S. 430. See *British India Banking & Industrial Corpn Ltd* v *Shiva Chedumbaria*, AIR 1934 Bom 469; *P. K. Krishnaswami, Re*, AIR 1948 Mad 162.

12 S. 431.

13 S. 432.

14 AIR 1936 Lah 226.

15 *Mirza Ahamad Namazi, Re*. AIR 1924 Mad 703.

managerial personnel is liable, in the winding up of the company, in addition to his liability as a shareholder, "to make further contribution as if he were a member of an unlimited company". The liability attaches to both present and past officers. But a past officer is not liable if he ceased to be an officer for a year or more before the commencement of the winding up, or for a debt incurred after he ceased to be an officer or where the Tribunal does not deem it necessary to require further contribution.

**Set off**

A debtor of the company may set off for any amount which is due to him from the company. The right applies where the cross-claims are mutual. The counter-claims must exist between the same parties in the same right. Neither a joint claim can be set off against individual liability, nor a set off is allowed where it would result in a preference of one creditor over another. A director who was liable to make good the company's losses was not allowed to claim set off against the money which was due to him from the company.[16] Set off cannot be allowed for a claim which is already time-barred.[17] Set off was not allowed in respect of the claim of the creditor against the holding company.[18]

**Payment of liabilities [Ss. 528, 529, 529-A]**

Another important duty of the liquidator is to pay off the company's liabilities. All persons who are entitled to receive money from the company have the right to claim their respective amounts from the liquidator. Indeed, Section 528 declares so clearly that "in every winding up.... all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company." A just estimate shall have to be made, so far as possible, of the value of such debts or claims as are subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value. But where the company in liquidation is insolvent, insolvency rules will apply and only such claims shall be provable against the company as are provable against an insolvent person.[19] According to the present law of insolvency, demands in the nature of unliquidated damages arising other than by reason of a contract or breach of trust[20] and debts and liabilities which are incapable of being fairly estimated[21] a claim for damages for misrepresentation in purchase of

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16 *Manson* v *Smith*, (1997) 2 BCLC 161 CA; *Bank of Credit and Commerce International (No 8) Re*, (1996) 2 BCLC 254 CA.

17 *Maruti Udyog Ltd* v *Blue Star Ltd*, (1999) 95 Comp Cas 108 P&H.

18 *MCC Finance Ltd* v *Reserve Bank of India*, (2002) 110 Comp Cas 645 Mad.

19 S. 529. See *Gujarat Electricity Board* v *Rajratan Naranbhai Mills*, (1974) 44 Comp Cas 127 Guj. All claimants are put on equality and are entitled to *pari passu* payment including the landlord for his rent. *S. S. Chawla* v *Globe Motors Ltd*, (1987) 62 Comp Cas 815 Del. Claims have to be filed before the liquidator and not consumer forum even if the cause of action was such that if the company had been a going concern, a consumer forum would have had jurisdiction. *Sudarsan Chits India Ltd* v *Official Liquidator*, (1992) 1 Comp LJ 34 Mad.

20 S. 46(1) of the Presidency Towns Insolvency Act and S. 34(1) of the Provincial Insolvency Act.

21 S. 46(4) of the Presidency Town Insolvency Act and S. 34(1) of the Provincial Insolvency Act. *Soden* v *British and Commonwealth Holdings plc*, (1996) 2 BCLC 207 CA, claim for damages for misrepresentation and breach of contract.

shares,[22] are not provable in insolvency. One of the principles of insolvency laws, as stated in Section 46 of the Provincial Insolvency Act, 1920, is that where there have been mutual dealings between a debtor and the insolvent, only the net amount due after giving him the set off can be recovered from the debtor. The same will be the position of a debtor of an insolvent company notwithstanding Section 530 which provides for preferential payments.[23]

A secured creditor need not come in the winding up. He has the right to realize his security, but he shall be liable to pay the expenses incurred by the liquidator for the preservation of the security before its realization by the creditor.[24] However, he has the option of relinquishing his security and to prove the amount due to him as if he were an unsecured creditor. Under this scheme a secured creditor was able to rule out all other claims including claims of workmen. This has now been changed. Changes have been introduced in the scheme of Section 529 by the Amendment Act of 1985. Workers' claims have been equated with those of secured creditors by providing that the security of every creditor shall be subject to a *pari passu* charge in favour of workmen. If the secured creditor enforces his security, the liquidator will have the power to represent the workmen to enforce the charge deemed in their favour. For this purpose Section 529-A has also been added to the Act.[25] The section says that

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22 *Soden* v *British & Commonwealth Holdings plc*, [1997] 1 BCLC 501 HL.

23 Expressly so laid down by the Supreme Court in *Official Liquidator* v *V. Lakshmikutty*, (1981) 3 SCC 32: (1981) 51 Comp Cas 566 SC.

24 S. 529(2), proviso. *New Swadeshi Mills of Ahmedabad Ltd, Re*, (1985) 58 Comp Cas 86 Guj. Followed in *Punjab United Forge Ltd* v *Punjab Financial Corpn*, (1993) 76 Comp Cas 660 P&H, claim for contribution towards salaries of watch and ward. *Travancore Ogale Glass Mfg Co Ltd, Re*, (1997) 88 Comp Cas 179 Ker, where the secured creditor realised 1.5 crore rupees less than what was being offered by other bidders and though such offers were received after the completion of the sale, the gap being too big, the sale was set aside in the interest of other creditors. *Karnataka State Industrial Investment and Development Corpn Ltd* v *Intermodel Transport Technology Systems*, AIR 1998 Kant 195, sale under orders of BIFR would also require leave of court. The State Financial Corporation have also to make their contribution towards the costs of preservation of their security but not required to make its contribution to the expenses of winding up order including those of advertisement of the petition. *BIFR* v *Advasi Paper Mills Ltd*, (2000) 100 Comp Cas 794 DB; *Darshan Forgings P Ltd* v *Punjab Financial Corpn*, [2000] 1 Comp LJ 53 P&H, corporation required to pay monthly sums for salary of watch and ward; the creditor would be entitled to indemnity from sale proceeds for such contributions. *Accumeasure Punjab Ltd* v *Punjab Wireless Systems Ltd*, [2000] 1 Comp LJ 55 P&H.

25 *Indian Bank* v *V. S. Perumal Raja*, (1993) 76 Comp Cas 787 Mad: [1992] 1 Comp LJ 327, *pari passu* payment to workers. *State Bank of India* v *Podar Mills Ltd*, (1992) 74 Comp Cas 710 Bom, workers are not a necessary party to the proceeding. All the securities which remained unrealised at the time of the amendment would become subject to the workmen's deemed charge. *UCO Bank* v *Official Liquidator, Bom*, (1994) 5 SCC 1: (1994) 81 Comp Cas 780 SC. There are decisions to the effect that by virtue of the overriding effect under the State Financial Corpns Acts, a corporation can enforce its security without the intervention of the winding up court. *Boolani Engg Corpn* v *Asup Synthetics & Chemicals*, (1994) 81 Comp Cas 872 Raj. Execution of decree would also require leave of the court, *Industrial Finance Corpn* v *Century Mills Ltd*, (1992) 73 Comp Cas 630 Del. It has been held that by virtue of S. 29 of the State Financial Corpn Act, 1951 which gives a direct power of sale of the industrial concern, the right of the corporation cannot be defeated or subjected to S. 529-A, *F. S. Chhajerah* v *Kerala Financial Corpn*, (1995) 82 Comp Cas 1 Ker; *State Bank of India* v *Spinter Tubes and Constructions Ltd*, (1995) 82 Comp Cas Raj, a portion of the proceeds to be earmarked for

workmen's dues as equated with those of secured creditors shall be paid in priority to all other debts. If the assets are not sufficient to meet them they shall abate in equal proportion. The concept of workmen's dues for the purposes of Section 530 has also been made more broad-based. Preferential payments listed in Section 530 are now subject to the provisions of Section 529-A.[26]

When the list of claimants is settled, the liquidator may start making payments out of the available assets of the company.

**Preferential payments [S. 530]**

The first payments to be made are called "preferential payments". They have to be paid in priority to all other debts. Such payments are listed below:

1. All revenues, taxes, cesses and rates due to the Central or a State Government or to a local authority. The amount should have become due and payable within twelve months before the winding up.[27]

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payment of workers; *Maharashtra State Finance Corpn* v *Official Liquidator, Bombay HC*, (1995) 82 Comp Cas 342 Bom.

26 See *Govindla Binny Brighton & Co, Re*, [1990] 1 Comp LJ 102, 108: (1990) 67 Comp Cas 441, showing overriding effect of the section. *Pryavarta Plywood* v *Rajasthan State I & I Corpn*, [1990] 1 Comp LJ 222 Del; *Gendalal Bhaggaji* v *Shri Sujjan Mills Ltd*, (1989) 65 Comp Cas 480 MP. Claim to interest ceases to run from the date of winding up unless surplus is available after meeting claims of workmen and other creditors. *Haryana Financial Corpn* v *PNB Auto Ancillary (India) Ltd*, (1994) 81 Comp Cas 588 Del. Since the property of the company is deemed to be in the custody of the official liquidator, a secured creditor can recover possession of such property only with the order of the court. *Indian Textiles* v *Gujarat State Finance Corpn*, (1994) 81 Comp Cas 599. Where assets of the company were insufficient to meet all the claims, the sale proceeds in the hands of the corporation were ordered to be made available for discharge of other *pari passu* claims. The court said that financial corporations could not use S. 29 of the State Financial Corporations Act, 1951 for defeating the claims of other secured creditors. *AP State Financial Corpn* v *Electrothermic P Ltd*, (1996) 86 Comp Cas 402 (AP). The Gujarat High Court has differed from the view that workers become secured creditors, see *Gujarat State Financial Corpn* v *Official Liquidator*, (1996) 87 Comp Cas 658 Guj; *Peerless General Finance & Investment Co Ltd* v *Majestic Apparels (P) Ltd*, (1997) 24 Corpt LA 44 Del; *Polyo-lefins Industries Ltd* v *Kosmek Plastics Mfg Co Ltd*, (1998) 28 Corpt LA 266 Bom; *National Textiles Corpn Ltd* v *Textile Workers' Union*, (1995) 1 Cal HN 522 Cal, advance of loans after takeover of management under IDRA, 1951, does not enable the Government to supersede the preferential status of employees in the matters of payment of claims. *UCO Bank* v *Official Liquidator, High Court*, (1994) 5 SCC 1: (1994) 81 Comp Cas 780 SC. Workers secured creditors alongwith other security-holders. The *non obstante* clause in S. 29 of the State Financial Corporations Act, 1951 would have to yield before that of S. 529-A of the Companies Act, 1956 because it was brought in by an amendment of 1985 and being later in time would prevail over the earlier in time. *AP State Financial Corpn* v *Official Liquidator*, (2000) 7 SCC 291: AIR 2000 SC 2642: (2000) 38 CLA 315 SC. The court said that the object of the new section was to protect workmen in respect of their dues. *International Coach Builders Ltd* v *Karnataka State Corpn*, (2003) 114 Comp Cas 614 SC, directions sought from the court for working out proper proportions of the claim of the secured creditor and *pari passu* charge in favour of workers. *KTC Tyres (India) Ltd, Re*, (2003) 114 Comp Cas 185 Ker, tax claims of all variety come subsequent to the priority of secured creditors and workmen's dues. *India Maize & Chemicals Ltd* v *Official Liquidator, UP*, (2002) 108 Comp Cas 401 (All), workman cannot be paid in priority to secured creditors.

27 The State is not entitled to preference in respect of any other claims, for example, the cost of machinery supplied. *Union of India* v *J. R. & Sons*, AIR 1962 Punj 528 or charges for services rendered, *Kerala Water Transport Corpn, Re*, (1967) 37 Comp Cas 538 Ker. There is no preference for previous years' arrears. *STO* v *Official Liquidator*, (1968) 38 Comp

2. All wages or salary of any employee, in respect of services rendered to the company and due for a period of four months only within twelve months before the winding up and any compensation payable to any workman under Chapter V-A of the Industrial Disputes Act, 1947. The amount is not to exceed such sum as may be prescribed in the case of any one claimant.[28]
3. All secured holiday remuneration becoming payable to any employee on the termination of his employment before, or by the effect of the winding up.
4. All amount due in respect of contributions payable during the twelve months before the winding up under the Employees' State Insurance Act, 1948 or any other law.[29]
5. All amounts due in respect of any compensation or liability for compensation under the Workmen's Compensation Act, 1923 in respect of death or disablement of any employee of the company.[30]

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Cas 430 All. Penalties are not preferential claims unless they are part of the tax due. *STO* v *R. N. Mills*, (1974) 44 Comp Cas 65 Guj. The winding up is deemed to commence for this purpose from the date of the appointment of the first provisional liquidator, or if no such appointment was made, from the date of winding up order. In the case of voluntary liquidation, the relevant time means the date of the passing of the special resolution for winding up. S. 530(8)(*c*). Tax becomes due for this purpose when it is assessed and demanded. *Baroda Board & Paper Mills Ltd* v *ITO*, (1976) 102 ITR 153: (1976) 46 Comp Cas 25 Guj. It has been held by the Andhra Pradesh High Court in *ITO*, v *Official Liquidator*; *ITO* v *Swaraj Motors*, (1978) 48 Comp Cas 11 Ker, that interest due on unpaid taxes cannot be claimed as a preferential payment. A special order of the court would be necessary because ordinarily interest cannot be claimed from a company after the commencement of winding up. *Official Liquidator* v *ITO*, (1978) 48 Comp Cas 59 Ker; *ITO* v *Official Liquidator*, (1985) 58 Comp Cas 590 Ker; *Rajratna Naranbhaw Mills Co* v *STO*, (1991) 3 SCC 283, relevant period of 12 months. The decision in *Imperial Chit Funds (P) Ltd* v *I T Deptt*, (1979) 49 Comp Cas 58: AIR 1979 Ker 23 FB was approved by the Supreme Court in *Imperial Chit Funds (P) Ltd* v *ITO*, (1996) 8 SCC 303: (1996) 86 Comp Cas 555 at 564 (SC), where it was observed that on a total view of the provisions, the IT Deptt is treated as a secured creditor and the amount set aside by the official liquidator is marked off as outside the area of winding up proceedings and jurisdiction of the winding up court. But the company court can decide the matter as to the validity of the claim and its protected amount, see *CIT* v *Official Liquidator., Golcha Properties (P) Ltd*, (1974) 44 Comp Cas 445 Raj.

28 Provided that where a claimant is a labourer in a husbandry who has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such a sum, or a part thereof, as the court may decide to be due under the contract, proportionate to the time of service. S. 530(2). Amounts payable under the Act on the closure of an undertaking are also entitled to preference. See *R. Srinivasan* v *Official Liquidator*, (1967) 37 Comp Cas 544. The amount presently prescribed by notification w.e.f. March 1, 1997 is Rs 20,000 per claimant.

29 This does not apply when the company is being wound up voluntarily merely for the purpose of reconstruction or amalgamation with another company. S. 530(1)(*d*). *Official Liquidator, Golcha Properties (P) Ltd* v *ITO, Jaipur*, (1974) 44 Comp Cas 144 Raj; *National Conduits (P) Ltd, Re*, (1974) 44 Comp Cas 219 Del.

30 This priority also has no application in the above noted case and also when the company has, under such a contract with insurers as is mentioned in S. 14 of the Workmen's Compensation Act, 1923, rights capable of being transferred to and vested in the workmen, S. 530(1)(*e*).

6. 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.[31]
7. The expenses of any investigation held in pursuance of Section 235 or 237 in so far as they are payable by the company.

After retaining sums necessary for meeting the costs and expenses of winding up,[32] the above debts have to be discharged forthwith so far as assets are sufficient to meet them.[33] Section 511 provides that the assets of the company shall be applied in satisfaction of its liabilities *pari passu*. The remaining assets have to be distributed among the members according to their rights and interests in the company unless the articles provide otherwise.[34] Where the liquidator carries on business for beneficial winding up, the taxes that become due on the profits are expenses of winding up.[35] The fee payable to a chartered accountant for preparing the statement of affairs is also an expense of winding up.[36] The preferential claims rank equally among themselves and have to be paid in full. But when the assets are insufficient to meet them, they shall abate in equal proportion.[37] By virtue of the

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31 *RPF Commr* v *Official Liquidator*, [1968] 2 Comp LJ 15; *S. K. Bhudiraja* v *State of Haryana* (1993) 1 Punj LR 313, duty to pay dues under Employees Provident Fund and Miscellaneous Provisions Act, 1951.

32 S.476 empowers the court, where the assets are insufficient, to order payment out of the assets for costs, charges and expenses of winding up in such priority as the court thinks just. In the case of a voluntary winding up, S. 520 provides that subject to the claims of secured creditors, if any, the costs of winding up shall be paid in priority to all other claims. The Cal H. C. has held in *Shadhra (Delhi) Saharanpur Light Rly Co* v *ITO*, (1988) 63 Comp Cas 627 that the court cannot under these sections interfere with assessment proceedings, except that it may hear an appeal after assessment. *Govindla Binny Brighton & Co, Re*, [1990] 1 Comp LJ 102: (1990) 67 Comp Cas 441, capital gains tax on the company's property mortgaged to others is not an expense of winding up. Debts incurred and rents paid for the purposes of winding up are expenses of winding and are payable in priority to all other claims. *Sanitary Burial Assn, Re*, [1990] 2 LCH 289; *Massey Freehold Land and Brickmaking Co, Re*, (1870) LR 9 EQ 367. Improperly incurred expenses do not enjoy this priority. *Linda Marie Ltd, Re*, 1989 BCLC 46 Ch D, rent incurred for premises needlessly retained. *Portbase Clothing Ltd, Re*, (1993) 3 All ER 829 Ch D, priority of expenses of liquidation over preferential creditors and floating charge holders. *Mohinder Singh* v *Indian Overseas Bank*, (1996) 86 Comp Cas 110 P&H, even a secured creditor might be ordered to pay costs when the company was not in a position to meet the watch and ward expenses for protecting the property. *Grey Martin Ltd, Re*, [1999] 4 All ER 429: (2000) CLC 1258 Ch D, tax liability was incurred as a result of proper performance of the provisional liquidator's duties, the liability was held to be an expense properly incurred. The company continued trading during provisional liquidation. Other similar decisions are: *Toshoko Finance (UK) plc, Re*, [2000] 1 BCLC 683 CA on appeal from [1999] 2 BCLC 777 Ch D. The amount of interest accruing on loans during the period of winding up has been held to be not an expense of winding up, *Kohn* v *IRC*: sub nom *Toshoko Finance (UK) plc*, [1999] STC 922 Ch D.

