

Article



Compulsory Winding Up of Insolvent Companies-A step by step analysis

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Introduction

A company is a juristic person that comes into existence by way of incorporation and gets dissolved by taking a winding up process as per the provisions of the Companies Act and the Companies (Courts) Rules, 1959. There are several modes of winding up of a company i.e. a company can be wound up either *suo moto* by way of voluntary winding up or there may be circumstances through which it becomes compulsory to dissolve the affairs of the Company. The later is known as compulsory winding up.

In this article we have discussed the existing provisions and steps to be followed for compulsory winding up.

Relevant Provisions

Section 433 to Section 483 of the Companies Act, 1956 (corresponds to Section 271 to section 303 of the Companies Act, 2013) read with Companies (Courts) Rule, 1959, deals with the provisions of Compulsory winding Up. Since, Chapter XX of the Companies Act, 2013 pertaining to winding up of affairs of the company have not been notified yet, hence, the Companies Act 1956 governs the proceeding of winding up.

Who can put a company in compulsory liquidation?

Usually, it is the creditors of the company who present the petition of winding up before the Court. However, the following may also make application before the Court for winding up of a company in case any one of them is of the opinion that the company is not in a position to continue functioning:

- a. The Company itself;
- b. Any contributory or contributories;
- c. The Registrar;
- d. In case falling under section 243, by any person authorized by Central Govt. in that behalf;
- e. In case falling under clause (h) of section 433, by the Central Government or a State Government.

Grounds on which compulsory winding up may take place

In case of compulsory winding up, the petition can be filed by any of the above mentioned in the following mentioned circumstance:

- If the company, of its own, passes a Special Resolution that it should be wound up by the court, and presents a petition to the court for same;
- If the company makes any default in filing the statutory report with the registrar of companies or in holding the statutory meeting within the prescribed time;

- If the company does not commence business within one year from the date of its incorporation or suspends its business for a whole year;
- If the number of members falls below seven in the case of a public company, and below two in the case of a private company;
- If the company is unable to pay its debts;
- If the court is of the opinion that it is just and equitable that the company be wound up;
- If the company has made default in filing its Balance sheet and Profit and Loss account or annual return for any five consecutive financial year;
- If the company has acted against the sovereignty or integrity of India, the security of the state or friendly relation with foreign state etc;
- If the tribunal is of the opinion that the Company should be wound up under circumstances mentioned under Section 424G (sick company).

Steps of compulsory winding up:

Steps of Compulsory winding up		
Section/ Rule	Particular	Required Form
Sec 439 of the Companies Act, 1956 and Rule. 95 of the Companies (Court) Rules, 1959	Creditor shall file a petition before Court for winding up of company The Registrar of the court shall note on the petition the date of its presentation. <i>A petition for the winding-up of a company presented by a contingent or prospective creditor shall be accompanied by an application under section 439(8) for the leave of the Court for the admission of the petition.</i>	Form 46
Rule 96 of the Companies (Court) Rules, 1959	Upon the filing of petition the Court shall fix a date of hearing thereof and for advertisement to be published and the persons to whom the copy of said petition are to be served	
Rule 24 and Rule. 98 of the Companies (Court) Rules, 1959	Subject to the direction of the Court, the petition shall be advertise not less than 14 days before the date fixed for hearing, in one issue of Official gazette of the state and in one issue each of a daily newspaper in English and in the regional language	Form 48

<p>Sec 450 of the CA, 1956 and Rule 106 of the Companies (Court) Rules, 1959</p>	<p>Upon the submission of petition the Court may appoint the Official Liquidator to be Provisional Liquidator of the company.</p> <p><i>Subject to the order of Court, all the costs, charges and expenses incurred by the Official Liquidator as provisional liquidator, including such sum as is or would be payable to the Central Government under the scale of fees for the time being in force applicable where the Official Liquidator acts as liquidator of the company, shall be paid out of the assets of the company.</i></p>	<p>the order shall be in Form 49</p>
<p>Rule 109 of the Companies (Court) Rules, 1959</p>	<p>Where an order for the appointment of a Provisional Liquidator has been made, the Registrar shall forthwith send to the Official Liquidator of the Court notice of the order under the seal of the Court in duplicate together with a copy of the petition and the affidavit, if any, filed in support thereof.</p>	<p>Form 51</p>
<p>Sec 454 of the Companies Act, 1956</p>	<p>Company to submit to the liquidator a Statement of Company's affair duly verified by an affidavit by one or more officer of the company (within 21 days of commencement of winding up).</p> <p>The statement of affairs shall be accompanied by-</p> <ul style="list-style-type: none"> i) the assets of the company, stating separately the cash balance in hand and at the bank, if any, and negotiable securities, if any, held by the company ii) its debts and liabilities; iii) the names, residences and occupations of its creditors, stating separately the amount of secured and unsecured debts ; and in the case of secured debts, particulars of the securities given, iv) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised on account thereof v) such other details as the court may direct. <p><i>The person responsible to submit the statement of affairs may apply to the Official liquidator for extension of time. The Official liquidator may, if he thinks fit, give a written certificate in Form 59 extending the time.</i></p>	<p>Form 57 along with Form 58</p>

