



An analysis of winding up of companies under Indian companies act 2013

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Abstract

The life of the Company comes into existence by legal procedure through incorporating it. Therefore it enjoys the legal status and wide range of the rights and obligations under the statute. Moreover, the life and death of the Company are also legally manufacture phenomena. As per the article of association of the Company, the closing the affairs of the Company or wind up the Company is a legal tactic. Hence this article seeks to find out mechanism of winding up or shutting down the affairs of the Company under the different Companies Laws. This article also examines the scope of the winding up of the Company under these statutes.

Keywords: Winding Up of Company, Liquidation

1. Introduction

A company exist by the legal procedure, and when it wants to end it is life, and when it wants to end its reality, it is just conceivable through the lawful mechanism. Consequently, the ending up of the organization is the instrument to end its life, the last stage in the existence of the company. The existence of the company extinguished then its property governed for the benefits and advantage of the its creditors and members. The administrator is being appointed he look after the affairs of the company and accumulate the assets, pay its debts and allocate the surplus among the members and creditors of the company if any exist according to their respective rights and liabilities.

The company Act 1956, and company Act, 2013 provides the mechanism of the winding up of the company. The mechanism can be divided into two categories, Firstly, the winding up by the order of the court and second, winding up by the creditors and member of the Company. In the wilful winding, the members and its creditors are allowed to determine their differences commonly without the intervention of the Court.

In order to make the company more fruitful and more convenience, the government of the India time to time bring changes and consequently. It also established the National Company Tribunal (NCLT) and new version of the company Act, passed in 2013 by the parliament of the India and it received the consent of the president of India on 29 August 2013. It has been told in the Official Gazette on 30 sept, 2013. Having said that the arrangements of the organization Act 1956 is still valid^[1].

2. Research Methodology

The study is essentially being doctrinal and use analytical method based on secondary sources. The primary sources

include Company law 1956 and Company amendment law 2013, and subsequent changes in Company law. The study analysing the changing prospect winding up of the Company in India. The secondary sources include available books, research articles, and paper, briefs and opinion published in various journals and magazine. However, the attention will be made to rely only on recent work as far as possible.

3. Winding Up of the Company

The result of the registration of the company is that it transforms the business of the company as a legal entity, having legal rights and obligations which are distinct from its member's^[2]. The company incorporated and it becomes a separate legal entity as a natural person^[3]. Hence the existence of the Company separate from it is legal persons, shareholder sand directors^[4].

Winding up of the Company is mechanism by which legal entity of the Company come into end, and its affairs accrue from its Directors control and assets assessed by the liquidator and debts paid out. The existence of the Company is conveyed to an end and its property administered for the benefit of its members and creditors. In words Professor Gower, "Winding up of a company is the process whereby its life is ended. The Property of it administered for the benefit of its members & creditors. The Company appoint the liquidators from the penal set up by the Central Government about the winding up the affairs of the Company^[5]. Hence it is the duty of the liquidators distributes the assets of the Company.

Furthermore, the liquidation is the last step to wind up the troubled Company it involves the congregate its assets and

¹ "Ministry of corporate affairs",<http://www.mca.gov.in/MinistryV2/companiesact2013.html>

² Talbot Le, *Critical Company Law*, (New YORK: Routledge-Cavendish, 2008),24

³ Griffin Stephen, *Company Law Fundamental Principles*,(England: Pearson 2006),1

⁴ Sealy, L., & Worthington, S. (2013). *Sealy & Worthington's Cases and Materials in Company Law*. Oxford University Press.

⁵ Section 310, of the Company Act,2013

redistribute it ^[6]. However, the Court appointed the administrator, with the power of the reorganize and restructures the Company debts and offers the most suitable means of the realization of the assets for the favour of creditors and shareholders ^[7]. Moreover, there are two kinds of liquidators for that purpose, the voluntary liquidator and member liquidator he has been pertain to restructure the solvent Company ^[8].

According to Halsbury's Laws of England, the winding up of the Company is a mechanism by which a Company finished, and in the course its assets are aggregated and acknowledged and utilized as a part of the payment of the Company obligations, and when these obligations are fulfilled, the remaining sum is providing for its members and creditors for the sum they added to the Company as per the Article of the Company ^[9].

By means of the winding up of the Company, the life of the Company comes to an end and its property being directed to the advancement of the members and its creditors. Moreover, the liquidator assesses the Company liabilities and debts.

