

## LIQUIDATION AND WINDING OF COMPANY UNDER INSOLVENCY AND BANKRUPTCY CODE 2016

<sup>1</sup>A. LIVYA RATHNA

<sup>1</sup>Student, BBA,LLB, 2nd yr, Saveetha School of Law, Saveetha Institute of Medical and Technical Sciences, Saveetha University, Chennai-77,Tamilnadu,India.

<sup>2</sup>ARYA R

<sup>2</sup>Assistant Professor, Saveetha School of Law, Saveetha Institute of Medical and Technical Sciences, Saveetha University, Chennai-77,Tamilnadu,India.

<sup>1</sup>[auglivya98@gmail.com](mailto:auglivya98@gmail.com), <sup>2</sup>[adv.aryar@gmail.com](mailto:adv.aryar@gmail.com)

### ABSTRACT

Companies in India are governed by Companies Act 1956 and 2013. Sometimes it became necessary to close the companies for several reasons. Liquidation and winding up of them are the procedures laid out in the said Act. Liquidation means is a process by which the company is brought to an end. It is the process of liquidating the assets of the company. It may sometimes known as dissolution of the company.

Winding up is a process defined under the Companies Act, 1956 by which the corporate existence of a company comes to an end. Under the process of winding up, the company is dissolved and its assets are liquidated to discharge its liabilities.

According to Halsbury's Laws of England, "Winding up is a proceeding by means of which the dissolution of a company is brought about & in the course of which its assets are collected and realized; and applied in payment of its debts; and when these are satisfied, the remaining amount is applied for returning to its members the sums which they have contributed to the company in accordance with Articles of the company."

Winding up of a company may be required due to a number of reasons including closure of business, loss, bankruptcy, passing away of promoters, etc.

In this study we will see the procedures for the same as well as the variations brought forth by the Insolvency and Bankruptcy Code 2016 and the effect of the code in practice.

key word : winding up, insolvency bankruptcy code 2016, liquidation.

## INTRODUCTION

In this study, we will see the method and manner of liquidation and winding up of companies prior and post to the Insolvency and Bankruptcy Code 2016 and the effect of the code in practice. We will see also the recent judicial activity in this regard and their effect in the current situation. (Pradhan 2013) the research on the difference between failure macro economic condition and insolvency law.(Code and Nair, n.d.) it indicates some implecations of coporate finacial distress for corporating governace. (Hooper and Auger 1978) winding up of a company can refer to creditors voluntary liquidation and also a compulsory liquidation if the company is insolvent. ((Lawyer) and Shriram 2017)of a company is most often shown by the inability of the company. to pay those who owns it the money to when their payment. (Myneni 2017) it would be off general interest to the profession in connection with the subject matter of this study. (Lester 1995) the resolution of the dissolution shall receive the affirmative vote of holder of 2/3rd of its share. (“Burundi - Bankruptcy & Insolvency,” n.d.) the prescribes that financial and operates creditors can takes any type corporates insolvency resolution process. (Collins 1925) it may imitate the voluntary liquidation process with the approval of majority of directors of the board. (Keay 2001) he studied the purpose of liquidation, the liquidator form of assets and hold the liquidation estate on benefits of all creditor.

(Singh 2015)5) (Pástor and Stambaugh 2003)it followed by the approval of the majority of its shareholders and liquidators. (Womack 1975)on which up may take place appointment of liquidator and its dissolutions. (Lipstein 1958) winding up of a company by a tribunal filing of winding up a petition and voluntary winding up of a company. (Pradhan 2013) winding up of a company act 2013 on insolvency and bankruptcy code 2016, compulsory winding up of a company is liquidate.

(Prantl 2003)liquidation of a company under companies act.it should be appointed as liquidator and its power of its liquidation. (Gao and Huang 2011) voluntary winding up at a

general meeting of members considered as voluntary winding up subject to supervision of the court.(Branch and Khizer 2016)nding up and its type of liquidation in appropriate resolutions.(Patwari 2014)ides a range of avoidance or clawbacks provision design to give effect.

(*Global Banking and Financial Policy Review* 1996) it is the creditor bill against the consisting corporation can be successfully in work by the court liquidation jurisdiction.(Paik, Kwon, and Chen 2017)ion is reached at the moment when he received his letter and his duty to liquidate and distribute.