33 S. 530(6).

34 Rule 200 of the Companies (Court) Rules provides that payment up to Rs 500 can be made to the legal heirs of a deceased member without succession certificate. *Mittal Steel Re-Rolling & Allied Industries Ltd, Re*, (1999) 33 CLA 44 3610 Ker.

35 *M. R. Agarwal* v *Official Liquidator*, (1973) 43 Comp Cas 423 Raj.

36 *Barleycorn Enterprises Ltd, Re*, [1970] 2 All ER 155. But when business is not continued there is no question of any business expenditure. Even salaries to staff would not fall in that category. Money earned from fixed deposits would also not be income from business, *Vijay Laxmi Sugar Mills Ltd* v *CIT*, 1991 Supp (2) SCC 331: (1991) 72 Comp Cas 740 SC.

37 S. 530(5). Where the assets of the company available for payment of general creditors are

provision in Section 178 of the Income Tax Act, 1961, the income tax authorities have been claiming preference over other preferential payments. But the courts have always held that there is nothing in the Income Tax Act which interferes with or abrogates the provisions for priority of debts laid down in Section 530(1)(*a*) of the Companies Act.[38]

*Insolvency Laws and Preferential Payments*

When a company is being wound up on account of its insolvency, Section 529 comes into play. It provides for the application of insolvency laws to the payment of the debts of an insolvent company. One of the principles of insolvency laws provides for cancellation of cross claims where there have been mutual dealings.[39] A question arose before the Supreme Court[40] whether a person having mutual dealings with the company can claim set-off in winding up or whether he should pay what is due from him to the company and then rank as one of the claimants after preferential payments. The Supreme Court ruled that such a debtor-cum-creditor must be given the benefit of set-off. BHAGWATI J tried to reconcile the apparent clash between Sections 529 and 530:[41]

> It is true that Section 530 provides for preferential payments, but the provision cannot in any way detract from full effect being given to Section 529 and in fact the only way in which these two sections can be reconciled is by reading them together so as to provide that whenever any creditor seeks to prove his debt, the rule enacted in Section 46 of the Provincial Insolvency Act would apply and only that amount which is ultimately found due from him at the foot of the account in respect of mutual dealings should be recoverable from him and not that the amount due from him should be recovered fully while the amount due to him should rank in payment after the preferential payments. We find that the same view has been taken by the English courts on the interpretation of the corresponding provisions of the English Companies Act, 1948, and since our Companies Act is modelled largely on the English Companies Act, we do not see any reason why we should take a different view, particularly when that view appears to be fair and just.[42]

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insufficient to meet them, the preferential payments will have priority over the claims of debenture-holders under any floating charge created by the company and be paid accordingly out of any property covered by the charge.

38 *See*, for example, *Baroda Board & Paper Mills Ltd* v *ITO*, (1976) 102 ITR 153: (1976) 46 Comp Cas 25 Guj; *ITO* v *Official Liquidator, National Conduits (P) Ltd*, (1981) 51 Comp Cas 174 Del; *ITO* v *Official Liquidator*, (1967) 63 ITR 810: (1967) 37 Comp Cas 114 (Mys). Contrary views have been expressed in *ITO* v *Official Liquidator*, (1975) 101 ITR 470: (1976) 46 Comp Cas 46 AP; *Steel Sons (P) Ltd* v *ROC*, C. P. No 14/1969 Ker. The provision of S. 178 of the Income Tax Act is that when the ITO informs the O. L. the amount of taxes due from the company, the latter must keep in his hands an amount equal to that.

39 S. 46 of the Provincial Insolvency Act, 1920.

40 *Official Liquidator* v *V. Lakshmikutty*, (1981) 3 SCC 32: (1981) 51 Comp Cas 566 SC.

41 *Id.*, 570.

42 The learned judge cited from Gore-Browne's, COMPANY LAW (43rd Edn) a statement to the effect that: "Indeed, all claims provable in the winding up may be subject to set off, provided that there is mutuality". Observations of the House of Lords in *National Westminster Bank Ltd*

Where the guarantor claimed to be the beneficial owner of the money held by the insolvent, set-off in respect of such money was not allowed. The court said: "The right to set-off mutual debts and credits is confined within narrow limits, particularly by the requirement of mutuality, because the effect of a set-off is to prefer one creditor over the general body of creditors. The requirement of mutuality cannot be satisfied unless a person's beneficial interest in a bank account in the insolvent bank can be established without any further inquiry. Things were not that clear in this case.[43]

*Deposits on Trust*

The property divisible among creditors does not include the property held by the company in trust. In a case before the Madras High Court[44] a sum of Rs 40,000 was given to a company for the specific purpose of depositing it with a mill and thereby to secure an agency of the mill. A sum of Rs 30,000 was, in fact, so deposited. The company went into liquidation and, therefore, the agency did not materialise. The deposit was refunded by the mill to the company. The court held that the deposit being in the nature of a constructive trust was refundable to the depositor. The court distinguished the case from the decision of the Supreme Court in *Seth Jissa Ram Fatehchand* v *Om Narain*,[45] where a sum of money deposited by a person with a company to obtain its agency was held to be not a deposit on trust because it was not earmarked for any special purpose and the company had the liberty to put it to any use. Similarly, where vehicles are purchased on hire-purchase finance basis, they belong to the financier and he is entitled to their sale proceeds as though they were held in trust for him.[46] Margin money deposited in a bank for the purpose of securing a bank guarantee and letter of credit has been held to be trust deposit refundable to the depositor outside of the bank's winding

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v *Halesowen Presswork & Assemblies Ltd*, [1972] 1 All ER 641, 659 are also to the same effect. English law on the subject is now to be found in the Insolvency Act 1986, S. 323, Rule 490. See *Bank of Credit and Commerce International SA (No. 8), Re*, (1994) 3 All ER 565 Ch D where the deposits of a third person were lying in the bank and he charged them as a security for the amount due from the principle debtor, the latter was not allowed a set off for the amount of such deposits, the arrangement imposed no personal liability on the third party depositor. Accordingly, where the guarantor accepted liability as principal debtor, deposit amount lying with them was taken to have reduced his liability pro tanto. *MS Fashions Ltd* v *BCCI sa (No 2)*, (1993) 3 All ER 769 CA.

43 *Bank of Credit and Commerce Investment SA* v *Al-Saud*, (1997) 1 BCLC 457 CA. Money lying in an ordinary banking account has not been given the status of a deposit in trust. The account holder can rank as an unsecured creditor of the insolvent company. Payment to the account holders was recovered back as fraudulent preference. *Exchange Travel Holdings (No 3) Re*, (1996) 2 BCLC 524 Ch D. Money of the participants in a holiday promotion scheme which was a part of the general fund was held to be not a trust money, *Holiday Promotions (Europe) Ltd, Re*, (1996) 2 BCLC 618 Ch D.

44 *Mansuba & Co (P) Ltd, Re*, (1973) 43 Comp Cas 244 Mad.

45 AIR 1967 SC 1162: (1967) Comp Cas 204.

46 *Official Liquidator of Mansuba & Co Ltd* v *Commr of Police*, (1968) 38 Comp Cas 884 Mad. The amount deducted from employees' wages for their co-operative society is in the same category. Baroda *S. & W. Mills* v *B. S. & W. Coop*, (1976) 46 Comp Cas 1 Guj; *Eastern Capital Futures Ltd, Re*, 1989 BCLC 371 Ch D, money belonging to clients held by the company in trust for investment purposes.

up.[47] Subscription money for shares *etc.* in the hands of the company is also in the same category.[48] Security deposit made by a tenant[49] was held to be not in the nature of a trust deposit.

Employees' Provident Fund is held by the company in trust. The amount is payable out of the sale proceeds of the company's securities by a secured creditor.[50]

The corpus of loans given by a workers' cooperative to the employer company in winding up out of the fund constituted from deductions from wages was held to be a trust property. It could not be included in the assets of the company. The workers' credit society could make a preferential claim.[51]

### *Employees' Provident Fund*

Employees' Provident Fund is maintained by the employer under a statutory duty. The Provident Fund Authorities could effect recovery from the employer without the permission of the BIFR.[52]

### *Recovery of employees, dues*

Suspension of legal proceedings does not bar grant of interim relief to workmen pending writ petition against the award of a labour court.[53]

### *Donations*

Donations were received by a charitable company during the period of winding up but before its final dissolution. The liquidator sought court directions as to whether the amount could be used for paying off the creditors. The court said that donations took effect according to their terms. There was no indication in their terms that they were meant to be used only for charitable purposes.[54]

### *General Creditors and Shareholders*

Next the liquidator has to pay the general creditors of the company.[55] The surplus, if any, is then used to pay back the shareholders in accordance with their rights. Preference shareholders are paid first. Where the articles provide that in the event of winding up the preference shareholders would be entitled to their arrears of dividend whether earned, declared or not, it has been held by the

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47 *RBI* v *BCCI (Overseas) Ltd*, (1993) 78 Comp Cas 207 Bom, following the Supreme Court decision in *Shanti Pd Jain* v *Director of Enforcement*, (1962) 2 SCR 297: (1963) 33 Comp Cas 231.

48 *RBI* v *BCCI (Overseas) Ltd (No 2)*, (1993) 78 Comp Cas 230 Bom.

49 *Nimesh R Thakkar* v *Official Liquidator*, (1991) 70 Comp Cas 257, the deposit did not carry any terms showing hallmark of trust.

50 *Central Bank of India* v *Recovery Mamlatdar*, (1996) 23 Corpt LA 167 Guj.

51 *Nutan Mills Employees Coop Credit Society Ltd* v *Official Liquidator, Nutan Mills Ltd*, (2001) 104 Comp Cas 439 Guj.

52 *Sarvaraya Textiles Ltd* v *Commr. EPF*, (2002) 108 Comp Cas 406 AP.

53 *Mideast India Ltd* v *K.M. Unni*, (2003) 115 Comp Cas 184 Del.

54 *ARMS (Multiple Sclerosis Research) Ltd* v *Attorney-General*, (1997) 1 BCLC 157 Ch D.

55 Where the general creditor was the landlord of the company, his arrears of rent were paid after deducting the company's security deposit with him. *Mohan Pyari Sethi* v *Official Liquidator*, (1991) 71 Comp Cas 77 Del.

Delhi High Court, that this would enable them to claim their arrears even if the company never commenced business or made any profits.[56] Dividends paid to members are not their income, but refund of capital. This will be so even if the dividends include some profits earned by the liquidator. This well-known principle of English Law has now been ratified by the Supreme Court in *CIT* v *M. V. Murugappan.*[57] SHAH J (later CJ) laid down that payments made by the liquidator after the commencement of winding up are not dividends, but return of capital, from whatever source they may be made. This principle applies to the earnings of the whole of the financial year in which winding up commences. The learned Judge quoted the following observation of POLLOCK MR in *CIR* v *George Burrel*:[58]

> ....[I]t is a misapprehension, after the liquidator has assumed his duties, to continue the distinction between surplus profits and capital.

**Unclaimed dividends [S. 555]**

Dividends which have not been claimed by any creditor or contributory for a period of six months have to be deposited in the Reserve Bank, which may then be claimed by the person concerned with an order of the Tribunal. If they are not claimed for 15 years they merge in the general revenue of the Central Government.[59] In the meantime they belong to the contributory and cannot be claimed back by the liquidator or the company which has been revived under a scheme of compromise *etc.*[60]

## ANTECEDENT AND OTHER TRANSACTIONS

**Fraudulent preference [S. 531]**

The power under the section has been transferred to the Tribunal.

The expression "fraudulent preference" is borrowed from the law of insolvency. According to that law any transfer of property or payment made by a person who is unable to pay his debts in favour of a creditor with a view to giving him a preference over other creditors is regarded as fraudulent preference, if within three months an insolvency petition is presented against him and he is adjudicated insolvent, the transaction becomes invalid. Any such transaction entered into by a company within six months before the commencement of its winding up is deemed a fraudulent preference of its creditors and invalid accordingly.[61]

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56 *Globe Motors Ltd* v *Globe United Engg & Foundry Co Ltd*, (1975) 45 Comp Cas 429 Del. In all the matters relating to winding up the court has the supplementary power under S. 557 to call meetings of creditors and contributories to ascertain their wishes and prescribe the manner of conducting the meeting.

57 (1970) 2 SCC 145: (1970) 40 Comp Cas 994.

58 [1924] 2 KB 52, 63 CA.

59 The amount so deposited into the company's liquidation account remains available for payment of liabilities, for example, income tax dues which are subsequently confirmed or discovered. *Union of India* v *Hindu Bank Karur Ltd*, (1977) 47 Comp Cas 224 Mad.

60 *Colaba Land and Mills Co Ltd* v *Union of India*, (1985) 58 Comp Cas 513 Bom: (1989) 66 Comp Cas 610; *E. M.C. Golcha* v *Official Liquidator*, (1990) 67 Comp Cas 302 Raj.

61 As to jurisdiction see *Barclays Bank plc* v *Horman*, (1993) BCLC 680 Ch D. Here the holding company was in winding up in London and its US based subsidiary was sold to pay a local bank there and the question arose as to jurisdiction for proceedings for fraudulent

The facts of *Eric Holmes (Property) Ltd, Re*,[62] furnish a suitable illustration:

> A company carried on the business of purchasing land and erecting buildings thereon. *R*, a shareholder, provided finance for the purpose. In each case the company promised to hold the title deeds to his order and to execute a formal charge on demand. When the company became unable to pay its debts, *R*, had the charges formally executed and registered. Winding up followed within two months.

The liquidator applied for a declaration that the charges were void on the ground of fraudulent preference. PENNYCUICK J considered the authorities and said that the principle may perhaps be restated in these terms:

> Where a creditor making an advance takes from the debtor a promise to execute a charge at the request of the creditor, the court will in the absence of any other circumstances, readily infer that the purpose of the parties... was to give the creditor the right to be preferred at request. Such an arrangement although for value, is fraudulent and unenforceable.

A creditor of this kind who does not have the security executed and registered commits a fraud on the other creditors by giving them the impression that the company's property is free from encumbrances.[63]

But where a company under pressure of litigation and threat of attachment of its properties, makes payment to a creditor, the same cannot be regarded as a fraudulent preference, provided, of course, the money is really due. This has been held by the Andhra Pradesh High Court in *Official Liquidator* v *Venkataratnam*:[64]

> A Motor Transport Co was sued for a debt and attachment before judgment of its buses. The court passed a compromise decree under which three of the company's buses were given to the creditor. A few days later the company went into liquidation.

The liquidator claimed that the transaction was a fraudulent preference. Rejecting his stand CHANDRA REDDY CJ said: "If a debtor prefers one creditor to another on account of pressure that is put upon him, the payment cannot be regarded as a fraudulent preference... Persons in charge of the management thought that it is profitable to discharge the debts by allotting some of the buses to the creditors."[65]

Thus, it appears that whether a transaction is a "fraudulent preference" or not does not depend on its result but on the "intention" of the debtor. The words "with a *view* to giving him a preference" mean "with the *intention* of giving

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preference. The court said that normally the foreign court would be convenient but proceedings there would be restrained if they would be vexatious or oppressive to one party or the other.

62 [1965] 2 All ER 333: [1966] 1 Comp LJ 19: [1965] Ch 1052.

63 See BUCKLEY J in *Jackson & Bassford Ltd, Re*, [1960] 2 Ch D 467, 477, 479: 95 LT 292.

64 [1966] 1 Comp LJ 243 AP.

65 *Ibid.*, 246. *See* also *Jayanti Bai* v *Popular Bank Ltd*, [1966] 2 Comp LJ 36 Ker.

preference".[66] In the words of PENNYCUICK J in *F. L. E. Holdings Ltd, Re*:[67]

> There is no fraudulent preference when a debtor's dominant intention is to benefit himself rather than to confer an advantage on his creditor.

The facts were:

> A bank took a deposit of title deeds to secure a company's overdraft, but failed to register the deposit as a charge under the Companies Act. Subsequently when the company got into financial straits and when one creditor had served a statutory notice and another obtained a judgment against the company, the bank got the company to execute a legal charge without either exercising any pressure on the company or promising to increase its overdraft.

Winding up having followed within less than six months, it was held that though the charge was void for want of registration, there had been no fraudulent preference, since the dominant intention of the company in effecting the legal charge was not to prefer the bank to other creditors but to benefit the company by keeping on good terms with the bank in the hope of keeping the company a going concern.[68]

Payment to directors with knowledge of the company's financial state created the presumption of preference. The directors were not able to justify the payment. They had to pay back the company's loss.[69] Where a security was provided to a creditor at a time when the company was in insolvent circumstances and the directors were unable to rebut the desire to prefer, they were held to be guilty of committing fraudulent preference.[70]

Where payments were made to directors to enable them to clear their loan accounts shortly before the company ceased trading, it was held to be preference over other creditors whose claims were also then due for payment. The court said that in considering whether the creditor of an insolvent company has received preference, the court has to consider the state of mind of the director at

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66 See *T. W. Cutts, Re*, (1956) 2 All ER 537 and PENNYCUICK J in *Eric Holmes (Property) Ltd, Re*, [1965] 2 All ER 333: [1966] 1 Comp LJ 19, 25: [1965] Ch 1052. *See* also *Tansukharai M. Karundia* v *Official Liquidator*, AIR 1952 Mad 595.

67 [1967] 1 WLR 1409: [1967] 3 All ER 553; noted 1968 JBL 154.

68 An orally created charge may be valid and may not be fraudulent preference. *Sushili Pd* v *Official Liquidator*, (1984) 55 Comp Cas 52 Delhi. Where the machinery of the company had been pledged before winding up in the ordinary course of business, no fraudulent preference. *Official Liquidator* v *P. Viswanathan*, (1984) 56 Comp Cas 435 Kant; *Monark Enterprises* v *Kishan Tulpule*, [1992] 74 Comp Cas 89: (1992) 1 Comp LJ 288 where also payment was made under a compromise to save the company from execution of a decree. The liquidator has to prove that the transferor and the transferee joined hands to defraud creditors. It is not enough to show that the company was under some financial strains. Some kind of connivance between the company and the transferee has to be shown. Liquidator has to prove this fact. *Maruti Ltd* v *Laxmi Patel Traders*, (1998) 91 Comp Cas 632 P&H. *Hindustan Development Corpn Ltd* v *Shaw Wallace & Co Ltd*, (2001) 107 Comp Cas 30 Cal, payment directed to be made by court, not a case of fraudulent preference.

69 *Exchange Travel Holdings Ltd (No 4) Re*, [1999] BCC 291 CA; *Katz* v *Nc Nally (Recovery of Preferences)*, [1999] BCC 291 CA.