Hence the winding up of the company does not mean that the company is insolvent. Moreover, the process of the winding up is not limited to the situation where the Company become insolvent; it also adopts when the members of the Company not in position to cooperate in order to run the business of the Company.

The order of the winding up of the Company is final, and it's not subject to annul. Hence a fresh petition required to stay under section 466 of the Company Act ^[10]. Therefore winding up of the company process by which the stopping the affairs of the Company, assessing it is assets, pay its debts and reaming distributes to the members and creditors.

4. Different types of winding up of companies

There are various types of the Company on which Indian Company Act apply like, foreign Companies, Defunct Companies, Sick Companies, Government Companies, and Unregistered Companies:

4.1 Winding up of foreign company

The foreign company running it is business in India it does not substantially it incorporated under the Indian Company Act, and fall within the jurisdiction of the Indian court. Moreover, such company governed under section 2 (42) of the company Act 2013, which provided any Company or body not registered in India but operating it is business in India by itself or through an agent, either physically or electronic means or any other manner ^[11]. Further, it may be wind up under some particular situations if

- a. It is dissolved or stops its business in India, or running it is business only for the winding up purpose.
- b. It is unable to pay its debts
- c. If the tribunal determine in its opinion that it's just and equitable and it should be winding up ^[12].

4.2 Winding up of banking companies

Parts III and IIIA of Banking Regulation Act, 1949 provides particular mechanism for the winding up of the banking companies, if no provisions mention the winding up of these Companies than Companies provisions operates in order to wind up such company.

4.3 Winding up of the defunct companies

The Defunct Companies are those companies, which ended it is business or dead, and it is the duty of the Registrar of the Companies of State or Union territory the where the office is situated to decide whether the company is currently running it is business or not. The Defunct company could be dissolve if the registrar has reasonable believes that Company is not running it is business, of which he must send a letter to inquiry company whether it working or not. If the Registrar not receive an answer within one month than within fourteen days from expiry of one month, send to Company via post another letter motioning previous letter. If the company gives no answer within one month, thereof the notice would publish in the official gazette to striking off the name of the company off the register ^[13].

4.4 Winding up of sick company

The sick company Act, 1985 was enacted with the object to determine sick or seriously sick company and expedient determination by the board experts to take preventive and remedial or other manner. The section 4 of the said Act, the board of industrial and financial established to apply the jurisdiction and discharge the function under said Act. Section 20 provides that sick company must be wind up on the report of the board by the High Court according to the Company Act, 1956 ^[14]. The High Court of the Andhra Pradesh held that winding up petition is not sustainable the reference previously registered with the Board for Industrial and Financial Reconstruction ^[15].

4.5 Winding up of government companies

The company having either 51 or more shares of the government are called the government company, which registered under the Company Act, 1956 and the procedure of the winding up of it alike to the normal winding up of the company. Having said that Court consider the interest of the public hence its primary purpose to provides the service to public.

5. Modes of Winding Up of the Company

The Company Act 1956, under the part VII and chapter XX of

⁶ Finch, V. (2002). *Corporate insolvency law: perspectives and principles*. Cambridge University Press.

⁷ Liu, J., & Wilson, N. (2002). Corporate failure rates and the impact of the 1986 insolvency act: An econometric analysis. *Managerial Finance*, 28(6), 61-71.

⁸ Cuthbertson, K., & Hudson, J. (1996). The determinants of compulsory liquidations in the UK. *The Manchester School*, 64(3), 298-308.

⁹ Practical guidance Indian companies law, *winding up of the company*, <https://www.lexisnexis.com/ap/pg/indiacompanieslaw/document>

¹⁰ Re. Intermain Properties Ltd. 1986 BCLC 265(Ch D)

¹¹ Section 2(42) of Company Act, 2013.

¹² Section 375 of Company Act, 2013.

¹³ Section 560, of company act 1956.

¹⁴ Section 20 in the Sick Industrial Companies (Special Provisions) Act, 1985

¹⁵ Mohd. Nizamuddin v. Shiri Shakti LPG Ltd, (2003) 117 Comp. Cas. 138 (AP)

Company Act, 2013 provided the mechanism for winding up the company. The section 425 of former Act and section 270 of the later offer the comprehensive procedure of winding up of the Company. Therefore the modes of winding up of the Company can be classified into following heads

1. Compulsory winding up by the Court,
2. Winding up under the supervision of the Court
3. Voluntary winding up, its two kinds
4. By the members voluntary winding up
5. By the Creditors voluntary winding up.