(White 2011) Resolution on professional appointment on conducting corporate insolvency on liquidation.evaluated and took some measures to protect and preserve the assets of corporate debtors.(Ahmadu, n.d.) the resolution plan under the corporate insolvency which fails in order to appoint the liquidator. (Guide, n.d.)

## **OBJECTIVES**

1. To study of the procedure of liquidation and winding up of the company in pre and post of the code
2. To study the effects of insolvency and bankruptcy code 2016 on company liquidation and winding up

## **HYPOTHESIS**

Ho : There is no significant impact on winding up of a company under insolvency and bankruptcy code

Ha : There is a significant impact on winding up of a company under insolvency and bankruptcy code

## **RESEARCH METHODOLOGY**

Type of research

- Doctrinal research

Data collection

This research is done by using secondary data. The secondary data's are collected from books, journal, articles, papers...

## **LIQUIDATION**

As per Section 59 of the Code, the voluntary liquidation process can only be initiated by a corporate person, which has not committed any default. Default here includes those debts that are not repaid and has become due and payable. The compliances of some requirements are necessary.

- Declaration by directors that winding up is not to defraud any person;
- Liquidator can be insolvency professional who fulfils criteria under the regulations;
- Registers to be maintained and preserved in prescribed manner;
- Liquidators to receive claims of stakeholders only in specified forms;
- Within twelve months from commencement of voluntary winding up, the affairs of corporate person to be wound up;
- Reports by Liquidator to be submitted to corporate person, Registrar of Companies and Insolvency and Bankruptcy Board of India.
- The time period to comply the requirements has also been reduced to expedite the process.

## **WINDING UP OF A COMPANY**

Winding up is a process defined under the Companies Act, 1956 by which the corporate existence of a company comes to an end. Under the process of winding up, the company is dissolved and its assets are liquidated to discharge its liabilities

Winding up of a company is the process through which life of a company comes to an end and its property is administered for the benefit of its members & creditors. 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.

## **TYPES OF WINDING UP**

The Companies Act, 1956 as well as the Companies Act, 2013, provides that winding up of a Company may be either:

1. • by the tribunal; or
2. • voluntary

### **I. WINDING UP OF A COMPANY BY A TRIBUNAL:-**

As per Companies Act 1956, a company can be wound up by a tribunal on the basis of the Suspension of the business for one year from the date of incorporation or suspension of business for whole year, Reduction in number of minimum members as specified in the act etc.

As per new act, if the company is unable to pay its debts, by special resolution, on action against the integrity, morality and security of the state and not filing annual returns etc. are the reasons for winding up.

### **II. FILING OF WINDING UP PETITION**

Petition for compulsory winding up can be filed by the company, the creditors, contributories, central or state governments, registrar by any person authorized by the government.

### **III. FINAL ORDER AND ITS CONTENT**

The tribunal after hearing the petition has the power to dismiss the petition pass interim order or appoint provisional liquidator.

For voluntary winding up of a company certain procedures are prescribed which are to be followed without fail.

A COMPARATIVE ANALYSIS OF WINDING UP OF A COMPANY – COMPANIES ACT, 1956, COMPANIES ACT, 2013 AND THE INSOLVENCY AND BANKRUPTCY CODE, 2016

**Difference between winding up and dissolution**

<b>WINDING UP</b>	<b>DISSOLUTION</b>
Winding up is a proceeding by means of which company is dissolved and in course of dissolution, assets are realized, liabilities are paid off and surplus is distributed among members.	The legal existence of company is brought to an end by dissolution
Winding up precedes the dissolution.	It is the final stage where the existence of company is withdrawn by law.
The liquidator can present the company in winding up proceeding.	Once the order of dissolution is made by the Court, liquidator cannot represent the company.
Winding up proceeding can be started without the intervention of the court.	For the dissolution of the company, order of the court is essential.
Any person can proceed against the company which is being wound up.	No proceedings can be started against the company which has been dissolved.