70 *Transworld Trading, Re*, (1999) BPIR 628 Ch D; *Mills* v *ED, ICT Ltd*, (1999) BPIR 391 Ch D.

the time of the payment so as to see whether there was an overriding intention to prefer one particular creditor.[71]

The recipient of a fraudulent preference becomes a constructive trustee towards the company for the benefits received and is, as such, bound to restore them to the company.[72]

Section 533 provides that if the property was comprised in a charge or mortgage and it goes into the hands of a fraudulently preferred person, the latter would be personally liable as a surety to the extent of the interest of the security-holder.

Further, any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.[73]

**Avoidance of voluntary transfer [S. 531-A]**

The power under the section has been vested in the Tribunal.

A transfer of immovable or movable property or any delivery of goods made by a company within a period of one year before the presentation of a winding up petition or the passing of a resolution for voluntary winding up, is void against the liquidator.[74] But the following transactions are protected from the operation of this rule:

1. a transfer or delivery of property made in the ordinary course of the business of the company, and
2. a transfer or delivery of property in favour of a purchaser or encumbrancer in good faith and for valuable consideration.[75]

Where money was collected from members by means of a false prospectus and payments were made out of that money lying in the company's banking account and a validation order was sought for such payments, the court refused to pass such order. Even if the company is perfectly solvent, the winding up petition being presented on the ground of public interest, the court cannot sanction a payment to be made at the cost of members. The ultimate end of the

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71 *Wills* v *Corfe Joinery Ltd*, [1998] 2 BCLC 75 Ch D; *Brain D Pierson (Contractors) Ltd, Re*, [1999] BCC 26 Ch D.

72 *Clasper Group Services Ltd, Re*, 1989 BCLC 143 Ch D where, however, the recipient of a sum of money by way of remuneration, being a minor, no recovery was allowed.

73 S. 532.

74 It is in the discretion of the liquidator to avoid or not. An income tax officer's direction could not prevail in the matter. *K. N. Narayanan Iyer* v *CIT*, (1993) 78 Comp Cas 156 Ker.

75 See *S. Sabapathi Rao* v *Sabapathi Press Co*, AIR 1930 Mad 1012. In this case a winding up petition was presented against a company in 1922 and the order was passed in 1927. During this period the company contracted to purchase certain goods and actually took delivery of them. As the goods were purchased in good faith in the ordinary course of business the transaction was confirmed. *Sugar Properties (Derisley Wood) Ltd*, 1983 BCLC 146 Ch D, where it is emphasised that the exceptions enable the court to protect the transactions of the company which might be for the benefit of those who are interested in the company's property. *Monark Enterprises* v *Kishan Tulpule*, (1992) 74 Comp Cas 89; [1992] 1 Comp LJ 288, transfer of leasehold premises for payment of price of goods, valid, following *N Subramania Iyer* v *Official Receiver*, AIR 1958 SC 1.

payment, in the event of winding up would be preference of the beneficiary of the payment over others.[76]

About the payment of long standing arrears of rent due under a lease which was made to obtain the lessor's permission for assignment of the lease, the court said that it could not be regarded as made in the ordinary course of business. It was a disposal of a part of the company's assets.[77] The shares of a company were sold, before it went into insolvent liquidation, at an undervalue, the court said that the person who acquired the shares was to account for the unpaid value together with interest on it.[78]

The sale of the company's mortgaged property to the mortgagee and hypothecated property to the hypothecatee were held to be not so unusual transactions as to be hit by Section 531-A. The transaction was necessary in good faith in the interest of the company and was also made before the commencement of winding up.[79]

**Avoidance of transfer of shares and disposition of property [S. 536]**

The power under the section has been vested in the Tribunal.

In the case of voluntary winding up, any transfer of shares in the company and any alteration in the status of the members of the company, made after the commencement of winding up, is void. But a transfer made to, or with the sanction of the liquidator is valid. In the case of winding up by the Tribunal, any disposition of the company's property, and transfer of shares, or alteration in the status of its members made after the commencement of the winding up is void, except when the Tribunal orders otherwise. The sanction of the Tribunal may be obtained either before or after the transfer is made. Complete discretion has been given to the Tribunal to do whatever it may think just in a matter of this kind.[80] Similarly, in the last mentioned case any attachment, distress or execution put in force without leave of the Tribunal, against the estate or effects of the company or any sale held of any property or effects of the company shall be void.[81] The court refused to validate the transfer of the company's leasehold interest for a price so small that it

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76 *A Company Re, (No 007130 of 1998)*, [2000] 1 BCLC 528 Ch D.

77 *Countrywide Banking Corpn Ltd* v *Dean*, [1998] 1 BCLC 306.

78 *Philips* v *Brewin Dolphin Bell Lawrie Ltd*, [1999] 1 BCLC 714 CA.

79 *Official Liquidator, AP High Court* v *APSE Corpn Ltd*, [2000] 2 Comp LJ 71 AP. *Percept Advertising Ltd* v *M. Ravindran, Administrator, Anubhav Plantations Ltd*, (2003) 114 Comp Cas 652 SC, orders of avoidance of transfer and dispossession and other incidental orders as to lease etc.

80 S. 536. See *Bir Chand* v *John Bros*, AIR 1934 All 161: 1934 ALJ 195: *Transport Corpn of India Ltd* v *Haryana State Industrial Development Corpn*, (1992) 74 Comp Cas 800 P&H, transfer of shares which was the result of a compromise not allowed to be enforced after the commencement of winding up.

81 S. 537. For the effect of winding up on a floating charge *see* S. 534. *See* also *Navjivan Mills Ltd, Re*, (1986) 59 Comp Cas 201 Guj, where the operation of the section was stayed in the interest of the company. *Travancore Rayons Ltd* v *ROC*, (1988) 64 Comp Cas 819: [1989] Comp LJ 77 Ker, the court ordered the assets to be disposed of in the interest of getting financial support from financial institutions. *Rushvi Estate & Investments P Ltd* v *Official Liquidator of Shri Ambica Mills Ltd*, (2001) 105 Comp Cas 828 (Guj), a sale made in violation of Supreme Orders was avoided.

would not have helped the company in any way.[82] The court (now Tribunal) did not interfere where the transfer of some of the properties of the company to its subsidiary was made in the interest of business expediency and as a part of a scheme of restructuring. The sole objecting creditor was not able to show any prejudice to the creditors' interests.[83]

The payment of a dishonoured cheque does not come within the catch of the section. The section cannot be used to ward off liability under Section 138 of the Negotiable Instruments Act, 1881.[84]

**Avoidance of attachments, executions, etc. [S. 537]**

The power under the section has been vested in the Tribunal.

The provision applies to companies which are being wound up by Tribunal. Any attachment, distress or execution put in force, against the effects or estate of the company, or any sale held of any of the properties or effects of the company, without leave of the Tribunal, after commencement of winding up, can be avoided. The guarantor of a company's bank loans has been allowed to invoke the jurisdiction of the court (now Tribunal) under this section.[85]

One of the effects of the doctrine of relation back of the winding up order is shown by *Rajratna Naranbhai Mills* v *New Quality Bobbin Works.*[86] A creditor filed a suit against a company to recover a sum of money due to him and on the same day got some shares of the company attached. Then a winding up petition was presented against the company. After this, but before the winding up order, a consent decree was passed and the attached shares were sold in the execution of the decree. Then came the winding up order. The liquidator applied for a declaration that the sale was void and for recovery of the sale proceeds. Under Section 537(1) any attachment or sale of a company's property after the commencement of winding up without the sanction of the court is void and under Section 441(2) winding up by the court is deemed to commence at the

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82 *India Maize & Chemicals, Ltd Re*, (1998) 94 Comp Cas 762 All; *Bengal Food Produce (P) Ltd* v *Official Liquidator*, (1999) 94 Comp Cas 762 All.

83 *K & Co* v *Aruna Sugars & Enterprises Ltd*, AIR 1999 Mad 45.

84 *Okay Industries Ltd* v *State of Maharashtra*, [1999] 4 Comp LJ 491 Bom; affirmed by the Supreme Court in *Pankaj K Mehta* v *State of Maharashtra*, (2000) 2 SCC 756: AIR 2000 SC 1953: (2000) 100 Comp Cas 417 SC and followed in *Stephen Aranha* v *Jindal Leasefin Ltd*, (2000) 28 SCL 170 Delhi.

85 *K.S. Shivapaa* v *State Bank of Mysore*, (1988) 63 Comp Cas 229 Kant. A secured creditor would also be within the catch of the section if he has to effectuate his remedies through the court process. Leave of the court would then be necessary, *Gujarat State Financial Corpn* v *Official Liquidator*, (1996) 87 Comp Cas 658 Guj. The provisions of the Limitation Act are not applicable to an application for setting aside a transaction under the section, *Travancore Ogale Glass Mfg Co Ltd, Re*, (1997) 88 Comp Cas 179 Ker.

86 (1973) 43 Comp Cas 131 Guj. *See* also *State Industrial and Investment Corporation of Maharashtra* v *Maharashtra State Financial Corpn*, (1988) 64 Comp Cas 102 Bom. The section does not apply to a secured creditor realising the security by disposing of the assets. *Arya Varta Plywood* v *Rajasthan State J & J Corpn*, [1990] 1 Comp LJ 222 Del, distinguishing *Mysore Surgical Cotton (P) Ltd* v *KSFC*, [1988] 1 Comp LJ 63 Kant. The liquidator was not allowed to question a decree obtained by a secured creditor for recovery by sale of mortgaged property and hypothecated goods, *Hindustan Forest Co (P) Ltd* v *United Commercial Bank*, (1994) 79 Comp Cas 669 P&H.

time of the presentation of the petition. Thus, the court had no choice but to hold that the sale, having taken place after the presentation of the petition, was void and the liquidator was entitled to recover the sale proceeds. It was not necessary for him to bring a civil suit for this purpose. The winding up court had sufficient power under Section 446(2) to entertain the summons.

**Disclaimer of onerous property [S. 535]**

The power under the section has been vested in the Tribunal.

The liquidator may abandon onerous properties belonging to the company. Following kinds of properties are regarded as onerous for purposes of Section 535—

1. land of any tenure, burdened with covenants;
2. shares or stock in companies;
3. any other property which is unsaleable or is not readily saleable by reason of the fact that it requires the possessor to perform certain acts or pay a sum of money;
4. unprofitable contracts.

The liquidator may with the leave of the Tribunal disclaim any such property. It is the duty of the Tribunal to help the liquidator to get rid of "onerous and burdensome contracts" whenever it is necessary to safeguard in full the interests of the body of creditors and the shareholders of the company. Thus in *Raka Corpn (P) Ltd, Re*:[87]

> A company in winding up was called upon to pay Rs 46,052 being the amount of the first call on equity shares held by it in a company. The liquidator asked for time to enable himself to examine the position. He found that the financial position of the company in which the shares were held was not sound and there was no prospect of getting any return on the investment.

He, therefore, applied for leave to disclaim the shares. He was opposed on the ground that by asking for time he had adopted the transaction. The court, finding that the burdensome shares would only hamper the course of the liquidator, granted leave to disclaim.

The term "contract" in this section has been held not to include "lease".[88] The outstanding contracts do not *ipso facto* become inoperative on the commencement of winding up. They remain binding unless disclaimed or rescinded as allowed by the section.[89]

A waste management licence under the Environment Protection Act, 1990 (UK) for management and disposal of wastes has been held to be a disclaimable

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87 [1968] 1 Comp LJ 220: (1968) 38 Comp Cas 329. The court did not permit leasehold premises to be disclaimed. The asset in question was of high value to the company. *Union Bank of India* v *Official Liquidator*, [1993] 3 Comp LJ 414 SC. The court may by order vest the property in any person having legitimate claim to such property. *Shree Cement Ltd* v *Official Liquidator*, AIR 1994 Cal 90.

88 *ABC Coupler Engg Co Ltd, Re, (No 3)*, [1970] 1 All ER 650 at p 669: (1970) 40 Comp Cas 952.

89 *Southern Automotive Corporation (P) Ltd, (No 3), Re*, AIR 1960 Mad 223: (1960) 30 Comp Cas 119. For the effects of disclaimer in favour of the purchaser on the rights in property see *Capital Prime Properties plc* v *Worthgate Ltd*, [2000] 1 BCLC 647 Ch D.

property. The court said that the licence remains in force until the Authority revokes it or accepts its surrender. This factor does not preclude disclaimer. The court also found that there was a market in which people were prepared to pay for the transfer of the licence.[90] On dissolution of the company the licence would cease to exist and not vest in the Crown as *bona vacantia*.[91]

The disclaimer should be in writing signed by the liquidator. It has to be made within twelve months after the commencement of the winding up or such extended period as the Tribunal may allow. Where, however, the liquidator does not come to know of the existence of an onerous property within one month of the commencement of the winding up, the above period of twelve months shall begin to run from the date of his knowledge.[92]

The disclaimer determines in respect of the property disclaimed, the rights, interests and liabilities of the company.[93] It releases the company and the property from liability. But it does not affect the rights or liabilities of any other person in respect of that property. The court (now Tribunal) may, before granting the disclaimer, require notices to be given to persons interested in the property.[94] The landlord of the premises who is affected by the disclaimer becomes a creditor for his loss of rent etc.[95]

Sometimes a person interested in any such property may have required the liquidator, to decide whether he will or will not disclaim the property. In such a case the liquidator should, within twenty-eight days,[96] give notice to the applicant that he intends to apply to the court for leave to disclaim. If he does not do so, he shall not be entitled to disclaim the property and where the property is a contract which he has not disclaimed within the above time he shall be deemed to have adopted it.[97]

## PROCEEDINGS AGAINST DELINQUENT OFFICERS

### Liability for fraudulent conduct of business [S. 542]

The power under the section has been vested in the Tribunal.

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90 *Celtic Extraction Ltd, Re*, [1999] 4 All ER 684; *Bluestone Chemicals Ltd, Re*, [1999] 4 All ER 684 on appeal from *Mineral Resources Ltd Re*, [1999] 1 All ER 746; applied in *Swift* v *Dairywise Farms Ltd*, [2000] 1 BCLC 632 Ch D.

91 *Wilmott Trading Nos 1 and 2*, [1999] 2 BCLC 541 Ch D.

92 S. 535(1) and proviso.

93 S. 535(2). Where the sub-lessee of a lease disclaimed by the liquidator did not want to be included in the matter and the court allotted the lease to another person, the right of the sub-lessee became determined. *A. E. Realisations, Re*, [1987] 3 All ER 83 Ch D.

94 S. 535(3).

95 *Park Air Services plc, Re*, (1996) 1 BCLC 547 Ch D; affirmed by the House of Lords in *Park Air Services plc, Re*, [1999] 2 WLR 396 HL, as to how the landlord's loss is to be calculated. *Christopher Moran Holdings Ltd* v *Bairstow*, (1996) 1 BCLC 547 Ch D; *Hindcastle Ltd* v *Barbara Associates Ltd*, (1996) 2 BCLC 234 HL.

96 Or such extended period as may be allowed by the court. S. 534(4).

97 S. 535(4). Where a disclaimer is effected on the orders of the court under rule 268 of the Companies (Court) Rules 1959, which the liquidator is bound to carry out, it is necessary for him to file a copy of the disclaimer in the court. *Ritz Continental Hotels Ltd, Re*, (1986) 60 Comp Cas 526 Cal.

Sometimes it may appear in the course of winding up that the business of the company has been carried on with intent to defraud creditors of the company or any other persons or for any fraudulent purpose. In such a case the Tribunal, on the application of the liquidator or any creditor or contributory of the company, may declare that the persons who were parties to such business shall be personally responsible for such debts of the company as the Tribunal may direct. Besides, every person who was knowingly a party to such conduct of business, is punishable with imprisonment or fine or both.[1] A well-known illustration is *William C. Leitch Bros Ltd, Re*:[2]

> One *A* transferred his business to a company promoted by himself. He took shares and debentures for the price, the latter creating a charge upon the company's assets. The company came to be indebted up to £6,500 for goods supplied and was unable to pay. Even so *A*, the managing director, ordered goods worth £6,000 on credit, which became subject to the charge. The company became insolvent and *A* received payments in lieu of the charge. The court held him liable to pay £3,000 to the liquidator. WILLIAM MAUGHAM J said: "If a company continues to carry on business and to incur debt at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of those debts, it is in general a proper inference that the company is carrying on business with intent to defraud creditors."

This statement has been cited with approval by the Kerala High Court in *Nagendra Prabhu* v *The Popular Bank*.[3] The court added:

> Although the section leaves the court with a discretion to make a declaration of liability in relation to "all or any of the debts or other liability of the company", the order would in general be limited to the amount of the debts of those creditors who have been defrauded. Thus, there must be some nexus between the fraudulent trading or purpose and the extent of liability.

Further, this liability arises only when the company is in winding up and for offences committed before or during winding up.[4] "Fraudulent trading connotes real dishonesty—according to current notions of fair trading among commercial men, real moral blame."[5] In this respect it is different from "fraudulent preference" which does not require moral turpitude. In *Patrick & Lyon Ltd, Re*[6], a company remained in business only to save certain debentures which other-

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1 The term of imprisonment may extend to two years and the fine may extend to fifty thousand rupees. [S. 543(3)]. There must be specific allegations and positive evidence, otherwise proceedings would be liable to be dropped. *Security and Finance P Ltd* v *B. K. Bedi*, (1991) 71 Comp Cas 101 Delhi.

2 [1932] Ch 261: [1932] All ER Rep 897: 148 LT 108.

3 ILR [1969] 1 Ker 340: AIR 1970 Ker 120.

4 *Regina* v *Rollafson*, [1969] 1 WLR 815 and the House of Lords in *D. P. P.* v *Schild Kamp*, [1969] 3 All ER 1640. *See* also *'Criminal Liability for Fraudulent Trading'*, 1969 JBL 302. *Hypine Carbons Ltd* v *J.C. Bhatia*, (2001) 103 Comp Cas 422 HP, mere failure on the part of the directors-respondents to initiate legal steps against the debtors would not bring the case within the ambit of S. 542 of the Act.