5.1. Compulsory winding up by the court

The section 433 of the company Act 1956 deals with the situation under which a company can be compulsorily wind up:

1. If special resolution being passed which stated the Company should wound up by tribunal
2. In the case of default is made to sending the statutory report to the Registrar or holding the statutory meeting
3. Company failed to began its business within the one year from its registration or postpone its affairs for entire year. The power to the court with regard to is discretionary it cannot be used unless there is indication that company does not have the intention to carry out its business.
4. If the numbers of the members are reduce, in a public company less than seven and in a private company less than two.
5. If the company is unable pay its debts
6. If in the opinion of the Court that it is being just and equitable that Company could be wind up. The Court has power to wind up the Company on ground of the just and equitable where the peculiar conditions exist, and it appears to the court it just and reasonable. Where the substratum of the company does not seems, and there is acute crisis in the management of the company.

In *Vijay Lakshmi talkies v. Roa* ^[16]. When the worsening the condition of the management and control of the company business seem shape differences among the members of the company it also reflected in the resolution. The company can also be wind up when it carry unlawful commerce or insolvent and the business of the company running for the advantage of the debentures holders ^[17].

5.2. Winding up the company under the supervision of the tribunal

The winding up of the company under the supervision of the Court is entirely different from the winding of the Company through Court. In the case of the supervisory wind up of the Company, the Court only supervises the mechanism or proceeding of the wind up the affairs of the Company. Members of the company finally passed the resolution for the winding up the business of the Company and the Court for some particular grounds with some special conditions, supervise the proceeding of the winding up of the Company. Moreover, the creditors and contributors have the autonomy to apply to the Court for supervision of the winding up the Company under section 522.

¹⁶ AIR. 966Adh.pr.285

¹⁷ *Clandown Colliery Co (1915)*,1 Ch. 369

The Court may also appoint or remove more liquidation and also appoint an official liquidator to fill up the vacancy. Hence the liquidator empowers to take all steps for the best possible interest and benefit of the Company. He can enjoy all powers as Company wound up voluntary

Furthermore, the Court may enforce the adjudication of the liquidators including the winding up of the Company as the section 526 of the Company Act, 1956. Moreover, the liquidators also carry to an obligation under section 583 of the said Act, which imposed the responsibility other than official liquidator, to deposit the money in the scheduled bank, which they have received or to the credit of a particular account which they opened.

5.3. Voluntary winding up

Chapter III, part VII of the company Act 1956, under section 484 to 520, comprehensively provides the mechanism of the winding up the company. Company can be a voluntary wind up if it is incapable to take it is business, Orit established for the limited purpose, or it is not capable to fulfil its fiscal commitment ^[18].

If the voluntary winding up of the company the whole proceeding has been done with the supervision of the Court. Moreover, when the proceeding of the winding up is completed, the pertinent documents are being presented before the Court with the view of acquire the order of dissolution of it life. Thus the object of the voluntary winding up of a company to enabling its members and creditors to resolve their dispute without the intervention of the Court. Although direction or order of the Court is permissible if and when necessary.

1. The section 484(1) deals with the specific conditions by which a Company may be Voluntary winding up
2. When the period mention in the article of association has been lapsed or
3. On the happening of the event which has mentioned in article and eventually it occurred
4. By the passing special resolution that it should be wound up voluntary

Furthermore, in *Neptune Assurance Co. Ltd. v. Union of India* ^[19]. The voluntary winding up means by a specific resolution of a company to that effect. In *British Water Gas Syndicate v. Notts Derby Water Gas Co. Ltd* ^[20]. the well-functioning company, can be wound up only by passing a special resolution hence either article of the company or the Court can intervened by implementing the statutory right. Re, *West Cumberland Iron Steel Co* ^[21], the voluntary winding commence at the point of time when resolution of it passed not when the court supervise or passed an order.

In *National Stores v. Ramsaran* ^[22]. The consequence of the voluntary wind up is that the Company stops to bear on its business except so far as might be required for useful wind-up.

¹⁸ Ministry of corporate affairs,
http://www.companyliquidator.gov.in/winding_up_3.html

¹⁹ 1973 SCR (2) 940

²⁰ 1889 WN 204

²¹ (1889) 40 Ch D 361

²² AIR 1926 Nag 303

In Knowles v. Scott^[23]. The voluntary wind does not prevent for legal proceeding and filing of new case.