**Difference between winding up and insolvency**

<b>Winding up</b>	<b>Insolvency</b>
It is a process by which company is dissolved. The assets are collected, liabilities are paid off out of assets or from contributions by members and if surplus left,	It is inability of a debtor to pay debts as they fall due. A person is said to be insolvent when his liabilities exceeds his assets and against whom Court makes order of

it is distributed among members	adjudication.
A company cannot be adjudged as insolvent	An individual can be adjudged as insolvent
A company can be wound up even if it financially sound.	A person can be adjudged as insolvent when he is unable to pay his liabilities.
During winding up proceeding, the property is vested in the Company.	In insolvency proceedings, the assets of person are vested in Official Receiver.
After completion of proceedings, the Company is dissolved.	After completion of proceedings, the insolvent person is discharged from liabilities.

On winding up, the company does not cease to exist as such except when it is dissolved. The administrative machinery of the company gets changed as the administration is transferred in the hands of liquidator. Even after commencement of winding-up, the assets of the company belong to the company until dissolution takes place. The company ceases to exist as a separate entity on dissolution and becomes incapable of keeping its own property, suing and being sued. Thus, the legal status of the company continues to exist between the period of winding-up and dissolution. Winding up by the court or compulsory winding up is initiated by application by way of petition to appropriate Court for a winding up order

**CIRCUMSTANCES IN WHICH COMPANY MAY BE WOUND UP BY THE COURT**

Section 433 of the Companies Act, 1956 provides for the circumstances in which company can be wound up-

*Just & Equitable Grounds* – Court has complete discretion to decide just & equitable grounds for winding up of a company. Some of the grounds on which court ordered the winding up of company under this clause,

- When the object of the company was fraudulent,
- When substratum of the company has disappeared i.e original object become impossible to attain;
- The object for which the company is formed is illegal or becomes illegal by change in law;
- The object for which company was incorporated has been completed;
- Deadlock in management due to differences among rival group and disagreement cannot be resolved in general or board meeting;
- There has been mismanagement and misapplication of funds by directors of private company.

**VOLUNTARY WINDING UP (Section 488 of Companies Act, 1956)**

The company and its creditors may apply to court for directions or orders but usually they are left to settle their affairs within themselves. There are two kinds of voluntary winding up, Member’s Voluntary winding up and Creditor’s voluntary winding up.

***Date of commencement of winding up***-Section 441 of the Companies Act, 1956 lays the provision for the date of commencement of winding up

The winding up of a company by a court is deemed to commence at the time of the presentation of petition for winding up.
Where a resolution has been passed by the company, for voluntary winding up, the winding up shall be deemed to have commenced at the time of passing of the resolution.

Distinction between Members’ voluntary winding up and creditors’ voluntary winding up

<b>Members’ Voluntary Winding up</b>	<b>Creditors Voluntary Winding up</b>
Where a company is solvent & declaration of	Where a company is solvent, the declaration



solvency is made by the directors, it is called members' voluntary winding up	of solvency is not made by the directors, it is called as the creditors' voluntary winding up.
Dominant control remains in the hands of the members of the company.	In creditors' winding up, dominant control remains in hands of the creditors.
There is no meeting of creditors and the liquidator is appointed by the company.	In creditors' winding up, meetings of creditors have to be called at the beginning and subsequently the liquidator is appointed by the creditors.
The liquidator can exercise some of his powers with the sanction of a special resolution of the company.	The liquidator can do so with the sanction of the court or the Committee of inspection or of meeting of creditors.

#### **PROCEDURE FOR WINDING UP UNDER NEW REGULATIONS**

- One has to submit a declaration to Registrar of Companies, stating that company will pay its dues and liquidation is not to defraud any person;
- Within 4 weeks of such declaration, special resolution has to be passed for approval of proposal of voluntary liquidation and appointment of liquidator;
- Within 5 days of such approval, public announcement in newspaper and website of company has to be made for inviting claims of stakeholders;
- Within 7 days of such approval, intimation should be given to ROC and Board;
- Submission of preliminary report containing capital structure, estimates of assets and liabilities, proposed plan of action within 45 days to a corporate person;
- Verification of claims within 30 days and preparation of list of stakeholders within 45 days from the last date of receipt of claims;
- For receipt of money due to corporate person, bank account needs to be open in name of corporate person having words 'in voluntary liquidation' after its name.
- Sale of assets and recovery of due money, uncalled capital is realised;
- The proceeds from realization to be distributed within 6 months from receipt of amount to the stakeholders;

- The final report by the liquidator has to be submitted to corporate person, ROC, the Board and application to NCLT.
- The order of NCLT regarding dissolution to be submitted within 14 days of receipt of order.