5 MAUGHAM J in *Patrick & Lyon Ltd, Re*, [1933] Ch 786: [1933] All ER Rep 590: 149 LT 231.

6 *Ibid*.

wise would have become invalid. The court held that this did not amount to an intention to defraud creditors. Similarly, no responsibility comes under the section to an auditor or the secretary of the company for mere failure to report.[7] The same is the position of a person who only provides finance.[8] But officers guilty of filing false purchase tax returns have been held liable. LORD DENNING MR said:[9] "The section is deliberately framed in wide terms so as to enable the court to bring fraudulent persons to book."[10] The basis of decisions under the section has recently been explained in an Australian case in the following words:[11]

> There is nothing wrong in the fact that directors incur credit at a time when, to their knowledge, the company is not liable to meet all its liabilities as they fall due. What is manifestly wrong is if directors allow a company to incur credit at a time when the business is being carried on in such circumstances that it is clear that the company will never be able to satisfy its creditors. However, there is nothing wrong to say that directors who genuinely believe that the clouds may roll away and the sunshine of prosperity will shine upon them again and disperse the fog of their depression are not entitled to incur credit to help them to get over the bad time.[12]

Where a person who takes part in the management of a company's affairs obtains credit or further credit for the company when he knows that there is no reason for thinking that funds will become available to pay the debt when it becomes due or shortly thereafter, he may be found guilty of the offence of carrying on the company's affairs with intent to defraud creditors. It is not necessary for the prosecution to prove that there was no reasonable prospect of the company's creditors ever receiving payment of their debts.[13] Heavy withdrawals of money by directors from the company's account under pretended loans knowing fully well that the company was in losses and would not be able to pay its creditors would be sufficient to charge them with liability even if they were only nominal directors and not incharge of the company's affairs.[14]

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7 *Maidstone Buildings Provisions Ltd, Re*, [1971] 3 All ER 363: [1971] 1 WLR 1085, though in view of the extended meaning given to the position of the secretary in *Panorama Development (Guildford) v Fidelis Furnishing Fabrics*, [1971] 3 WLR 440: [1971] 3 All ER 16: (1971) 2 QB 711 CA, the case may not sound to be a good law.

8 *Maidstone Buildings Provisions Ltd, Re*, [1971] 3 All ER 363: [1971] 1 WLR 1085.

9 *Cyona Distributors Ltd, Re*, [1967] 1 All ER 281: [1967] Ch 889.

10 All such recent cases have been considered by Nigel L. Macassey, *Responsibility for Fraudulent Trading*, [1973] New LJ 822. R. Williams, *Liability for Reckless Trading by Companies: The South African Experience*, 33 IC LQ 684.

11 *White & Osmond (Parkstone) Ltd, Re*, [Unreported]; noted 1976 JBL 225, J. H. Farrar, CORPORATE INSOLVENCY AND THE LAW.

12 *See* also *Shiwalik Transport Co v Thakur Ajit Singh*, (1978) 48 Comp Cas 465 Punj, where it was held that the liability survives the death of the director concerned, though his legal representatives will be bound to pay only out of the director's estate.

13 *R v Grantham*, [1984] 3 All ER 166 CA. In a subsequent case the Court of Appeal pointed out that it is not necessary to bring in the names of any creditors who might have been affected by fraudulent conduct of business. *R v Kemp*, 1988 BCLC 217: [1988] 2 WLR 975: 1988 QB 645.

14 *Official Liquidator v Ram Swarup*, (1997) 88 Comp Cas 569: AIR 1997 All 72. *Shivmoni*

Where the declaration of liability under Section 542 or 543 is against a firm or a body corporate, Section 544 gives this power to the Tribunal that it may make a similar declaration against any person who is a partner in that firm or a director in that body corporate.

Proceedings were allowed to be instituted in an English court though the fraud in question was practised in a cross-country banking transaction through electronic media. Excepting for crediting the money in a New York bank account, everything else was done in England and the fraudster and his victims were both in England.[15]

**Falsification of books [S. 539]**

If any officer or contributory of a company has, with intent to defraud or deceive any person, destroyed, mutilated, altered, falsified or secreted any books, papers or securities of the company, he is punishable with imprisonment and fine. A person who is privy to such acts is also punishable. There is similar penalty for making any false or fraudulent entry in any book or register or document of the company.[16]

**Frauds by officers [S. 540]**

The section provides a penalty for any of the following acts done by any officer of a company which subsequently goes into liquidation:

1. Where he has, by fraud or false pretences, induced any person to give credit to the company.
2. Where he has, with intent to defraud creditors of the company, made any gift or transfer of any property of the company or has created a charge on, or caused the levying of any execution against any property of the company.
3. Where he has, with intent to defraud creditors of the company, concealed or removed any property of the company within two months before, or since the date of any judgment for payment against the company.

**Liability where proper accounts not kept (S. 541)**

If it is shown in the case of a company being wound up that proper books of account were not kept by the company throughout the period of 2 years immediately preceding the commencement of the winding up, or the period between the incorporation of the company and the commencement of winding up whichever is shorter, every officer of the company who is in default will be liable unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable. Where the auditor who audited the accounts of the company merely stated that

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*Steel Tubes Ltd* v *A. Murali*, (2002) 108 Comp Cas 584 Kant. a person who was sought to be made liable was appointed after the company was placed before the BIFR, no transactions taking place since then till the date of winding up order. The court (now Tribunal) said he could not be held guilty of misfeasance.

15 *R* v *Smith*, (1996) 2 BCLC 109 CA.

16 *P. P. Looke* v *N. J. Mathew*, (1967) 37 Comp Cas 790 Ker: [1967] 2 Comp LJ 146.

at the time the books of account were made available to him the accounts were not complete. There was nothing in the statement of the auditor to show that such books of account were incomplete throughout for a period of two years immediately preceding the commencement of winding up. It was held that in the absence of any averment or evidence no case under S. 541 could be made out.[17]

**Offences by officers [S. 538]**

Section 538 contains a long list of offences for which officers of a company in winding up are made punishable with imprisonment or fine. Following offences are covered by the section:

1. Failure to discover to the liquidator to the best of knowledge, fully and truly, all the property of the company and how and to whom and for what consideration the company disposed of any property. This does not include dispositions made in the ordinary course of business.[18]
2. Failure on the part of an officer to deliver up to the liquidator any property of the company in his custody or control and which he is required by law to deliver up.
3. Failure on the part of an officer to deliver up to the liquidator, books and papers of the company in his custody or control and which he is required by law to deliver up.
4. If any officer, within twelve months before winding up, conceals any property of the company of the value of one hundred rupees or upwards or conceals any debt due to or from the company.
5. Within twelve months before winding up or at any time thereafter, any officer fraudulently removes any property of the company of the value of one hundred rupees or upwards.
6. If any officer makes any material omission in any statement relating to the affairs of the company.
7. If an officer knows or believes that a false debt has been proved by any person under the winding up, but fails within one month to inform the liquidator.
8. After the commencement of winding up, any officer prevents the production of any book or paper affecting or relating to the property or affairs of the company.
9. Within 12 months before or at any time after the commencement of winding up, an officer conceals, destroys, mutilates or falsifies any book or paper relating to the property or the affairs of the company. The next clause, namely, (*f*) covers the making of false entries in books and clause (*k*) punishes fraudulent parting with books and papers of the company.
10. After the commencement of winding up or at any meeting of the creditors within the twelve months before winding up, any officer

17 *Hypine Carbons Ltd* v *J.C. Bhatia*, (2001) 103 Comp Cas 422 HP.

18 See *Official Liquidator, Golcha Properties* v *P. C. Dhadda*, (1980) 50 Comp Cas 175 Raj, where the three officers incharge were not able to account for the money which they had sent to the main office of the company and they were ordered to pay.

attempts to account for any part of the property of the company by fictitious losses or expenses.

11. Within the twelve months next before the commencement of winding up or at any time thereafter, any officer by false representation or other fraud, obtains on credit on behalf of the company any property which the company does not subsequently pay for.
12. Under the similar circumstances as above, any officer, under the false pretence that the company is carrying on its business, obtains on credit on behalf of the company, any property which the company does not subsequently pay for.
13. Within the same time as above, any officer pawns, pledges, or disposes of any property of the company which has been obtained on credit and has not been paid for, except when it is done in the ordinary course of the business of the company.
14. Any officer is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company to an agreement with reference to the affairs of the company or the winding up.

Directors owe a continuing duty to produce to the liquidator all the books, property and assets of the company. They have not to wait for this purpose for a request from the liquidator. This duty of cooperation further extends on a continuing basis to passing on to the liquidator any information relating to the company.[19]

**Misfeasance proceedings [S. 543]**

Section 543 empowers the Tribunal to assess damages and requires the delinquent officer to pay the amount to the company. Permitting the company's claims to become time-barred by sheer inaction[20] and transferring from the company's account, while it was in a state of insolvency, to a creditor's account with a view to relieving the director in question from his guarantee for the debt amounting to fraudulent preference, have been held to be misfeasance and the directors in question were accordingly compelled to make good the company's loss.[21] This power of the Tribunal comes into play when, in the course of winding up, it appears that any person who has taken part in the promotion or formation of the company or any past or present director or manager, liquidator or officer of the company has misapplied or retained or become liable for any money or property of the company or has been guilty of misfeasance or breach of trust in relation to the company. The liquidator, or any creditor or contributory may apply to the Tribunal for action against the delinquent

19 *R* v *Mc Credle*, [2000] 2 BCLC 438 CA.

20 *Smart Advertising Com (P) Ltd* v *Ramesh K. Nanchahal*, (1989) 65 Comp Cas 92 P&H.

21 *West Mercia Safetywear Ltd* v *Dodd*, 1988 BCLC 250 CA. The proceedings are of quasi-criminal nature. They are not affected by the fact that the person proceeded against may be liable for any offence which may be brought to the surface by the proceeding. *Chamundi Chemicals* v *M. C. Cherian*, (1993) 77 Comp Cas 1, 18 Kant.

officer.[22] The Tribunal shall examine his conduct.[23] If he is found guilty he may be required to repay or restore the money or property of the company or to contribute such sum to the assets of the company by way of compensation as the Tribunal thinks just. The jurisdiction under Section 468 to secure delivery of property to the liquidator is exercisable "at any time after making a winding up order" and is not barred by any length of time. Thus where a company's agent received money without authority in 1956, the court (now Tribunal) ordered its delivery to the company in 1964, the company having gone into liquidation in 1959.[24]

The misfeasance proceedings against officers of the company are capable of covering the full range of duties owed by a director to his company and are not restricted to ethical or fiduciary duties.[25]

An application under this section has to be made within five years from the date of the order of winding up or of the first appointment of the liquidator or of the alleged offence, whichever is longer.[26] The period of five years begins to run from the date of the first appointment of the liquidator. Time does not start afresh every time a new liquidator is appointed.[27]

There is no such distinct wrongful act known to law as "misfeasance". The section does not create any new right or offence, but only provides a summary and cheap remedy for enforcing such rights as are otherwise enforceable by law. There are two conditions of liability under the section, *i.e.* an act in the nature of breach of trust, and an act which results in loss to the company.[28] The act may be that of commission or omission. Gross negligence on the part of a director which gives opportunity to others to misappropriate would be misfeasance.[29] Misfeasance was held to be inferable where large sums of money were

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22 This application is filed by the liquidator or the relevant party in his own name and not in company's name and therefore the benefit of the additional period of limitation under S. 458-A is not available. *B. Patnaik Mines (P) Ltd* v *Bijoyananda Pattnaik*, (1994) 80 Comp Cas 237 Ori. The AP High Court allowed the benefit of extended period under S. 458-A because the proceedings are in essence for the benefit of the company. *Official Liquidator* v *T. J. Swamy*, (1992) 73 Comp Cas 583 AP.

23 The liquidator has only to prove a *prima facie* case. *Supreme Bank of India Ltd, Re*, (1967) 37 Comp Cas 392 Mys.

24 *Bharat Traders Ltd* v *Sadhu Singh*, (1968) 38 Comp Cas 537 P&H.

25 *Westlowe Storage & Distribution Ltd Re*, [2000] 2 BCLC 590 Ch D.

26 *J.V.V. Singh* v *Shyam Sunder*, AIR 1970 Raj 91.

27 *Punjab Commerce Bank Ltd* v *Ram Narain Virmani*, (1973) 43 Comp Cas 323 Punj.

28 *Official Liquidator* v *Shailendra Nath Sinha (Dr)*, (1973) 43 Comp Cas 107 Cal. The burden of proof is on the applicant liquidator. *Sandal Chit Fund & Financiers (P) Ltd* v *Narinder Kumar Sharma*, (1994) 79 Comp Cas 25 P&H, where the liquidator could not even name any creditor remaining unpaid. *Chamundi Chemicals* v *M. C. Cherian*, (1993) 77 Comp Cas 1 Kant, bona fide decisions of directors are not questionable. *Official Liquidator, Aryodaya Ginning and Mfg Mills Ltd* v *Gulabchand Chandalia*, (2003) 114 Comp Cas 654 Guj, a mere error or mistake in an accounting practice, no loss to company shown, creditors and depositors alleged to be misled by suppression of losses and enhancing the value of assets, held, no misfeasance.

29 *Official Liquidator* v *Ashok Kumar*, (1976) 46 Comp Cas 572 Pat. *Official Liquidator, Janhitkari Alap Bachat Rindayatri Sansthan P Ltd* v *Vishnu Kumar Pradhan*, (2001) 103 Comp Cas 1026 Raj, it is not necessary to fix liability under Section 543 that a director should be a shareholder or that he should have actually participated in the management.

withdrawn by the director at a time when the company was grinding in losses.[30] Where the money of the company was lent to a third party in contravention of the company's objects, both the directors, (one of them through legal representative since deceased), were responsible for it and were held to be jointly and severally liable to replace the company's money.[31] No liability arose under the section for the sums which were refundable from Income Tax Department, but having not been claimed within time became time-barred because the director in question had sent several reminders to Income Tax Department for refund and subsequently all the records and papers were handed over to the liquidator. Similarly, no liability arose for the sums due to the company from certain parties because the company had itself written off those claims as bad debts and also for stock spoiled and destroyed and written off by the company.[32] Mere vague and general accusations will not be sufficient to found a liability under the section. The Karnataka High Court[33] refused to entertain a proceeding against the managing director on general accusations like this that there was unaccounted cash balance, that proper books of account were not maintained and that the stock-in-trade was in the possession of a bank and its sale was delayed.

There must be specific allegation against each director or officer alongwith a quantification of loss. Mere allegations against former directors were held not sufficient for maintaining an application under the section.[34]

It is a misfeasance on the part of directors to make gifts of the company's property for no proper trading purpose. Disposal of the plant and machinery of the company without any justification was also held to be misfeasance. The directors were required to pay the sums involved with interest.[35] Where no steps were taken by the directors to enforce the company's claims and consequently they became time-barred, the directors were held liable to compensate the company for its loss with interest at 12% from the date of winding up till payment.[36]

Failure to take proper care of assets and consequential loss to the company is a ground for misfeasance proceedings. But where the assets were in the

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30 *Official Liquidator* v *Ram Swarup*, (1997) 88 Comp Cas 569: AIR 1997 All 72.

31 *Babubhai Chandulal Mody* v *Official Liquidator, Atlas Import & Export Co (P) Ltd*, (1996) 86 Comp Cas 580 (Mad).

32 *Ibid.*

33 *Official Liquidator* v *R. C. Marathe*, (1980) 50 Comp Cas 562 Kant. *Hypine Carbons Ltd* v *J.C. Bhatia*, (2001) 103 Comp Cas 422 HP, allegation of misappropriation of furniture belonging to the company but no specific evidence as to which item was in possession and control of a particular director was given, no case was made out for fastening liability. *Official Liquidator, Dhavalgiri Paper Mills P Ltd* v *Chinubhai Khilachand*, (2002) 114 Comp Cas 277 Guj. It is necessary for official liquidator to make specific allegation against each director or officer, mere allegation against former directors is not sufficient.

34 *Official Liquidator, Dhavalgiri Paper Mills P Ltd* v *Chinubhai Khilachand*, (2003) 114 Comp Cas 277 Guj.

35 *Barton Mfg Co Ltd Re*, [1999] 1 BCLC 740 Ch D, gratuitous payments were made to one of the directors and his wife.

36 *Xpo Xpert P Ltd* v *Jai Gopal Angrish*, [1998] 3 Comp LJ 438 P&H; *Kainth Finance P Ltd* v *Shri Karam Singh Kainth*, (1999) 98 Comp Cases 131 P&H.

possession of a bank for over seven years and with the liquidator for two years, the directors could not be held to be guilty of improper care of assets.[37] The directors were held liable for the loss of the company's diamonds while on a foreign trip without insurance cover. A person who was working as a shadow director was not excused. There were circumstances of gross negligence.[38]

Nominee directors (nominated by a financial institution in this case) can also be held liable depending upon the role which they played in the conduct of affairs, i.e., whether they performed their statutory duties in good faith.[39] They were not permitted to defend themselves against liability just by saying that they only knew that the directors were withdrawing heavy amounts from the company free of interest. The company was led to financial starvation and heavy losses. Their silence gave rise to an inference of complexity.[40]

The principles relating to misfeasance proceedings have been restated by the Supreme Court in *Official Liquidator, Supreme Bank Ltd* v *P. A. Tendulkar*.[41] While the proceedings were pending before the Mysore High Court, the chairman of the board and another director died. BEG J laid down that the liability would devolve upon the legal representatives, but would be "confined to the assets or estate left by the deceased in the hands of the successors".[42] Referring to the position taken by one of the directors, BEG J said:

> A director may be shown to be so placed and to have been so closely associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of the company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the company.

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37 *Official Liquidator, AutoElectricals (India) P Ltd* v *D P Gupta*, (1999) 98 Comp Cas 59 Raj.

38 *Simmon Box (Diamonds) Ltd Re*, 2000 BCC 275.

39 *A Stock & Co* v *Dilip Kumar Chakraborti*, (1996) 87 Comp Cas 139 Cal.

40 *Official Liquidator* v *Ram Swarup*, (1997) 88 Comp Cas 569: AIR 1997 All 72. It was not necessary to implead the legal heirs of a legal heir who had also died, there being other legal heirs on record.

41 (1973) 1 SCC 602: (1973) 43 Comp Cas 382; and again in *Official Liquidator* v *Parthasarathi Sinha*, (1983) 1 SCC 538: (1983) 53 Comp Cas 163.

42 The Calcutta High Court did not allow substitution of legal heirs in place of a delinquent director upon his death. *Parthasarathi Sinha* v *Official Liquidator*, (1976) 46 Comp Cas 555 Cal. No decree can be passed against a deceased director until his representatives are brought on record. *Modern Transporters (P) Ltd* v *J. Mehta*, (1977) 47 Comp Cas 302 P&H. *Ennen Castings P Ltd* v *M.M. Sundaresh*, (2003) 114 Comp Cas 541 Kant, a director accused other directors of misfeasance, held, the other directors would have to be given the right to cross-examine him.