The company may be voluntary wind up by two means^[24].

1. members voluntarily winding up
2. Creditors voluntarily winding up

Company may be a voluntary wind up by passing the ordinary or special resolution, in a former situation when the purpose of the Company have been fulfilled or the time period of the company expire and in later case by passing of an special resolution in the general meeting of Company^[25].

5.3.1. Voluntary winding up by member

The company can be voluntary wind up by the member under section 490 to 498 of the Company Act 1956, and section 304 to 323 of company Act 2013. When the company is insolvent, and it's capable of paying its liabilities in such situation, the consultation of the creditors or to call their meeting not required. The Directors of the company or in a case where more than two directors, in a Board meeting.

They may declare by the majority of the Directors the insolvency which is verified by the affidavit which mentions that they inquire the full affair of the company. Hence they formed the outlook that Company is free from debts or it is capable to pay its debts within the period from the commencement of the winding up as may be mention in the announcement^[26]. In Collector of Moradabad v. Equity Insurance Co. Ltd, the section,488 of the company Act1956 does not impose any obligation to the each Director to specifically declare by affidavit.

The declaration by the members to wind up of the Company must be within five weeks at instantly going earlier than the date of passing the determination, and it sends to the Registrar for the registration^[27]. The declaration must pertain to the asset or liabilities of the company at the latest possible date before the declaration is making.

Any Director is making such an affirmation under the section above with no rational justification for the opinion that Company will have the capacity to pay its obligation within specified in the declaration, must be imprisonment up to six month or fine, which may stretch out up to 5,000 rupees or both^[28]. Having said that the declaration of the insolvency is not issued according to the law, eventually, the subsequent proceeding will be void^[29].

Procedures for the member voluntary winding up

The section 490 of the Company Act, 1956 gives that Company must delegate at least more than one liquidator, in the general meeting who must care for the winding up procedure of the Company and the Secretary of it can be

designated. In London & Australian Agency Corp. Ltd. Re^[30]. The court held that the solicitor could be appointed as liquidator and remuneration must be paid to him for his services.

In amalgamated Syndicate Ltd., Re^[31] the remuneration for the liquidator in voluntary winding up of the company has to be fixed at the meeting by the contribution if the court also can adjust the compensation if it not done. As indicated by section 493 of Act above, the Company must given the appointment notice to Registrar within the ten of appointment. Subsequently, powers of Directors, Managing Director, and Manager stop to subsist^[32].

The liquidator takes the best possible effort for the benefit of the Company as well as creditors and members. However, the all the proceeding regarding the closing the affairs of the Company might be take more than one year. The exact position of the liquidator and procedure of the winding up must be disclosed^[33].

The liquidator help and assists in the winding up of the Company, he may call the meeting of the members. He also produce the complete record of the methodology of the closing the affairs of the Company and circulate the advertisement with appropriate time, place and purpose of the meeting.

Additionally, he dispatches to the Register a copy of the account and must make a return to him of the meeting. On the off possibility that he neglects to send a copy or return is not made then he must be punish with fine which might be extended fifty rupees for consistently amid which default exists^[34]. The Court on the acceptance of the report either make the order that Company may wind up with the effect as the date mention by the Court or make other report in the circum position of the case carry out in report^[35].

5.3.2. Voluntary winding up by creditors

When the Board of Director passed the resolution for the closing the affairs of the Company but their position are not obvious about the liability of the Company. In such situation they might be call the meeting of all creditors regarding the winding up of the Company^[36]. So in such a circumstance it is liability of the Board of Directors to provide the full description of the Company business and dues on it before the creditors meeting^[37]. Hence the resolution must be submitted to the Registrar within the ten days of its pass^[38].

In Re Karamelli and Barnett Ltd^[39] in the procedure of winding up, the Company must arrange the meeting of the creditors and shareholders. After that, the Directors must describe the position of Company business affairs to the creditors. Furthermore, in a case of Pure Milk Supply Co. Ltd.

²³ (1891) 1 Ch 717

²⁴ Section304, company Act 2013.

²⁵ *Supra* note 1.

²⁶ Section 488 of company Act, 1956.

²⁷ *Ibid* at 4.