### **CHANGES IN WINDING UP AFTER THE INSOLVENCY AND BANKRUPTCY CODE, 2016**

The Insolvency & Bankruptcy Code, 2016 consolidate and amend the laws relating to insolvency of companies, partnership firms, limited liability partnership into a single legislation. It aims to provide time bound resolution and empowered the creditors to initiate the insolvency resolution process if default occurs.

After the MCA wide notification no. S.O. 3453 E of November 15<sup>th</sup>, 2016, section 255 of Insolvency & Bankruptcy Code, 2016 amended following sections of the Companies Act, 2013

In the definition of Winding up, new insertion was made which makes it as winding up means winding up under this Act or liquidation under the Insolvency & Bankruptcy Code, 2016 as applicable.

Section 270 of the Companies Act, 2013 regarding the Modes of winding up, has been deleted after the enforcement of this Code. It has been substituted by Winding up by Tribunal

Section 271, companies Act, 2013 which deals with Circumstances in which company may be wound up by Tribunal has been substituted namely- A company may be wound up by the Tribunal, on petition under Section 272, if the company has resolved by special resolution that company be wound up by the Tribunal; if the company has acted against sovereignty, integrity, security of India friendly relations with foreign states, public order, decency, morality; if the tribunal is of opinion that acts of the company are fraudulent or the object for which it was formed was fraudulent or unlawful or persons concerned in formation and management have been held guilty of fraud, misconduct and it would be proper for it to be wound up; if the company defaulted in filing financial statement for the immediately

preceding last financial years with the Registrar; if Tribunal is of opinion that company should be wound up on just and equitable grounds.

The sub-section has been substituted in Section 275 of the Companies Act, 2013 as Section 275(2) which deals with Company Liquidators and their appointment as per which Tribunal shall appoint the provisional or the Company Liquidator from amongst the insolvency professionals registered under the Insolvency & Bankruptcy Code, 2016.

Section 304 of the Companies Act, 2013 that deals with the circumstances in which company may be wound up voluntarily has been omitted by the Insolvency & Bankruptcy Code, 2016 along with other sections relating to voluntarily winding up under the Act

Distinction between Members’ voluntary winding up and creditors’ voluntary winding up

<b>Members’ Voluntary Winding up</b>	<b>Creditors Voluntary Winding up</b>
Where a company is solvent & declaration of solvency is made by the directors, it is called members’ voluntary winding up	Where a company is solvent, the declaration of solvency is not made by the directors, it is called as the creditors’ voluntary winding up.
Dominant control remains in the hands of the members of the company.	In creditors’ winding up, dominant control remains in hands of the creditors.
There is no meeting of creditors and the liquidator is appointed by the company.	In creditors’ winding up, meetings of creditors have to be called at the beginning and subsequently the liquidator is appointed by the creditors.
The liquidator can exercise some of his powers with the sanction of a special resolution of the company.	The liquidator can do so with the sanction of the court or the Committee of inspection or of meeting of creditors.

## SUGGESTION

Reform procedure to avoid unnecessary delay time of practice field companies according to the latest development innovation of the corporate law governance

## CONCLUSION

In the year 1999, as per Justice Eradi Committee Report, 473 winding up cases were pending for more than 25 years and in 2015, there were 1479 winding up cases pending for more than 20 years, as per data furnished by the Department of Financial Services. The Insolvency and Bankruptcy Code, 2016 was passed to ensure time bound settlement of insolvency which would in turn help in solving India's bad debt problem.

To expedite the process of voluntary winding up, Government had introduced New Regulations as the procedure of voluntary winding up under Companies Act, 1956 was time consuming and there was no prescribed qualification for liquidator. The Code mandates that insolvency professionals are to be appointed as Liquidators, such a move is welcome by corporates and professionals.

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