The Karnataka High Court[43] has stated that though liability for misfeasance will survive the death of the officer, it is necessary that it should have been ascertained during his lifetime, so that he was in a position to defend himself. His legal representatives are not likely to be acquainted with his conduct in the company and, therefore, they cannot be put on the defensive.[44]

Non-joinder of the legal heirs of a deceased director does not affect the proceedings against the others. Where the company fails to bring the representatives of the deceased director on record, the surviving director cannot claim to be relieved of his liability, the liability being joint and several.[45]

The section does not give the Tribunal power to fine a director for misconduct. It also does not apply to cases in which the claim is for simple contract debt, or is an ordinary claim for unliquidated damages.[46]

The conduct of a receiver or manager appointed by debenture-holders cannot be examined under the section,[47] he being not an officer of the company. But an auditor is an officer for this purpose. Thus, an auditor was held liable under the section for certifying false accounts whereby dividends were paid out of capital.[48] A liquidator who had negligently admitted claims was held liable under the section.[49] A liquidator who continued trading on behalf of the company without obtaining sanction of the court or of the committee and increased the deficiency of the company towards creditors was held liable in misfeasance.[50] The Kerala High Court has held that an official liquidator cannot be proceeded against under the section.[51]

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43 *Official Liquidator* v *Maganlal Hirachand Shah*, (1980) 50 Comp Cas 762 Kant.

44 Proceedings against legal representatives were not allowed for this reason in *Chamundi Chemicals* v *M.C. Cherian*, (1993) 77 Comp Cas 1 Kant, following *Joseline* v *Official Liquidator*, (1979) 49 Comp Cas 170. But the proceedings do not abate by reason of death, *NS Rajagopal* v *Official Liquidator, PNSS Nidhi Ltd*, (1993) 78 Comp Cas 687 Mad. Legal heirs were not allowed to be impleaded seven years after the death of the director, being out of time, *Official Liquidator, Bombay* v *Taru Jethmal Lalvani*, AIR 1994 Bom 74.

45 *Babubhai Chandulal Mody* v *Official Liquidator, Atlas Import & Export Co (P) Ltd*, (1996) 86 Comp Cas 580 (Mad). Legal heirs who are not brought on record could not be held liable. Even otherwise the affair was thirty years old and all the creditors had been paid in full, *Official Liquidator* v *Taru Jethmalani Lalvani*, (1997) 88 Comp Cas 834 Bom.

46 *Supreme Bank of India Ltd, Re*, (1967) 37 Comp Cas 392 Mys; *B. Johnson & Co, Re*, [1955] Ch 634 CA.

47 *Ibid.*

48 *Kingston Cotton Mills Co, Re*, [1896] 2 Ch 279: 74 LT 568.

49 *Home & Colonial Insurance Co, Re*, [1930] 1 Ch 102: [1929] All ER Rep 231; *National Sugar Mills Ltd, Re*, (1978) 48 Comp Cas 339 Cal, managing director held liable for misappropriations. It is not necessary for this liability to arise that the loss should be exactly calculated beforehand or that there should be shortfall in assets as against liabilities. *Official Liquidator of Milan Chit Fund* v *Joginder Singh Kohli*, (1978) 48 Comp Cas 357 Del. Misfeasance proceedings cannot be taken against sales agent of the company: *Voluntary Liquidator, Bharat Traders Ltd* v *Rattan Singh*, (1978) 48 Comp Cas 427. Liability survives the death of the director concerned and passes on to his legal representatives though they will be liable to pay only out of the estate of the deceased director. *F. & Co Osler (India) Ltd, Re*, (1978) 48 Comp Cas 698 Cal.

50 *Central Crest Engg Ltd Re*, [2000] BCC 727.

51 *L. K. Prabhu* v *S M Ameerul Millath*, AIR 1997 Ker 347.

*Liability of Partners and Directors of Body Corporate* [S. 544]

The power under the section has been vested in the Tribunal.

Where the declaration of liability is against a firm or a body corporate, the Tribunal may further declare that any partner in that firm or director in that body corporate shall also be liable.

**Prosecution of delinquent officers and members [S. 545]**

Section 545 provides that if it appears to the Tribunal, in the course of a compulsory winding up, that any past or present officer or member of the company has been guilty of any offence in relation to the company, the Tribunal may direct the liquidator either himself to prosecute the offender or to refer the matter to the Registrar. The Registrar may, if he thinks fit, refer the matter to the Central Government for further investigation. If the Registrar finds that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly. The liquidator may then with the sanction of the Tribunal himself take proceedings against the offender. Where the liquidator does not make any report to the Registrar, but an offence appears to the Tribunal to have been committed, it may direct the liquidator to make such a report.

**Wrongful withholding of property [S. 630]**

If an officer[52] wrongfully obtains possession of a company's property, or, being already in possession wrongfully refuses to deliver it to the company, a complaint can be made to a magistrate by the company or by any creditor or contributory. The magistrate can award punishment in terms of the section[53] and can also order the officer in possession to deliver the property to the company. A flat was allotted to an officer. He refused to vacate it on retirement. It was held that he was not entitled to the protection of tenancy laws and could be ordered under Section 630 to vacate the premises of the company.[54] Proceedings can be launched against heirs of an officer or employee who has died and whose heirs are withholding the property.[55] Such people who refuse to hand over vacant

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52 The word "officer" has been held to include the president of the company, *M. Gopal Krishnan* v *Leafin India Ltd*, (1995) 83 Comp Cas 351 Mad; *Prahladbhai Rajaram Mehta* v *Popatbhai Haribhai Patel*, (1996) 1 Guj C D 564 Guj; (1996) 67 Comp Cas 557 Guj, two remedies for eviction, S. 630 and also Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

53 Punishment is with fine extending to Rs 10,000.

54 *Krishan Avtar Bahadur* v *Co. Irwin Extross*, (1986) 59 Comp Cas 417 Bom. Proceedings were allowed when the premises in the possession of the company were under a tenancy and the employee surrendered the possession directly to the landlord. *Arvind Kotecha* v *Mahash Kumar*, (1994) 79 Comp Cas 338 Bom, or where the employee purchased the tenanted premises from the landlord, *Kannan Kandi Gopal Krishna Nair* v *Prakash Chander Juneja*, (1994) 81 Comp Cas 104 Bom. Proceedings against a director not allowed where the withholding was by the company, *M. K. Chandrakanta* v *Kannan*, (1994) 20 Comp Cas 307 Mad. Proceedings against a dismissed employee cannot be stopped because of reference under the Industrial Disputes Act, 1947. *Antony (R.)* v *Renusagar Power Co Ltd*, 1996 LLR 152 All.

55 *Abhilash Vinod Kumar Jain* v *Cox and King's (India) Ltd* (1995) 17 Corpt LA 90 SC; (1995) 84 Comp Cas 28 SC. "Officer" includes employees also and also both present and past, *Gokak Patel Volkart Ltd* v *Dundayya Gurushiddaiah Hiremath*, (1991) 2 SCC 141; (1991) 71 Comp Cas 403 SC; *Yogesh Kumar Kanlilal Shah* v *Gujrat Steel Tubes*, (1993) 2 Guj LH 1039. *Lalita Jalan* v *Bombay Gas Co*, (2003) 114 Comp Cas 515 SC, the legal heirs of deceased employee

possession cause hardship to the company and also to the successive allottees without having any right to cling to possession. A retired officer was refusing to vacate premises at Cochin. A complaint before a magistrate at Calcutta, where the company had its registered office, was held to be competent.[56] A subsequent decision of the same High Court went against this proposition. The complaint in the court where the company had its headquarters was quashed because the premises in question were situated elsewhere.[57]

Where the ingredients for attracting the application of Section 630 are made out, the right of the company to the possession of the property becomes established. There is then no scope for exercising any mercy power in favour of the employee.[58] An employee to whom a flat was given for a specified period was held bound to return it at the expiry of that period irrespective of the fact that the period did not correspond with his retirement.[59] A director was required to return the company's property and documents on his ceasing to be a director by reason of failure to attend meetings. He had filed a civil suit questioning the validity of the proceedings by which his office became vacated. The court did not go into the merits of the matter in a proceeding under Section 630.[60]

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who were in possession only through the employee and who were refusing to vacate were held liable to be prosecuted.

56 *T. S. Satyanath* v *Thomas & Co*, (1985) 57 Comp Cas 648 Cal. The Bombay High Court has disagreed with it and did not permit proceeding at Bombay for a property which was being wrongfully withheld at Jameshedpur. *Hirak Ghosh* v *Amarendra Nath Sinha*, [1989] 1 Bom CR 400: (1991) 70 Comp Cas 324. The default is an offence of continuing nature. *Arun Kumar Das* v *State*, (1990) 68 Comp Cas 482 Cal; The High Court of Delhi did not allow proceedings to be launched there (company's headquarter) for a withholding committed in the Punjab (company's factory), *Ramesh G. Bhatia* v *J. M. Malik*, (1994) 79 Comp Cas 44. *TNV Nanjappa Chettiar* v *Devi Films (P) Ltd*, (1993) 76 Comp Cas 875 Mad. The proceeding under the section is of criminal nature; it cannot be stayed under an order of a civil court. *S Palaniswamy* v *Sree Janardhana Mills Ltd*, (1993) 76 Comp Cas 323 Mad; *Texmaco Ltd* v *Ram Dayal*, (1993) 78 Comp Cas 518 Delhi.

57 *Vijay Rapur* v *Guest Keen Williams Ltd*, (1995) 83 Comp Cas 339 Cal. A Bombay decision has also been to the same effect. See *ibid.*

58 *Amrut Lal Pranlal Panchal* v *Prahladbhai Rajaram Mehta*, (1997) 26 Corpt LA 102 Guj. It is very difficult for an employee to establish that he was put into the premises as a tenant, *Prahladbhai Rajaram Mehta* v *Popatbhai Haribhai Patel*, (1996) 1 Guj CD 564 Guj: (1996) 67 Comp Cas 557 Guj; *Bimal Chand* v *DCM Ltd*, (1997) 27 CLA 304 P&H. The accused person can be given the benefit of doubt because it is a criminal matter. A conviction under the section was set aside because the company did nothing to initiate prosecution for two years during which the employee was constantly asserting that he was a tenant. *Chhatrasingh Nathusing Vaghela* v *State of Gujarat*, (1998) 29 Corpt LA 470 Guj. *Tata Tea Ltd* v *Fazlur Rehman*, (2001) 104 Comp Cas 718 Cal, an order can be passed against an employee under S. 630(1) formally disposes the criminal case against him. *Lalita Jalan* v *Bombay Gas Co Ltd*, (2003) 114 Comp Cas 515 SC, the court directed the officer or employee to deliver or refund the property within the fixed period but the order was not complied with, the court can awarded a sentence of two years. Earlier to this in *Lalita Jalan* v *Bombay Gas Co Ltd*, (2002) 7 SCC 37 on the question whether a past officer or employee or his legal heir would be included, the matter was referred to a larger Bench.

59 *Tariq Razi Azmi* v *Tata Hydro Electric Supply Co*, [2000] 5 Bom CR 211 Bom.

60 *K. Radhakrishnan* v *Thirumal Asphalts and Phelts P Ltd*, (1999) 97 Comp Cas 658 Mad. *Maratt Rubber Ltd* v *J.K. Marattukalam*, (2001) 104 Comp Cas 1 SC. Once the allegations made in the complaint make out an offence of which cognizance had been taken, an application cannot be filed under S. 245 of the Code of Criminal Procedure. Mere pendency of a civil proceeding would not be a ground for quashing the criminal proceedings.

A complaint under this section is maintainable against the legal heirs of the deceased employee or officer for retrieval of the company's property wrongfully withheld by them after the demise of the employee concerned.[61] However, the family members of the employee living with him while he was alive cannot be prosecuted.[62]

The machinery of this section will not be available where there is a *bona fide* dispute between an employee and the company as to the title or rights to the property.[63]

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61 *Gajra Gears Ltd* v *Smt Ashadevi*, (2001) 103 Comp Cas 489 MP.

62 *J.K. (Bombay) Ltd* v *Bharti Matha Mishra*, (2001) 104 Comp Cas 424 SC; *Lalita Jalan* v *Bombay Gas Co Ltd*, (2003) 114 Comp Cas 515 SC.

63 *Damodar Das Jain* v *Krishna Charan Chakraborti*, (1985) 57 Comp Cas 115 Bom. Where an ex-officer continuously assured the company that he would vacate and then the period of limitation expired, it was held to be a fit case of extension of time. *B. R. Herman & Mohatta* v *Ashok Raj*, (1984) 55 Comp Cas 61 Del; *Govind T. Jagtiani* v *S. S. Razi*, (1984) 56 Comp Cas 329 Bom, power not excluded by rent laws. "Property" includes both movable and immovable. The offence is of continuing nature. Hence, no period of limitation, *Beguram* v *Jaipur Udhyog Ltd*, (1987) 61 Comp Cas 744 Raj, order for vacation of quarters and punishment for withholding possession; *Baldev Krishna Sahi* v *Shipping Corpn of India*, (1987) 4 SCC 361: 1987 SCC (Cri) 750: (1988) 63 Comp Cas 1 SC, the provision is applicable to past employees. The purpose of the provision is to enable the company to get quick delivery of property from defaulting employees, *Atul Mathur* v *Atul Kabra*, (1989) 4 SCC 514: 1989 SCC (Cri) 761: [1989] 3 Comp LJ 127, 131: (1990) 68 Comp Cas 324 SC. It is not necessary that the property should belong to the company. *P.V. George* v *Jayems Engg Co (P) Ltd*, [1990] 2 Comp LJ 62 Mad. The section examines the employee's conduct. *Narayanana K* v *L. V. Subramanian*, [1988] 2 Comp LJ 181 Mad Disputes of civil nature cannot be examined by the court under this section. *Damodar Das Jain* v *Krishna Charan Chakraborti*, (1989) 4 SCC 531: 1991 SCC (Cri) 420: (1990) 67 Comp Cas 564 SC. Mere denial of the company's right is not a dispute. *Atul Mathur*, noted above, mere fact that an employee has questioned the validity of his removal under the Industrial Disputes Act, 1948 does not postpone the remedy of the company. *P.V. George* v *Jayems Engg Co (P) Ltd*, [1990] 2 Comp LJ 62 Mad. the period of limitation for proceedings under the section is to be found in S. 468(2)(c) of the Criminal Procedure Code, 1973. *Herman B R and Mohatta Ltd* v *Ashok Rai*, (1984) 55 Comp Cas 61 Del. It was held to be not a bona fide dispute that the managing director had agreed to sell the flat to the employee but the board of directors refused. There was no agreement to sell. *Indian Hotels Co Ltd* v *Bhaskar Moreshwar Karve*, (1994) 81 Comp Cas 132 Bom. It was also held to be not a bona fide dispute that the employee was claiming himself to be tenant without there being any signs and symbols of tenancy, *Texmaco Ltd* v *Arun Kumar Sharma*, (1991) 20 Comp Cas 287 Delhi, or that he was claiming himself to be a part owner only on the ground that rent deduction from salary was stopped from date of his promotion, *Airfreight Ltd* v *K. Kothawala*, (1995) 2 Mh LJ 17: (1995) 4 Bom CR 109 Bom. Remedy under the section was not allowed where the employee was found to be a direct tenant of the owner of the premises, *V.M. Shah* v *State of Maharashtra*, (1996) 85 Comp Cas 465: AIR 1996 SC 339. The court cannot go into the merits of the dispute as to the rights of the employee over the property, *Minoo P Bulsara* v *Hindustan Petroleum Corpn*, (1996) 23 Corpt LA 120 Bom. The employee's defence that the company had orally agreed to sell the flat to him could not be considered in the summary jurisdiction under S. 630, *Jolly Durga Pd* v *Goodricks Group Ltd*, (1998) 28 Corpt LA 335 Cal. Conviction of the employee is not a condition to the order of handing over possession to the company. *Metal Box (India) Ltd* v *State of WB*, (1997) 27 Corpt LA 359 Cal; *Airfreight Ltd* v *K. Kothawala*, (1995) 2 Mh LJ 17: (1995) 4 Bom CR 109 Bom, any claim of the employee to some superior title should be determined only after taking evidence. *Abhilash Vinodkumar Jain* v *Cox & Kings (India) Ltd*, (1995) 84 Comp Cas 1, legal heirs affected by section. *D C M Ltd* v *Lt Governor*, (1998) 71 Delhi LT 70 (DB), approval of closure of mill and settlement with workers, does not convert the workers into statutory tenant, receiver directed to get quarters vacated. *Petlad Bulakhidas Mills Co Ltd* v *State of Gujarat*, (1998) 2 Guj CD 1213 Guj, continuing

The offence is of continuing nature. It continues till the possession is surrendered. Till then every day gives a new period of limitation.[64]

**Annulment of dissolution [S. 559]**

After a company has been dissolved in pursuance of any of the provisions of the Act, it is open to the Tribunal to declare the dissolution to have been void. But this can be done only within two years of the dissolution and on an application by the liquidator or any other person who appears to the Tribunal to be interested. A person entitled to claim damages for negligence from the company is a person "interested" for this purpose, but not his lawyer.[65] The Tribunal's order may be subject to such terms as it thinks fit to impose. Any proceedings may then be taken as might have been taken if the company had not been dissolved.

The person on whose application the order is passed should within thirty days or such further time as the Tribunal may allow, file a certified copy of the order with the Registrar.

**Disposal of books [S. 550]**

The section lays down the manner in which the books and papers of a dissolved company shall be disposed of. It says that when the affairs have been completely wound up and the company is about to be dissolved, the books and papers shall be disposed of in the following manner:

(*a*) When the winding up is by the Tribunal, in such manner as the Tribunal may direct.

(*b*) In the case of members' winding up, in such manner as the company by special resolution directs.

(*c*) In the case of creditors' winding up, in such manner as the committee of inspection, or the creditors, where there is no committee, may direct.

If the books and papers were committed to the custody of the company, or the liquidator or any other person, no liability will come to it or him after the expiry of five years if he is not able to produce them. In other words, he is accountable only up to five years.

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offence, no period of limitation. *Mannath Balchandran* v *Forbes Forbes Campell & Co Ltd*, (1996) 2 Mah LJ 302, subsequent sale of the premises by the company is not material, the court has to see whether offence constituted at the time of complaint. *Jagdish Chandra Nijhawan* v *S K Saraf*, (1999) 95 Comp Cas 48: (1999) 1 SCC 119: (1999) 1 LLJ 295, the agreement had certain requirements for eviction of the employee-tenant, whether they were fulfilled was viewed by the Supreme Court as a dispute of civil nature. *Mohd Zameel Hussain* v *Asst Labour Commr*, [2000] 1 Comp LJ 238, the fact that the removal of the employee is under challenge under the Industrial Disputes Act, 1947, is not a ground for withholding order of eviction, *J K (Bombay) Ltd* v *Bharti Matha Mishra*, AIR 2001 SC 49, the legal heirs of a deceased employee can be proceeded against but not other members of the family.

64 *Gokak Patel Volkart Ltd* v *Dundayya Gurusiddaiah Hiremath*, (1991) 2 SCC 141: (1991) 71 Comp Cas 403 SC; *Nanjappa Chettiar* v *Devi Films (P) Ltd*, (1993) 76 Comp Cas 875 Mad; *Kannan Kandi Gopal Krishna Nair* v *Prakash Chander Juneja*, (1994) 81 Comp Cas 104 Bom.