Sec 454 of the Companies Act, 1956	The persons as are liable to make out or concur in making out the company's statement of affairs under section 454, to attend the Official Liquidator at such time and place as he may appoint and to give him all information that he may require.	
Rule 180 of the Companies (Court) Rules, 1959	Unless the Court dispenses with the settlement of a list of contributories, the Official Liquidator shall prepare such list and file the same in the Court not later than 21 days after the date of the order on the application for directions	
Rule 181 of the Companies (Court) Rules, 1959	Upon the filing of the provisional list, the Official Liquidator shall fix a date not later than one month from the date of the filing of the provisional list for the settlement of the list before him, and shall give notice thereof to every person included in such list, stating in such notice in what character and for what number of shares or extent of interest such person is included in the list, the amount called up and the amount paidup in respect of shares or interest	Form 77
Rule 182 of the Companies (Court) Rules, 1959	On the date fixed for the settlement of the list, the Official Liquidator shall hear any person who objects to being settled as a contributory or to being settled as a contributory in such character or for such number of shares or extent of interest as is mentioned in the provisional list, and after such hearing, shall finally settle the list	
Rule 183 of the Companies (Court) Rules, 1959	Within 7 days after the settlement of the list the Official Liquidator shall file in Court a certificate of the list of contributories as finally settled by him	Form 79
Rule 114 of the Companies (Court) Rules, 1959	On winding up order to be made, the Official Liquidator attached to the Court shall forthwith take into his custody or under his control all the property and effects and the books and papers of the company	
Section 497 of the Companies Act, 1956	The Official liquidator on receiving the accounts and return shall make a scrutiny of the books and affairs of the Company and make a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interest of members or creditors of the Company	

<p>Section 464 of the Companies Act, 1956</p>	<p>The Court may, at the time of making of order of winding up or at any time thereafter direct that there shall be appointed a committee of inspection to act with the liquidator.</p> <p><i>As per the direction given by the Court, the liquidator shall, within 2 months from the date of such direction convene a meeting of creditors of the company to determine who are to be the members of the Committee. Thereafter within 14 days the liquidator shall convene a meeting of the Contributories to consider the decision of the creditors. However, the court shall finalise such membership.</i></p>	
<p>Rule 115 of the Companies (Court) Rules, 1959</p>	<p>The Court, after hearing the petition, may make an interim order as it may deem fit or make an order for winding up of company with or without cost.</p> <p><i>After a winding-up order is made, every subsequent proceeding in the winding-up shall bear the original number of the winding-up petition besides its own distinctive number, but against the name of the company in the cause-title, the words 'in liquidation' shall appear in brackets</i></p>	
<p>Sec 444 of the Companies Act, 1956</p>	<p>Where the Court makes an order for the winding up of a company, the Court, shall within a period not exceeding two weeks from the date of passing of the order, cause intimation thereof to be sent to the Official Liquidator and the Registrar of Companies.</p>	
<p>Rule 113 of the Companies (Court) Rules, 1959</p>	<p>Every order for the winding-up of a company by the Court, shall within 14 days of the date of making the order, be advertised by the petitioner in one issue each of a newspaper in the English language and a newspaper in the regional language</p>	<p>Form 53</p>

<p>Sec 455 of the Companies Act, 1956</p>	<p>In a case where a winding up order is made, the Official Liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 454 and not later than six months from the date of the order or such extended period as may be allowed by the court, shall submit a preliminary report (a) as to the amount of capital issued, subscribed, and paid-up, and the estimated amount of assets and liabilities, giving separately, under the heading of assets, particulars of (i) cash and negotiable securities ; (ii) debts due from contributories ; (iii) debts due to the company and securities, if any, available in respect thereof ; (iv) movable and immovable properties belonging to the company ; and (v) unpaid calls ;</p>	
<p>Sec 550 of the Companies Act, 1956</p>	<p>When the affairs of a company have been completely wound up and it is about to be dissolved, its books and papers and those of the liquidator may be disposed of as may be directed by the Court</p>	
<p>Rule 284 (a) of the Company Courts Rule, 1959</p>	<p>The winding up of company by order of Court shall be deemed to be concluded at the date on which the order dissolving the company has been reported by the liquidator to the Registrar of Companies</p>	
<p>Sec 445 of the Companies Act, 1956</p>	<p>On the making of a winding up order, it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the Registrar a certified copy of the order, within thirty days from the date of the making of the order. <i>In computing the period of thirty days from the date of the making of a winding up order, the time requisite for obtaining a certified copy of the order shall be excluded.</i></p>	
<p>Sec 445 (2) of the Companies Act, 1956</p>	<p>On the filing of a certified copy of the winding up order, the Registrar shall make a minute thereof in his books relating to the company, and shall notify in the Official Gazette that such an order has been made.</p>	



Conclusion

The Ministry of Corporate affairs ('MCA') vide notification dated 1st June, 2016 has come up with the direction to constitute National Company Law Tribunal ('NCLT') and National Company Law Appellate Tribunal ('NCLAT'). Further, MCA has also notified a list of sections of the Companies Act, 2013 that have come in force with the immediate effect from 1st June, 2016. All these will surely bring changes in the proceeding of winding up. However, as of now, provisions governing winding up of companies as per Companies Act, 2013 as well as NCLT Rules are not yet in force. Hence, Companies Act, 1956 is governing the proceedings of winding up.

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