²⁸ *Ibid*

²⁹ In Shri Raja Mohan Manucha v. Lakshminath Saigal, (1963) 33 Comp. Cases 719

³⁰ 1873) 29 LT 417: 22 WR 45

³¹ (1901) 2 Ch 181

³² Section 491, Companies Act, 1956

³³ Section 496, Companies Act, 1956

³⁴ Section 497, Companies Act, 1956

³⁵ *ibid*

³⁶ Section 500, Companies Act, 1956

³⁷ Section 500(3), Companies Act, 1956

³⁸ Section 501, Companies Act, 1956

³⁹ (1917)1 Ch 203

v. S. Hari Singh ^[40], the honorable Court said that on observance of the section 509 of the Company Act 1956, held directors liable to pay fine, but does not affect the proceeding of meeting. The section 509 of the Act above offers the various method of full wound up of the Company.

6. Who may file the petition for the winding up of the company?

The section 272 of the Company Act, 2013 provides the numbers of entity eligible to file the petition in Court for the winding up of the Company.

1. Company
2. Creditors
3. Contributories
4. Registrar
5. Person authorized by the Centre Government
6. If the case filed under section 271(c)(l) by the Centre or State Government

7. Current position of winding up of the company

Before to November 2016, neither the Company Act, 1956, nor the Company Act, 2013, defined the term “winding up of the Company.” Ministry of the Corporate Affairs in the notification no.S.O.3455 E, The section 255 of the Insolvency & Bankruptcy Code, 2016 amended following sections of the Company Act, 2013, it amended in accordance to schedule XI of the Insolvency & Bankruptcy Code.⁴¹

It amended in accordance to schedule XI of the Insolvency & Bankruptcy Code. It describe the term “winding up” by inserting new section 2(94A) to the Company Act, 2013 “the winding up” means winding up under this Act, or liquidation under the Insolvency & Bankruptcy Code, 2016 ^[42]. Hence it would be appropriate to conclude that the winding up of the company now govern by the Code above and the provisions of Company Act, 2013.

Furthermore, the noteworthy changes initiated by this Code to the Company Act, 2013, including the subtraction voluntary winding up and winding up on the ground of inability to pay debts. Consequently, the Ministry of Corporate Affairs (MCA) of 7 December 2016, notified the provision of Chapter XX of the Company Act, 2013 with the effect from December 15, 2016, these provisions are governed the winding up of Company in any ground other than inability to pay debts.

Although section 59 of the Code above, undertake the position of voluntary winding up of the liquidation of corporate persons. However, the provisions of the Company Act, 2013 on the grounds mention under section 271 of the Act above, still valid for the winding up of the Company:

1. By passing special resolution to that effect
2. Conducting against the sovereignty and integrity of India
3. Conducting the company affairs in fraudulent manner
4. Default in filing of financial statement or return
5. On just and equitable ground

⁴⁰ AIR 1962 Punj 190: (1962) 32 Com Cases 659

⁴¹ Pandey, Anubhav, A comparative analysis of winding up of a company – Companies Act, 1956, Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016, <https://blog.ipleaders.in/comparative-analysis-winding-company-companies-act-1956-companies-act-2013-insolvency-bankruptcy-code-2016/>

⁴² Id

The Registrar had power to strike off the name of the Company from the register of the companies on the non filing the financial statement and return. Moreover, after the 15 December 2016 winding up of the Company on the ground above mention would be made to the Tribunal in accordance of the provisions of the Company Act, 2013.

8. Conclusion

A company is an artificial legal entity cannot hence it could not come to end as natural person or other entity. The winding up is one of the legal procedures through which the life of the Company can be ended. This mechanism comprehends the process of selling the assets pays it debts and disseminated any residual assets to the creditors or shareholders and then dissolving the affairs of the company according to laws as well as the article of association.

Winding up can be compulsory or voluntary. Compulsory winding up take place when a company is forced, by law and usually by a tribunal order, to appoint the liquidator for carrying the control the assets of the Company and adoption of the procedure for the winding up of the Company. The Company which is subject to the wind up May or not be insolvent. The Company Act, 1956 and Company Act, 2013 are progressively trying to solve the complex and sophisticated issue of the Winding Up of the Company. The various provisions of these Acts have been collaterally working in the field of settling the winding up problem. Despite these with the development of times and progress of winding up companies, there are several issues came in front of the judiciary and it always tried to mitigate the friction in the process of winding up of companies. In the recent time, for the serving, the interest of the stakeholders in the process of winding up the role played by NCLT can't be ignored. Indeed the effort of NCLT is to expedite the winding up process and serve it is mandate.

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