65 *Roehampton Swimming Pool Ltd, Re*, [1968] 3 All ER 661.

The Central Government is authorised to make rules in the behalf, which may prevent destruction of books and papers for a period not exceeding five years. The rules may enable any creditor or contributory to make a representation to the Government in this matter and appeal to the court against the Government order.

Any contravention of the rules or of any Government order entails punishment up to six months of imprisonment or fine up to Rs 50,000.

**Winding up of unregistered company**

*Meaning of Unregistered Company* [S. 582]

The expression includes any partnership, association or company consisting of more than seven members[66] at the time of the petition, but does not include—

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

(2) a company registered under the Companies Act;

(3) a company registered under any previous company law, excepting those having registered office in Burma, Aden or Pakistan before their separation from India.

It has been held that "the word 'association' has to be understood in its general sense and not with reference to the provisions in Section 11 of the Act". Thus, construed, there would be no bar to the winding up of the Ex-servicemen's Rehabilitation Association, registered under the Societies Registration Act, as an unregistered company, though its membership was more than that of 20 persons.[67] Save as stated above, an unregistered company includes any partnership, association or company consisting of more than seven members [at the time when the petition for winding up the partnership, association or company, as the case may be, is presented before the Tribunal.

A partnership firm which was not registered under the Partnership Act, 1932 was allowed to be wound up under this jurisdiction. The bar of S. 69 of the Partnership Act was not applicable because a petition for winding up is not a suit nor it is an action based on contract.[68]

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66 A certificate from the Registrar of Firms that the firm had seven members on his record was held to be a sufficient proof of this requirement despite allegations that the firm had only five members. *Makhan Singh Devinder Pal Singh* v *Roja Oil Mills*, (1999) 98 Comp Cas 190 (P&H), here it could not be shown that the partnership had seven or more members, a petition for order of winding up not sustained. *R. Saraswathi* v *Shakthi Beneficial Corpn*, (1980) 50 Comp Cas 193 Kant. The right to apply for winding up accrues from the date of dissolution of the partnership. Under Article 137 of the Limitation Act, 1963, only three years would be available from that date. In this case the petition was late by a year, *Malini Rao* v *Hotel Dwarka*, (1997) 90 Comp Cas 179 AP.

67 *B. T. Industries* v *Madras Sapper Ex Servicemen's Rehabilitation Assn*, (1988) 63 Comp Cas 733 Kant. Under S. 665 of the English Act of 1985 it has been held that an international society consisting of States as members was not liable to be wound up as an unregistered company. *International Tin Council, Re*, [1987] 1 All ER 890 Ch D; followed in *Maclaine Watson* v *Deptt of Trade*, [1988] 3 All ER 257 CA.

68 *Shree Balaji Steels* v *Countermann-Peippers (India) Ltd.* (2003) 114 Comp Cas 193 Cal.

*Winding Up* [S. 583]

Such a company can be wound up under the Act and with some exceptions all the provisions of the Act relating to winding up are applicable.[69] Such a company can be wound up only by the Tribunal, not voluntarily.[70] The company may be wound up in the following circumstances:

(1) 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;[71]

(2) if the company is unable to pay its debts;

(3) if the Tribunal is of the opinion that it is just and equitable to wind up the company.[72]

The company is said to be unable to pay its debts in the following cases:[73]

(1) where a creditor to whom the company is indebted for more than Rs 500 has served a notice, but the company has not settled with him for three weeks;

(2) if any case has been filed against a member for a debt due from the company or from the member in his character as member, and the company has not within ten days settled the demand or procured the case to be stayed or indemnified the member against the sum due and the expenses *etc*;

(3) if any execution or other process has been returned unsatisfied in whole or in part;

(4) if it is otherwise proved to the satisfaction of the Tribunal that the company is unable to pay its debts.

*Winding Up of Foreign Companies* [S. 584]

Where a foreign company, having had a place of business in India, has ceased to carry on its business, it may be ordered to be wound up as an

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69 The jurisdiction of the company court to order the winding up of an unregistered company cannot be ousted either by the dissolution of the firm by the partners or under an arbitration clause. *M. V. Parsvarthavardhana* v *M. V. Ganesh Pd*, (1999) 35 CLA 318 Ker.

70 S. 583(3). Proceedings under the section are not in the nature of a civil suit and, therefore, not affected by S. 34 of the Arbitration Act. See *M. Vinoda Rao* v *M. Janardhana Rao*, (1988) 64 Comp Cas 167 Kant. Where the dispute was about profits and capital of the firm, a petition for winding up was not allowed. The partners were already locked up in a civil suit for accounts and partition of family assets. *K. N. Eswara Rao* v *K. H. Shama Rao*, (2000) CLC 408 Kant. Registered partnerships are not excluded from the definition of unregistered company, *Polaroid India Pvt Ltd* v *Naw Nirman Co (No 2)*, (2001) 105 Comp Cas (Bom); petition for winding up is not a "suit" for the purposes of S. 69(2) of the Partnership Act, 1932 which bars the institution of a suit to enforce a right arising from a contract by a firm against any third party, *Shree Balaji Steels* v *Gontermann-Peipers (India) Ltd*, (2002) 114 Comp Cas 193 Cal.

71 This clause will cover cases where the partnership firm has already been dissolved; clauses (*b*) and (*c*) apply to cases where the firm is subsisting, *Malini Rao* v *Hotel Dwarka, Hyderabad* (1994) 1 Andh LT 36.

72 S. 582(4). *K.N. Eswara Rao* v *K.H. Shama Rao and Sons*; (2001) 103 Comp Cas 306 Kant. The dispute regarding profit between partners of a firm is not a sufficient ground for winding up under S. 583 of the Act.

73 S. 582(5).

unregistered company even if it has already been dissolved in its mother country.[74]

*Contributories* [S. 585]

A contributory for this purpose means a person who is liable to contribute to the payment of any debt of the company or for adjustment of their mutual rights or the costs *etc.*, of winding up.

These provisions are additional to the rest of the provisions of the Act relating to winding up, all of which are also applicable.[75]

These provisions do not exclude the operation of the Partnership Act relating to dissolution even if the firm in question is likely to fall in the definition of an "unregistered company".[76]

**Period of limitation [S. 458-A]**

In computing the period of limitation for the purposes of the claims of a company in winding up, the period from the date of the petition to the date of the order of winding up (both inclusive) and the period of one year immediately following the winding up order is to be excluded. Thus, the company in winding up has the benefit of an additional period covering the time from the commencement of the proceeding to the date of the order and one more year from the date of the order.[77] Where leave of the court (now Tribunal) had to be obtained for filing the company's claim, the time lost in obtaining the leave, the period between the date of petition and winding up order was excluded and one more year was added.[78] The claim of the company should be alive at the time of

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74 See *Rajan Nagindas Doshi* v *British Burma Petroleum Co.* (1972) 42 Comp Cas 197 Bom; *Inland Revenue* v *Highland Engg Co, Scotland*, (1975) SLT 203; 1976 JBL 51; *RBI* v *BCCI (Overseas) Ltd, (No 1)*, (1993) 78 Comp Cas 207 Bom; *RBI* v *BCCI (Overseas) Ltd, (No 2)*, (1993) 78 Comp Cas 230 Bom.

75 S. 589.

76 *Vasantrao* v *Shyamrao*, (1977) 4 SCC 9; (1977) 47 Comp Cas 666; *G.P. Ganapaiah* v *M. T. R. Associates*, (1986) 59 Comp Cas 359 Kant; *Navjeevan Enterprises (P) Ltd* v *T. N. Ramalingaiah*, (1985) 58 Comp Cas 217 Kant; *Deutsche Dampschiffshrts* v *Bharat Aluminium Co*, (1984) 55 Comp Cas 727 Cal. The provisions of the Act relating to stay or restraint of proceedings are also applicable and on the passing of a winding up order suits or legal proceedings become stayed unless permitted by the court [Ss. 586-587]. Stay of proceedings against the company does not extinguish the liability of individuals, neither does it operate as a stay of proceedings against them, *Venkoba Rao* v *B.K. Shreenivasa Iyengar*, (1997) 88 Comp Cas 383 Kant.

77 See *Punjab Finance (P) Ltd, Re*, (1978) 48 Comp Cas 271 Punj; *Official Liquidator, Security & Finance (P) Ltd* v *Pushpa Wati Puri*, (1978) 48 Comp Cas 385 Del. *Karnataka Steel & Wire Products* v *Kohinoor Rolling Shutters & Engineering Works*, (2003) 1 SCC 76. This provision has been brought in to enable the official liquidator to file a claim on behalf of the company, which was legally enforceable on the date of winding up, after excluding the period u/S. 458-A so that the company or its shareholders would not suffer any loss. *Jagdish Parshad Gupta* v *Youngmen Benefit Chit (P) Ltd*, (1981) 51 Comp Cas 201 Del; *Pushpa Wati Puri* v *Official Liquidator*, (1984) 56 Comp Cas 88 Del. The period of limitation depends upon the nature of the proceedings. *Official Liquidator* v *Southern Screws (P) Ltd*, (1988) 63 Comp Cas 749 Mad.

78 *Sudarsan Chits (India) Ltd* v *Uma Sharma*, (1992) 73 Comp Cas 381 Ker; *Sudarsan Chits (India) Ltd* v *Madlam Narasimhulu Chetty*, [1993] 3 Comp LJ 96 Ker.

the winding up order.[79] If the company's claim is alive on the date of the petition for winding up, the right to sue accrues to the official liquidator on order of winding up. Three years time plus one more year would be available.[80] Where the company's debt had already become time-barred before presentation of the winding up petition it could not be revived under S. 458-A.[81]

Article 137 of the Limitation Act, 1963 applies to proceedings under Section 446. The period of limitation commences for the purposes of that section from the date of the winding up order or appointment of a provisional liquidator.[82]

**Abuse of Legal Process**

It is a settled principle of law that a petition for winding up cannot be permitted to be used as an ordinary mode of recovery of claims and counter-claims. The jurisdiction of the company court while entertaining and deciding the company petition was a limited one and the company court normally was reluctant to go into disputed questions of facts requiring detailed evidence and investigation and more so when such claims were based upon the alleged breach of terms of an agreement. Before the Companies (Second Amendment) Act, 2002 the High Court of the area in which the company's registered office was situated could entertain the petition for the winding up of the company and all the powers of the winding up were given to the High Courts but now this power has been transferred to the National Company Law Tribunal. Appeals from the Tribunal are to be heard by the Appellate Tribunal, from whose decision or order the appeals will lie in the Supreme Court.

**Information as to pending liquidations [S. 551]**

If the winding up of a company is not completed within one year of commencement, the liquidator has to prepare a statement in the prescribed form containing the prescribed particulars and duly audited by a person who is qualified to be a company auditor. The statement must be filed within two months of the expiry of the first year and thereafter each year. If the winding up is by the Tribunal, it should be filed in the Tribunal, (a copy with the Registrar) and in the case of voluntary winding up, with the Registrar. Auditing of the

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79 *Karnataka Steel and Wire Products Ltd* v *Kohinoor Rolling Shutters*, (1993) 78 Comp Cas 96 Kant (FB). The starting point depends upon the right of the company and the nature of its claim to which is added the benefit of this section, *Best and Crompton Engg Ltd* v *Official Liquidator*, AIR 1995 Mad 20: (1995) 82 Comp Cas 77.

80 *Unico Trading and Chit Funds (India) (P) Ltd* v *Zahaor Hasan*, (1991) 71 Comp Cas 270 Kant. Followed in *Unico Trading and Chit Funds (India) P Ltd* v *S.H. Lohati*, (1982) 52 Comp Cas 340 Kant; *United Hire-Purchase & Land Finance (P) Ltd*, (1996) 87 Comp Cas 246 P&H.

81 *Karnataka Steel & Wire Products* v *Kohinoor Rolling Shutters & Engineering Works*, (2002) 112 Comp Cas 606 SC.

82 See *K.P. Ulahaman* v *Wandoor Jupiter Chits P Ltd*, AIR 1989 Ker 41: (1989) 65 Comp Cas 178, winding up order passed on Dec 20, 1973 and a claim was filed on Feb 28, 1978 and the same was held to be within time. The period between the filing of the petition and the winding up order was excluded and one more year was added. For other decisions to the same effect, see *Maruti Ltd* v *Parry & Co Ltd*, (1989) 66 Comp Cas 309, 316: [1989] 3 Comp LJ 384 P&H and *New Kerala Roadways (P) Ltd* v *K. K. Nandal*, (1989) 66 Comp Cas 715: [1988] 3 Comp LJ 35 Ker.

statement is not necessary where the liquidator has to get his accounts audited under Section 462. In the case of the liquidation of a Government company, a copy has to be sent to the Central Government or States which are its members. Creditors and contributories are entitled to copies and inspection on prescribed fee. Any default by the liquidator in complying with the requirements and any person falsely claiming himself to be a creditor or contributory, are punishable.

Any person stating himself to be a creditor or contributory in writing, shall have the right of inspecting the documents and a person falsely claiming to be so is liable to punishment under Section 182 of the Indian Penal Code, 1860.

**Liquidator's miscellaneous powers [S. 546]**

The powers specified below may be exercised by the liquidator with the sanction of the Tribunal where the winding up is by the Tribunal or with the sanction of a special resolution where the winding up is voluntary:

1. The payment of a class or classes of creditors in full;
2. Compromise or arrangement with creditors, the word "creditors" for this purpose including persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages, against the company or whereby the company may be rendered liable.
3. Compromising any call, or liability to call, debt and any claim, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or alleged to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company; settling all questions relating to or affecting the assets of the company or its winding up; he may do so on such terms as may be mutually agreeable and take any security for the discharge of the call, debt, liability or claim and give a complete discharge for the same.

In the case of winding up by the Tribunal, the Supreme Court is empowered to make rules in respect of the exercise by the liquidator of any of the above powers and then the power shall be exercisable subject to such conditions, restrictions and limitations as may be specified in those rules.[83]

In the case of voluntary winding up the exercise of the above powers shall be subject to the control of the Tribunal and for this purpose any contributory or creditor may apply to the Tribunal.[84]

This section will not authorise any compromise to be imposed upon any unwilling creditors which is quite possible under S. 391.[85] The sanction of a special resolution or that of the Tribunal is necessary for the sanctity of the transaction.[86] The power of the liquidator is very wide. The Tribunal will act

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83 S. 546 (1-A).

84 S. 546 (2) and (3).

85 *Albert Life Assurance Co Ltd, Re*, (1871) 6 Ch App 381.

86 *Union Bank* v *Gobind Singh*, ILR 4 Lah 283, but compare with *Cyclemakers Coop Supply Co* v *Sims*, [1903] 1 KB 477.

with great caution before putting upon a transaction the stamp of its approval.[87]

**Notification of liquidation [S. 547]**

When a company is in winding up either voluntarily or by the Tribunal, all its invoices, orders for goods or business letters shall contain a statement that the company is being wound up, failing which the defaulting officer, liquidator, receiver or manager is liable to a fine up to Rs 5000.

**Books and papers to be evidence [S. 548]**

Where a company is being wound up, all the books and papers of the company shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be stated in them. A *prima facie* evidence creates only a presumption of truth and thereby shifts the burden to the contributory to disprove the inference of truth.[88]

**Inspection of books and papers [S. 549]**

Subject to the restrictions contained in the Supreme Court Rules, after an order of winding up by the Tribunal, creditors and contributories have the right to inspect the books and papers of the company. The Tribunal may allow inspection if the right is not going to be abused[89] and even to a person who is facing misfeasance proceedings.[90] A provision for secrecy in the Articles may not prevent inspection[91] except where the winding up is for purposes of reconstruction.[92]

**Enforcement of duty of liquidator to make returns, etc. [S. 556]**

The liquidator has to deliver or file some documents in the performance of his functions and also to give notices, *etc.* This section provides the procedure consequent upon a default. It says that if the liquidator does not make good the default within 14 days after the service on him of a notice, the Tribunal may make an order directing the liquidator to make good the default within such time as may be specified in the order. An application for this purpose may be made by any creditor or contributory or the Registrar. The order of the Tribunal may provide that all costs of and incidental to the application shall be borne by the liquidator.

**Meetings to ascertain wishes of creditors or contributories [S. 557]**

This section empowers the Tribunal in all matters relating to winding up to have regard to the wishes of creditors or contributories and for this purpose to call their meetings and appoint a person as the chairman of a meeting. The

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87 *Bank of Hindustan, China & Japan* v *Eastern Financial Assn Ltd.* (1869) 3 Moore's IA 15, PC.

88 *Great Northern Salt & Chemical Works, Re,* (1887) 36 CHD 702; *Kesar Singh* v *Joint Official Liquidator of Radheysham Beopar Co,* AIR 1937 Lah 61.

89 *People's Bank of Northern India, Re,* AIR 1937 Lah 821.

90 *Subramaiah Setty* v *Official Liquidator,* (1985) 57 Comp Cas 626: [1985] 2 Comp LJ 205 Kant.

91 *London & Yorshire Bank* v *Cooper,* (1885) 15 QBD 83.

92 *Glamorganshire Bkg Co, Re*; *Morgan's* case, (1884) 28 Ch D 620.

Tribunal may give due weight to the value of a creditor's debt, and the number of votes that may be cast by each contributory.

**Courts or persons before whom affidavits may be sworn [S. 558]**

Affidavits required by the Act may be sworn in India before any court or the Tribunal, judge or person lawfully authorised to take and receive affidavits and, in any other country, either before any court, judge or person lawfully authorised to take or receive affidavits in that country or before any Indian Consul or Vice-Consul. All courts, judges, justices, commissioners and person acting judicially in India are required to take judicial notice of the seal, stamp or signature, of the functionaries described above in reference to affidavits or other documents to be used for the purposes of the Companies Act.[93]

## COMPANIES AUTHORISED TO BE REGISTERED

### PART IX

**Companies capable of being registered (S. 565)**

Following types of company have been recognised for the purposes of registration and reregistration under the Act:

1. Any company consisting of seven or more members which was in existence on May 1, 1882 including companies registered under the Acts of 1857 and 1860 or any law corresponding to those Acts which was in force in Part-B states.
2. Any company consisting of seven or more members formed before or after the commencement of the present Companies Act, 1956 under any other Act of Parliament or Act of Parliament of UK or Letters Patent in force in India or is otherwise duly constituted according to law. The section provides that the registration is not to be regarded as invalid even if the registration has been brought about for the purpose of getting the company wound up under the Act.

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93 *K.K.Roy (P) Ltd, Re*, [1967] 1 Comp LJ 216: (1967) 37 Comp Cas 737 Cal, an affidavit sworn before a notary in a foreign country accepted though it would not have been evidence under Indian laws.

# 24
# *Miscellaneous*

## REGISTRATION OFFICES, OFFICERS AND FEES

**Registration offices [S. 609]**

The Central Government can open registration offices at places it thinks fit. The Government may appoint Registrars, Additional, Deputy and Assistant Registrars and may make regulations as to their duties; fix their salaries; authorise making of seals for authentification of documents.

**Inspection, production, and evidence of documents kept by the Registrar [S. 610]**

The section confers upon the members of the public the right of inspection and of obtaining copies of documents filed with the Registrar. The inspection shall be in accordance with the rules made under the Declaration of Records Act, 1917. The right extends to any documents kept by the Registrar, being documents filed or registered by him in pursuance of the Companies Act or making a record of any fact required or authorised to be recorded or registered in pursuance of the Act. The right of inspection can be exercised on payment of prescribed fees.

The Registrar can also be asked on payment of prescribed fee to give a certified copy of a company's certificate of incorporation or a copy or extract of any other document or any part thereof.

The prospectus of a company and other papers and documents filed along with it can be inspected within 14 days of the date of the publication of the prospectus and at other times with the permission of the Central Government. Documents in connection with the prospectus which have to be registered under S. 605 can be inspected within 14 days of the date of publication and at other times with the permission of the Central Government.

A process for production of any document by the Registrar has to issue from the Court or Tribunal. The Process should bear a statement on its face that it is issued with the leave of the Board.

Certified copies issued by the Registrar are admissible in evidence in all legal proceedings as of equal validity with the original document.

Documents which have to be filed or registered within a fixed period of time, may be registered after the expiry of that period on payment of additional prescribed fees.

The Amendment of 1996 (S. 610-A) permits the filing of documents in micro films, fascimile copies of documents, computer printouts and documents on computer media.

**Enforcement of duty of company to make returns etc. to Registrar [S. 614]**

If a company fails to file requisite papers with the Registrar, the latter should give a 14 day notice to the company to make good the default. In case of

further default, any creditor or member or the Registrar can get an order from the Tribunal. The order may provide that the costs shall be borne by the company or by any officer who is responsible for the default.

The Registrar is an administrative officer and not a court or an adjudicating authority. He is bound to follow guidelines and instructions provided by Government circulars. Where two rival factions in a company filed two different returns, it was the Registrar's duty to take both of them to the company's file in accordance with Government guidelines and not to accept one and to reject the other.[1]

The procedure prescribed by the section has to be followed for compelling a company to make good its default in filing documents for registration of charges under Section 125 of the Act.[2]

**Power of court trying offences to direct filing of documents [S. 614-A]**

Where the court is trying an offence arising out of a default in filing documents with the Registrar, the court may, irrespective of the result of the trial, order the officer or any employee of the company to make good the default within such time as may be allowed.

**Power of Central Government to direct companies to furnish information or statistics [S. 615]**

The Central Government can require a company to furnish information or statistics on any matter in connection with its constitution or working and within a time that may be specified in the order. Such an order has to be published in the Official Gazette. The date of publication is the date of demand. When the order is on an individual company, it should be served on the company in the manner laid down in Section 51. For ascertaining the correctness and completeness of the particulars furnished, the Government may demand more information and require the production of relevant records or documents. The Government may even constitute an inquiry by a named person. There is a punishment for submitting wrong or incomplete information. An information can also be demanded from an officer of the company but he cannot be punished unless the court is convinced that he was in a position to comply with the order. The provision is applicable to foreign companies carrying on business in India.

**Fee in Schedule X to be paid [S. 611]**

Schedule X carries a tariff of fees which is payable to the Registrar for the purpose of getting a company registered. It also indicates the structure of fees payable for filing of documents. In the case of delay in filing documents, the Registrar is authorised to receive the document on payment of such an additional fee not exceeding ten times the amount of the original fee as the Registrar may require.[3]

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1 *S.R. Bhattacharya* v *Union of India*, (1998) 91 Comp Cas 37 Del.

2 *ICICI Bank Ltd* v *Klen & Marshall Mfrs & Exporters Ltd*, (2000) 28 SCL 123 CLB.

3 When a document filed by a company is defective, the Registrar is empowered by Regulation

Section 612 provides that all such fee as is collected under the Act shall be paid into the public account of India in the Reserve Bank.

Section 613 empowers the Central Government to reduce the fee, charges etc., which are otherwise payable under the Act.

## OFFENCES

### Cognizance of offences under the Act [S. 621]

Any violations of the Act which constitute an offence are cognizable only on a complaint by the Registrar, Government or a shareholder of the company. The only exception specified in the section is a prosecution of delinquent officers and members of a company under Section 545. In such cases a complaint can be filed by any person who is interested in the winding up of the company. The word "shareholder" would include a person who has purchased the shares of a company and has applied to the company for registering him as a shareholder.[4] A proviso to the section added by the Amendment Act of 2000 says that the court may take cognizance of offence relating to issue and transfer of securities and non-payment of dividend on a complaint in writing by a person authorised by SEBI.

The bar of the section does not apply to a prosecution by the company of any of its officers and also to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters included in Part VII (Ss. 425-560) or in any other provision of this Act relating to the winding up of companies. For the purposes of this provision, a liquidator of a company shall not be deemed to be an officer of the company.

Where a complaint is made by the Registrar or by a representative of the Central Government, then, notwithstanding anything contained in the Criminal Procedure Code, the personal attendance of the complainant in the court shall not be necessary, unless the court for reasons to be recorded in writing requires personal attendance.

A complaint was allowed to be filed at the place of the transaction. The court was of the view that trade in securities was a country-wide phenomenon. The policy behind the penalty provisions would be defeated if a complaint against a company could lie only at the place of its registered office.[5]

### Composition of certain offences [S. 621-A]

This new section has been inserted by the amendment of 1988. This provision became necessary because the concept of an "officer who is in

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17 of the Companies Regulations 1956 to bring the defect to the notice of the company giving it 15 days' time to rectify the defect. If the company still fails to do so, the Registrar will take the defective document on record without prejudice to his powers to take action. Press Note No 12/92 of Dec 12, 1992.

4 *Federal Bank Ltd* v *Sarala Devi Rathi*, (1997) 88 Comp Cas 323 Raj. A complainant, who did not aver in his complaint that he was a shareholder and also concealed that an order of CLB in his favour was stayed by the High Court, had to face dismissal, *V.M. Modi* v *State of Gujarat*, (1997) 88 Comp Cas 871: [1997] 3 Comp LJ 244 Guj; *S. C. Bhatia* v *P. C. Wadhawa*, (1998) 30 Corpt LA 135 P&H.

5 *Ranbaxy Laboratories Ltd* v *Indra Kala*, (1997) 88 Comp Cas 348 Raj.

default" has been so defined in Section 5 (also by the amendment of 1988) that a director who is there only ceremonially and who may have no control or grip over the affairs of or even contact with, the company, is also likely to be covered. Such a person may have to pay the price for being merely a director though he may not be responsible for the default in question. Now the facility of compounding an offence has been given so that anyone can get rid of the default by paying composition money and save himself from the torture of a punishment by way of fine.[6] The provision does not apply to offences which are punishable with imprisonment only or with imprisonment and fine. Where the amount of fine does not exceed Rs 50,000 it can be compounded by the Regional Director and, in other cases, by the Central Government. Quite obviously, the compromised amount of fine cannot exceed the amount which would have been otherwise leviable. Where the default has been made good by paying additional fee under Section 611, the amount of such fee can go towards reduction of the fine money which the compromise may bring about.

Where an offence has been repeated within a period of three years from the date of the last similar offence, it cannot be compromised. Where an offence was compounded and three years thereafter has been repeated, the repeated offence should be taken to be the first offence.

Regional directors have to work under the supervision and control of the Central Government. An application for composition has to be presented to the Registrar who will forward it to the Regional Director or the Central Government, as the case may be. The fact that an offence has been compounded must be brought to the notice of the Registrar within seven days whether the compounding was before or after the institution of any prosecution. After the compounding of an offence, prosecution proceedings for the same cannot be launched. Where the compounding was done after a prosecution had already been taken up, the composition should be brought to the notice of the Registrar who will inform the court in which the prosecution is pending and thereafter the court shall discharge the company or the officer in question.

While dealing with an application for compounding an offence which arises out of default in filing documents *etc.*, with the Registrar, the defaulting company or officer may be ordered to file the documents on payment of additional fee leviable under Section 611 within a specified time.[7] An employee of the company or officer so ordered will have to suffer a penalty for his default in complying with the order which may extend to an imprisonment for six months or fine up to fifty thousand rupees.

An offence which is punishable with fine or imprisonment or both can be compounded only with the permission of the court in accordance with the

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6 Failure to deliver debenture certificates within the time delimited by S. 113 or even within the extended time has been held to be a compoundable offence, *Vikrant Tyres Ltd, Re*, (1995) 17 Corpt LA 100 CLB Mad : (1995) 83 Comp Cas 210, it was compounded on payment of Rs 5000.

7 An application for compounding was rejected where the company had not made good the default yet. *General Produce Co Ltd, Re*, (1994) 81 Comp Cas 570 CLB.

provisions of the Companies Act. An offence which is punishable with imprisonment only or with imprisonment and fine cannot be compounded.[8]

**Jurisdiction to try offences [S. 622]**

There is a categorical declaration in the section that no court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try an offence under this Act.

An offence punishable with fine only which is committed by a person within a Presidency Town may be tried summarily and punished by the Presidency Magistrate.[9]

Offences under the Act are non-cognizable.[10] Prosecutors are appointed by the Central Government.[11]

In the case of an acquittal by any court other than a High Court, the Central Government may authorise the filing of an appeal against such acquittal and it will be a valid appeal notwithstanding anything contained in the Criminal Procedure Code.[12]

Section 625 provides about payment of compensation in cases of frivolous or vexatious prosecution.

**Application of fines [S. 626]**

A court, the Tribunal imposing any fine under this Act may direct that the whole or any part thereof shall be applied in or towards payments of the costs of the proceedings or rewarding of the person on whose information or at whose instance the fine is recovered.

**Production and Inspection of books where offence committed [S. 627]**

Where an application is made to a High Court Judge in chambers or the Tribunal by the Public Prosecutor of the State or by the Central Government or by a company prosecutor appointed under Section 624-A, there is a reasonable cause to believe that any person while an officer of the company committed an offence in connection with the management of the company's affairs and that evidence of the company, an order may be passed authorising any person to inspect the books and papers for the purpose of investigating and obtaining evidence of the commissions of the offence and requiring the manager of the company or officer of the company named in the order to produce the books and

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8 *See* Circular No 5/93 of April 28, 1993 issued by DCA as to matters connected with this power. A default of technical nature (misdescription of a head of account: deposits being described as secured loans) was allowed to be compounded at a nominal fine of Rs 100 for the company and Rs 10 for secretary and each director. The compounding power of the CLB was not affected by the pending appeal in the High Court for quashing of proceedings, *Usha India Ltd, Re*, (1996) 85 Comp Cas 581 CLB. For procedural guidance see *Reliance Industries Ltd, Re*, (1997) 89 Comp Cas 67 and 465 CLB. Permission of the court under the Criminal Procedure Code is not required for compounding under the section, *Hoffland Finance Ltd, Re*, (1997) 90 Comp Cas 38: [1997] 3 Comp LJ 341 CLB.

9 S. 623.

10 S. 624.

11 S. 624-A.

12 S. 624-B.

papers to a person, place and time mentioned in the order. The power extends to banking companies also subject to due modifications that its exercise will be confined only to the affairs of the company and the second type of order requiring any officer to produce books etc. will not be passed.[13]

The orders under the section are not appealable.

**Penalty for false statements [S. 628]**

Many statements have to be prepared under the Act relating to the affairs of the company. The section requires that statements which are required by the Companies Act to be prepared should not carry any particular which is false in a material respect. Hence. if any person makes a statement which he knows to be false in any material particular or which omits any particular knowing it to be material and, if no punishment is otherwise provided in the Act in that respect, he is punishable with imprisonment extending up to two years and is also liable to a fine.

**Penalty for false evidence [S. 629]**

Intentionally giving false evidence in any examination upon oath or solemn affirmation authorised under the Act or in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under the Act or otherwise in or about any matter arising under the Act, is punishable with imprisonment extending up to seven years and shall also be punishable with a fine.

**Penalty where no specific penalty provided [S. 629-A]**

Any default in complying with the regulatory requirements of the Act is generally punishable under a penalty provision in the section itself. But even so there are many sections which prescribe one thing or the other but which do not carry any penalty provision. This section is intended to deal with such contradictions. This section also applies to defaults in complying with the conditions, restrictions *etc.*, subject to which an approval was granted. The penalty provided is fine extending up to Rs 5000 and, in the case of a continuing default, Rs 500 for every day of default. The Karnataka High Court held that on directors' failure to call a meeting on a requisition received by them, Section 169(*b*) gives an alternative remedy to requisitionists to call a meeting by themselves and therefore directors' failure would not attract Section 629-A.[14]

**Form and procedure of certain applications [S. 640-B]**

The section deals with applications to the Central Government under Sections 259, 268, 310, 311 and empowers to prescribe forms.

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13 The aid of the section is not available in the case of a shareholder seeking to prosecute the company's directors, *Kishan Rao* v *P Santha Reddy*, [2000] CLC 1911 AP.

14 *Anantha R. Hegde* v *Captain T.S. Gopalakrishna*, [1996] 3 Comp LJ 333 (Kant): (1996) 23 Corpt LA 142: (1998) 91 Comp Cas 312 (Kant).

**Power to alter Schedules [S. 641]**

The section authorises the Government to alter schedules. The Government cannot widen or constrict the scope of the Act or its policy.[15]

**Power of Central Government to make Rules [S. 642]**

The Central Government has the power to make rules in respect of all the matters which have to be prescribed by it and generally to carry out the purposes of the Act. The rules so promulgated may provide that contraventions will be punishable with a fine extending up to Rs 5000 and in case of a continuing default, with a fine extending up to Rs 500 for every day of default. Rules framed in the exercise of this power have to be laid before each House of Parliament while it is in session for a total period of 30 days. At the end of the session during which the 30-day period is completed, the rules become effective either as originally framed or subject to any modifications or annulment, made by the Parliament. Anything already done on the basis of the original rules will not be prejudiced by any such modification or annulment.[16] The Companies (Amendment) Act, 1999 (w.e.f. 31-10-1998) has added sub-section (4) of the section prescribing the same requirement of Parliamentary approval for Regulations made by SEBI.

**Power of Central Government to make Rules relating to winding up [S. 643]**

The Central Government is required to make rules providing for all matters relating to the winding up of companies which are to be prescribed under the Act and may also make rules on matters as may be prescribed.

The Central Government is also empowered to make rules, consistent with the Code of Civil Procedure, 1908 on the following matters: (1) as to mode of proceedings to be had for winding up a company in High Courts and in Courts subordinate to High Courts; (2) for the voluntary winding up of companies, whether by members or by creditors; (3) for the holding of meetings of creditors and members in connection with proceedings under Section 391 (compromise and arrangements); (4) for giving effect to the provisions of the Act for reduction of capital; (5) generally for all applications to be made to the court under the provisions of this Act; (6) holding and conducting of meetings to ascertain the wishes of creditors and contributors; (7) the settling of the list of contributors and rectification of the register of members where required and collecting and applying the assets; (8) the payment, delivery, conveyance, surrender, or transfer of money, property, books or papers to the liquidator; (9) the making of calls; and (10) the fixing of time within which debts and claims shall be proved.[17]

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15 *J. K. Industries Ltd* v *ROC*, (1997) 27 Corpt LA 195.

16 *See* The Companies (Central Government) General Rules and Forms, 1956. *See* further the Central Government's power to alter Schedules as conferred by S. 641 and to lay down Forms and Rules as conferred by S. 640-B.

17. Section 637-A empowers the Central Government or the Tribunal to accord approval in certain cases specified in the section subject to certain conditions and payment of prescribed fee.

**Annual report on working of Act [S. 638]**

The Central Government is under a duty to cause a general annual report on the working and administration of the Companies Act to be prepared and laid before both Houses of Parliament within one year of the close of the year to which the report relates.

**Condoning of delays in certain cases [S. 637-B]**

A number of provisions of the Act prescribe a time-limit for filing of applications. This section gives power to the Central Government to condone the delay in filing an application. Reasons for condoning delays must be recorded in writing. A similar power of condonation exists in reference to delays in filing documents with the Registrar. Here again reasons for condonation have to be recorded in writing.

**Delegation by Central Government of its powers [S. 637]**

The Central Government is empowered by this section to delegate any of its functions or powers to such authority or officer as may be specified in the notification. The delegation can be subject to such conditions, restrictions and limitations as may be specified in the notification : The section clearly says that the prior to appoint a person as a public trustee under Section 153-A and the power to make rules cannot be delegated.

The powers and functions which cannot be delegated under this section are those conferred by or mentioned in the following sections:

Section 10 [Jurisdiction of Courts]; Section 81 [Further Issue of Capital]; Section 89(4) [Termination of disproportionally excessive voting rights]; Section 213 [Financial year of holding company and subsidiary]; Sections 235 and 237 [Investigation of affairs]; Sections 241-245 [Powers after investigation of affairs]; Section 247 [Investigation of ownership of company]; Section 372 [inter-corporate investments]; Section 396 [Amalgamation in national interest]; Section 399(4) and (5) [Right to apply under Section 397 or 398]; Section 401 [Right of Central Government to apply under Section 397 or 398]; Section 408 [Power of Central Government to prevent oppression or mismanagement]; Section 410 [Appointment of Advisory Committee]; Section 448 [Appointment of official Liquidator]; Section 609 [Registration offices]; Section 620 [Power to modify Act in relation to Government companies]; Section 638 [Annual report by Central Government]; Section 641 [Power to alter Schedules]; and Section 642 [Power of Central Government to make rules].

**Enforcement of orders of one court by other courts [S. 635]**

An order of one court can be enforced by another court. A copy of the order should be produced to the proper officer of the court required to enforce the order. A certified copy of the order shall be a sufficient evidence of the order. It then becomes the duty of the court to enforce the order. A similar procedure has to be followed when the orders of the Company Law Board or Tribunal have to

be enforced through a court.[18] The procedure to be followed in the matter of execution of an order made by the company court is different from that laid down in the Code of Civil Procedure. It is sufficient to produce to the executing court a certified copy of the order sought to be executed.[19]

**Protection of acts done in good faith [S. 635-A]**

Acts done by the Government or any officer of the Government or any other person in pursuance of the Act and in good faith cannot be the subject-matter of any prosecution or other legal proceeding. The same protection is available in respect of the publication by or under the authority of the Government or such officer of any report, paper or proceedings.

**Protection of employees [S. 635-B]**

The section provides for protection of employees during investigation by an inspector and pendency of proceedings before courts against any person concerned in the conduct and management of the affairs of a company.

**Non-disclosure of information in certain cases [S. 635-AA]**

The Registrar, any officer of the Government or any other person is not compellable to disclose to any court, tribunal or other authority as to whence he got any information which led the Central Government to direct a special audit or an investigation and which is material in that connection.

**Enforcement of orders of court [S. 634]**

Orders of court under the Companies Act are enforceable in the same manner as a decree made by a court in a suit pending before it.[20]

**Enforcement of orders of Company Law Board [S. 634-A]**

This section will become deleted on the enforcement of the 2nd Amendment Act of 2002 which abolishes the CLB. The Company Law Board can enforce its orders in the same manner as if it were a decree made by a court in a suit pending before it. If the CLB is unable to do so, it may send the order for execution to the court which has jurisdiction over the party against whom the order is to be enforced. A consent order would be enforceable in the same manner.[21] An amicable settlement order has been held to be enforceable.[22]

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18 A certified copy of the order is sent to the court which has to enforce the order and it is not necessary that the matter should be transferred to the executing court in the manner of a decree under CPC. *Sindhu Chits and Trading (P) Ltd* v *Khayirunnissa*, (1993) 76 Comp Cas 878 Kant.

19 *Anand Finance (P) Ltd* v *Amrit Dasarat Kakad*, (1997) 90 Comp Cas 350 Del; (1996) 61 Delhi LT 305.

20 An order against the director of a company in winding up calling upon him to pay the debt of the company which he guaranteed was enforced under this section. *Deutsche Bank* v *S. P. Kala*, (1992) 74 Comp Cas 577 Bom. An order under S. 397 was held to be enforceable under this section as a decree. *Hungerford Investment Trust Ltd* v *Turner, Morrison Co Ltd*, (1994) 1 Cal LJ 500.

21 *TNK Gonvidaraju Chettiar & Co Ltd* v *Kuki Leather P Ltd*, (2000) 28 SCL 267 CLB.

22 *Betrand Faure* v *IFB Automotive Seating Systems Ltd*, (1999) 34 CLA 277 CLB.

**Power to require security for costs [S. 632]**

In a suit or proceeding instituted by a limited liability company, if the Tribunal has a reason to believe that the company will not be able to pay the costs of the defendant, should he win, the Tribunal may require sufficient security to be given for those costs and may stay all proceedings until the security is given.[23]

A person who is seeking an order for costs can simultaneously ask the Tribunal for striking out the proceedings.[24] The security for costs can be ordered only by the Tribunal and not by any other Authority like Controller of Patents.[25]

The Tribunal may hesitate in ordering a security for costs where the litigation started by the company involves a point of general public importance.[26]

**Penalty for improper use of "Limited" or "Private Limited" [S. 631]**

A fine extending up to Rs 500 for every day of default is leviable when the words "limited" or "Private Limited" are used without proper authorisation for anybody's trade or business.

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23 There should be reason to believe that the company would not be able to pay costs. All the circumstances must be considered to arrive at a decision. *Keary Developments Ltd* v *Tarmac Construction*, [1995] 3 All ER 534. There should be credible evidence for a reason to believe that the company would not be able to pay the defendant's costs, should he win. *Europa Holdings Ltd* v *Circle Industries (UK) plc*, (1993) BCLC 320 CA.

24 *Orsank S A* v *Spencer Associates*, The Times, Feb 19, 1998 CA.

25 *Abdullayoglu's Patent Application*, [2000] RPC 18.

26 *Lancefort Ltd* v *An Bord Pleanala Ireland*, [1998] 2 IR 511 Ireland.

# 25

# *Revival and Rehabilitation of Sick Industrial Companies*

**Reference to Tribunal [S. 424-A]**

Part VI-A has been introduced into the Companies Act by the Companies (Second Amendment) Act, 2002. Its enforcement will mean repeal of the Sick Industrial Companies (Special Provisions) Act, 1985 and also abolition of the Board of Industrial and Financial Reconstruction (BIFR). Such cases will go before the National Company Law Tribunal (Tribunal). Section 424-A provides for such reference. The Board of directors of a sick industrial company have to make a reference to the Tribunal. They have to prepare a scheme for its revival and rehabilitation and submit to the Tribunal along with an application containing such particulars as may be prescribed. This will enable the Tribunal to take a decision as to measures which may be taken for the company's revival.

Such a scheme about a Government company can be presented either by the Central Government or by the concerned State Government. Then the whole of provisions would apply to a Government company also.

The application has to be accompanie by a certificate from an auditor who shall be from one among the panel of auditors prepared by the Tribunal. The certificate has to indicate the reasons for the net worth of the company going down to 50% or below it and also the reasons for default in repayment of its debts by reason of which the company sank into sickness.

Such reference can also be made by the Central Government, Reserve Bank, State Government, a public financial institution, or a State level institution or a scheduled bank. The application shall show that there are sufficient reasons to believe that the company has, for the purposes of the Act, become a sick industrial unit. A State Government should not make a reference unless all the units belonging to the company are in the same state. A public financial institution or State level institution or a scheduled bank can make a reference by showing that it has an interest in the company by reason of financial assistance, rendered by it or an obligation undertaken by it with respect to the company.

The reference should be made within 180 days from the date on which the party making references came to know of the relevant facts giving rise to the cause for reference or within 60 days of the final adoption of accounts, whichever is earlier.

The Tribunal may, on receiving such a reference, pass an order that the company has become a sick industrial company. The order of the Tribunal has been given the status of being a final order.

**Inquiry into working of sick industrial companies (S. 424-B)**

On receipt of a reference or upon information received or upon its own knowledge as to the financial condition of the company, the Tribunal may make a necessary inquiry as to whether the company has gone into sickness.

The Tribunal may require an operating agency to examine the scheme of revival and make its report. Within 21 days the operating agency should submit its report. The time may be extended, on request, to 40 days. The Tribunal has to pass its final orders within 60 days from the commencement of inquiry. The Tribunal may extend its time to 90 days by its order after recording reasons in writing. The inquiry is deemed to commence from the date of reference or Tribunal's own knowledge.

For the purposes of the inquiry, the Tribunal may appoint one or more persons of knowledge, experience and expertise in management and control of company affairs to be special directors on the Board of Directors of the company under reference for safeguarding its financial and other interests and also the public interest. The terms and conditions of the appointment may be prescribed. They have to submit their report within 60 days. They will have the powers of a director for performance of their duties. The Tribunal can give them necessary directions about the performance of their duty. The requirements of the Companies Act as to appointment, qualifications, removal, etc. are not to apply to such directors, sub-s(9) says:

"Any special director appointed under sub-section (5), shall—

(*a*) hold office during the pleasures of the Tribunal and may be removed or substituted by any person by order of the Tribunal;

(*b*) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relation thereto;

(*c*) not be liable to retirement by rotation and shall not be taken into account for computing the number of directors liable to such retirement;

(*d*) not be liable to be prosecuted under any law for anything done or omitted to be done in good faith in the discharge of his duties in relation to the sick industrial company.".

**Power of Tribunal to make suitable orders on completion of inquiry [S. 424-C]**

On completion of the inquiry the Tribunal has to make an order as to whether the company is really a sick company and whether it would be practicable for the company to make its net worth exceed its accumulated losses or make repayment of its debts within a reasonable time. If the answer to this question is positive, the Tribunal may give the company appropriate time for achieving the two targets. If the answer to the question is negative, the Tribunal will order the operating agency to adopt suitable measures as specified in S. 424-D and to prepare a scheme for that purpose. The Tribunal may review and modify its orders as the situation may demand.

**Preparation and sanction of schemes [S. 424-D]**

In accordance with the guidelines framed by the Reserve Bank for this purpose, the operating agency has to prepare a scheme, ordinarily within 60 days from the date of the order, for adoption of one or more of the following measures:

(*a*) the financial reconstruction of such industrial company;

(*b*) the proper management of such industrial company by change in, or take over of, the management of such industrial company;

(*c*) the amalgamation of—

(*i*) such industrial company with any other company; or

(*ii*) any other company with such industrial company (hereafter in this section, in the case of sub-clause (*i*), the other company, and in the case of sub-clause (*ii*), such industrial company, referred to as "transferee-company");

(*d*) the sale or lease of a part or whole of any industrial undertaking of such industrial company;

(*e*) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;

(*f*) such other preventive ameliorative and remedial measures as may be appropriate;

(*g*) repayment of debt;

(*h*) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (*a*) to (*g*):

The Tribunal may extend the said period of sixty days to ninety days for reasons to be recorded in writing for such extension.

The scheme referred to in sub-section (1) may provide for any one or more of the following, namely: [Sub-s. (2)]

(*a*) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, duties and obligations of the sick industrial company or, as the case may be, of the transferee company;

(*b*) the transfer to the transferee company of the business, properties, assets and liabilities of the sick industrial company on such terms and conditions as may be specified in the scheme;

(*c*) any change in the Board of Directors, or the appointment of a new Board of Directors, of the sick industrial company and the authority by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made and in the case of appointment of a new Board of directors or of any director, the period for which such appointment shall be made;

(*d*) the alteration of the memorandum or articles of association of the sick industrial company or, as the case may be, of the transferee company

for the purpose of altering the capital structure thereof, or for such other purposes as may be necessary to give effect to the reconstruction or amalgamation;

(*e*) the continuation by or against the sick industrial company or, as the case may be, the transferee company of any action or other legal proceeding pending against the sick industrial company immediately before the date of the order made under sub-section (3) of section 424-C;

(*f*) the reduction of the interest or rights which the shareholders have in the sick industrial company to such extent as the Tribunal considers necessary in the interests of the reconstruction, revival or rehabilitation or repayment of debts of such sick industrial company or for the maintenance of the business of such industrial company;

(*g*) the allotment to the shareholders of the sick industrial company, of shares in such company or, as the case may be, in the transferee company and where any shareholder claims payment in cash and not allotment of shares, or where it is not possible to allot shares to any shareholder, the payment of cash to those shareholders in full satisfaction of their claims—

(*i*) in respect of their interest in shares in the sick industrial company before its reconstruction or amalgamation; or

(*ii*) where such interest has been reduced under clause (*f*) in respect of their interest in shares as so reduced;

(*h*) any other terms and conditions for the reconstruction or amalgamation of the sick industrial company;

(*i*) sale of the industrial undertaking of the sick industrial company free from all encumbrances and all liabilities of the company or other such encumbrances and liabilities as may be specified, to any person, including a co-operative society formed by the employees of such undertaking and fixing of reserve price for such sale;

(*j*) lease of the industrial undertaking of the sick industrial company to any person, including a co-operative society formed by the employees of such undertaking;

(*k*) method of sale of assets of the industrial undertaking of the sick industrial company such as by public auction or by inviting tenders or in any other manner as may be specified and for the manner of publicity therefor;

(*l*) issue of the shares in the sick industrial company at the face value or at the intrinsic value which may be at discount value or such other value as may be specified to any industrial company or any person including the executives and employees of such sick industrial company;

(*m*) such incidential, consequential and supplemental matters as may be necessary to secure that the reconstruction or amalgamation or other

measures mentioned in the scheme are fully and effectively carried out.

The proposed scheme is brought to the notice of the company and other persons or companies concerned. The Tribunal may publish it in a newspaper for inviting suggestions [424-D(3)]. The draft scheme has to be left at the office of the company and any other place notified in the advertisement [sub-s(3)(*b*)].

Keeping in mind the suggestions made by the company or the operating agency, or any member or creditor, or the transferee company or any other company concerned in the amalgamation, or employees of the company, the Tribunal may make necessary modifications in the scheme [sub-s3(*c*)]. Where amalgamation of the company is involved, the scheme formulated by the Tribunal has to be placed before the shareholders of the transferee company for their approval at a meeting by a special resolution. The Tribunal may then sanction the scheme and fix its effective date [sub-s(4)]. This has to be done within 60 days which may, however, be extended to 90 days under statement of reasons. Different parts of the scheme may be implemented on different dates.

The Tribunal may review a sanctioned scheme keeping in mind the guidelines, including those of the Reserve Bank and direct the operating agency accordingly. This power includes the power to make a fresh scheme and provision of necessary measures that the operating agency may require [sub-s(5)]. A fresh scheme would have to be formulated like the original scheme in accordance with the provisions of sub-ss(3) and (4) [sub-s(6)].

Where the scheme involves the transfer of any property or liability of the sick company to any other company or person, or vice versa, the transfer would take effect from the date specified in the scheme [sub-s(7)].

The sanction operates as a conclusive evidence that all the requirements of the Act have been complied with. A certified copy will operate as evidence for all purposes [sub-s(8)]. A copy has to be filed with the Registrar within the prescribed time [sub-s(9)]. The scheme binds the company, the transferee company, shareholders and creditors, guarantors and employees [sub-s(10)].

The creditors of the company have also been given the right to prepare a scheme for rehabilitation of the company and submit it to the Tribunal. Such scheme can be submitted only after approval at least 3/4 in value of the creditors [sub-s(11)]. Such schemes also have to undergo the same process of approval as any other scheme, after which it becomes binding upon the affected persons [sub-ss(12) & (13)].

The Tribunal may adopt any measures, even if they are inconsistent with the scheme, which the operating agency may suggest to be necessary for implementation of the scheme [sub-s(14)].

The Tribunal may, if it deems necessary or expedient so to do, by order in writing, direct any operating agency specified in the order to implement a sanctioned scheme with such terms and conditions in relation to the sick industrial company as may be specified in the order [sub-s(15)].

Where the whole of the undertaking of the sick industrial company is sold under a sanctioned scheme, the Tribunal may distribute the sale proceeds to the

parties entitled thereto in accordance with the provisions of Section 529-A and other provisions of the Companies Act [sub-s(16)].

The Tribunal may monitor periodically the implementation of the sanctioned scheme [sub-s(17)].

**Rehabilitation by giving financial assistance [S. 424-E]**

The Tribunal may adopt a scheme which is designed to prevent, ameliorate, remedy or to take any other measure in respect of the sick company. Such scheme may provide for financial assistance in the shape of loans, advances, guarantees or relief or concessions or sacrifices. Such help may be expected from the Central Government, or State Government, banks, public financial institutions or State level institutions, or any authority. The Tribunal may require any such source to provide the necessary help. Such scheme has to be circulated among persons who are required to provide the help. This is necessary to enable them to give their consent which must be done within sixty days. The period may be extended to another sixty days but not beyond. If no consent is received within the original or extended period, it may be assumed that consent has not been given [sub-s(2)].

Where consent becomes available, the Tribunal may sanction the scheme. From the date of the sanction, the scheme will become binding upon the concerned parties [sub-s(3)]. The banks and other institutions which have become the consenting parties have to designate by mutual agreement a responsible person who will disburse the assistance [sub-s(4)]. The required institution will then forthwith release the assistance [sub-s(5)]. Where no such assistance is forthcoming, the Tribunal may consider other measures, including winding up as it may consider necessary [sub-s(6)].

**Arrangement for continuing operations during enquiry [S. 424-F].**

Where a scheme of financial assistance has been floated, the persons or institution may apply to the Tribunal agreeing to an arrangement for continuing the operations of the sick industrial company or suggesting a scheme for financial reconstruction. Within sixty days the Tribunal may pass necessary orders.

**Winding up of sick industrial company [S. 424-G].**

Where the Tribunal has considered all the facts and circumstances of the case and has heard the concerned parties and is of he opinion that the company is not likely to make its net worth, within a reasonable time, to exceed its accumulated losses and is not likely to become viable in future after meeting all its financial obligations, the Tribunal may record a finding to the effect that it is just and equitable to wind up the company and may pass necessary orders [sub-s(2)].

The Tribunal may cause the assets of the company to be sold in a manner it deems fit. It may pass orders for distribution of the proceeds in accordance with the provisions of the Act particularly S. 529-A. [sub-s(3)]. Sub-section (4) ordains that without prejudice to the provisions of the Act, the winding up shall be completed within one year from the date of the order.

**Operating agency to prepare complete inventory [S. 424-H]**

The Tribunal may, where it is necessary for the discharge of its functions to do so, with the help of an operating agency to cause a complete inventory to be prepared with regard to (*a*) all the assets and liabilities of the company, all the books of account, registers, maps, plans, records, documents of title, or ownership of property and other connected documents; (*b*) the list of shareholders, creditors, separately showing the secured and unsecured creditors, (*c*) valuation report in respect of the shares and assets, in order to arrive at the reserve price for sale of a part or whole of the undertaking of the company or fixation of lease rent.

**Direction not to dispose of assets [S. 424-I]**

The Tribunal may issue a direction that the assets of the company are not to be disposed of during the period of inquiry and preparation of schemes. Such direction can be issued if the Tribunal is of opinion that the direction is necessary in the interest of the company, or its creditors or shareholders or public interest. Approval of the Tribunal would be necessary for making any disposal.

**Power to call for periodic information [S. 424-J]**

On receipt of a reference, the Tribunal may call for any periodic information from the company as to the steps taken by the company to make its net worth exceed its accumulated losses or about the liquidation of its debts. The company becomes bound to furnish such information.

**Misfeasance proceedings [S. 424-K]**

The course of scrutiny or implementation of any schemes or proposal may reveal to the Tribunal that a person, including any past or present director, manager, officer, or employee who had taken part in the promotion, formation or management of the company or its undertaking:

(*a*) had misapplied or retained or become accountable for, any money or property of the company, or

(*b*) has been guilty of any misfeasance, malfeasance, or non-feasance or breach of trust in relation to the company.

The Tribunal may in such a case direct the person in question to repay the money of the company or to restore its property. The order may be for repayment of money with or without interest. The Tribunal may direct him to make contribution of a sum of money to the assets of the company, or to make compensation to any person who suffered because of the misapplication, etc. The matter may also be reported to the Central Government for any necessary action. The person in question may also be deprived of any credit facility during 10 year period. The banks and financial institutions may be directed not to give him any assistance during the 10 year period.

Before passing any orders under the section, the person in question must be given an opportunity of being heard. The power under the section can be exercised even if the person in question may also be criminally liable.

**Penalty for offences [S. 424-L]**

Criminal liability can be inflicted upon any person who violates any provisions of this part or of any scheme, or order of the Tribunal or Appellate Tribunal, or makes false statement, or gives a false evidence before the Tribunal, or attempts to tamper the records of the reference or of any appeal. The punishment can be by way of imprisonment up to three years or fine up to ten lakh rupees. Cognizance cannot be taken of any such offence only on complaint in writing of an officer for the Tribunal or the Appellate Tribunal or any authorised officer of the Central Government or of any operating agency, or an officer authorised by the Tribunal or Appellate Tribunal.

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