Winding-up by Tribunal under the Companies Act, 2013

Lesson 25

KEY CONCEPTS

■ Winding up ■ Company Liquidator ■ Dissolution ■ Fraudulent preference

Learning Objectives

To understand:

- Grounds of winding up by Tribunal and its petition
- Functions of company liquidators
- Submission of reports to Tribunal

Lesson Outline

- Introduction
- Important changes brought about by IBC
- Winding up by Tribunal : Grounds
- Petition for the Winding-up
- Powers of the Tribunal
- Directions for filing statement of affairs
- Company Liquidators and their appointments
- Removal and replacement of Liquidators
- Submission of the reports by the Company Liquidator
- Advisory Committee
- Submission of periodical reports to the Tribunal
- Powers and duties of the Company Liquidator
- Audit of Company Liquidator's accounts
- Overriding Preferential Payments
- Fraudulent preferences
- Companies (Winding-up) Rules, 2020
- Case Laws
- Lesson Round-Up
- Test Yourself

REGULATORY FRAMEWORK

- Section 59 & 255 of the Insolvency and Bankruptcy Code, 201
- Section 270 to 303 & 324 to 365 of Companies Act, 2013
- Companies (Winding up) Rules, 2020

INTRODUCTION

Winding up is a means by which the dissolution of a company is brought about. The main purpose of winding up of a company is to realize the assets and pay the company's debts expeditiously and fairly in accordance with the law. If any surplus is left, it is distributed among the members in accordance with their rights.

It may be noted that on winding up, the company does not cease to exist as such, except when it is dissolved. Even after the commencement of winding-up, the property and assets of the company belong to the company until the dissolution takes place. On dissolution, the company ceases to exist as a separate entity and becomes incapable of keeping property, suing or being sued. Thus, in between the winding up and dissolution, the legal status of the company continues and it can be sued in the court of law.

> The terms "Winding up" and "dissolution" are sometimes erroneously used to mean the same thing. But, the legal implications of these two terms are quite different and there are fundamental differences between them as regards the legal procedure involved.

The entire procedure for bringing about a lawful end to the life of a company is divided into two stages i.e., 'winding up' and 'dissolution'. Winding up is the first stage in the process whereby assets are realised, liabilities are paid off and the surplus, if any, distributed among its members. Dissolution is the final stage whereby the existence of the company is withdrawn by the law. Dissolution brings about an end to the legal entity of the company.

IMPORTANT CHANGES BROUGHT ABOUT BY THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The Insolvency and Bankruptcy Code, 2016 ('Code') was passed with the objective of consolidating and amending the laws relating to reorganisation and insolvency resolution in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for other matters connected.

> The Ministry of Corporate Affairs has notified section 255 of the Insolvency and Bankruptcy Code, 2016. Section 255 of the Insolvency and Bankruptcy Code, 2016 amends the Companies Act, 2013, in accordance with the eleventh Schedule of the Insolvency and Bankruptcy Code, 2016.
>
> The Central Government had appointed 15th November, 2016 as the date on which the provisions of section 255 of the Insolvency and Bankruptcy Code, 2016 shall come into force

The Insolvency and Bankruptcy Code, 2016 has made significant amendments to provisions relating to winding up in the Companies Act, 2013. The important ones are discussed below:

Winding up – The expression "winding up" was not defined in the Companies Act, 2013 or in the erstwhile Companies Act of 1956. The eleventh Schedule has added sub-section (94a) to section 2 of the Companies Act, 1956. The definition of "winding up" reads as follows:

> "Winding up" means winding up under the Companies Act, 2013 or liquidation under the insolvency and Bankruptcy Code, 2016, as applicable" [Section 2(94a)]

Voluntary winding up – Provisions relating to voluntary winding up in the Companies Act, 2013 i.e., sections 304 to 323 have been omitted by the insolvency and Bankruptcy Code, 2016. Voluntary liquidation is now dealt with under section 59 of the insolvency and Bankruptcy Code, 2016 read with IBBI (Voluntary liquidation Process) regulations, 2017.

Inability to pay debts – The Insolvency and Bankruptcy Code, 2016 has substituted section 271 of the Companies Act, 2013.

Now after its substitution, section 271 provides the following five grounds where a company may be wound up by a tribunal:

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

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

(c) **if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;**

(d) **if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or**

(e) **if the tribunal is of the opinion that it is just and equitable that the company should be wound up.**

The following two grounds have been deleted from section 271:

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

(d) if the tribunal has ordered the winding up of the company under Chapter XIIX.

Thus, if a company is unable to pay its debts, creditors canno't file petition in tribunal in for winding up of the Company. However, the Companies Act, 2013 shall continue to govern winding up of companies on various other grounds excluding inability to pay debts.

WINDING UP BY TRIBUNAL UNDER THE COMPANIES ACT, 2013

The Companies Act, 2013 continues to govern winding up of companies on various other grounds excluding inability to pay debts. Sections 270 to 288, Sections 290 to 303, Section 324 and Sections 326 to 365 of Chapter XX of the Companies Act, 2013 contain the provisions relating to winding up of a company.

The Ministry of Corporate Affairs has notified these sections on 7th December, 2016 and these sections have come into force with effect from 15th December 2016.

WHO MAY FILE PETITION FOR WINDING UP

Section 272 lays down that a petition to the tribunal for the winding up of a company shall be presented by –

(a) the company;

(b) any contributory or contributories;

(c) all or any of the persons specified in clauses (a) and (b);

(d) the registrar;

(e) any person authorised by the Central Government in that behalf; or

(f) in a case falling under clause (b) of section 271, by the Central Government or a State Government.

POWERS OF TRIBUNA

According to section 273(1), the tribunal may, on receipt of a petition for winding up under section 272 pass any of the following orders, namely: –

(a) dismiss it, with or without costs;

(b) make any interim order as it thinks fit;

(c) appoint a provisional liquidator of the company till the making of a winding up order;

(d) make an order for the winding up of the company with or without costs; or

(e) any other order as it thinks fit:

Provided that an order under this sub-section shall be made within ninety days from the date of presentation of the petition:

Provided further that before appointing a provisional liquidator under clause (c), the tribunal shall give notice to the company and afford a reasonable opportunity to it to make its representations, if any, unless for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice:

Provided also that the tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged for an amount equal to or in excess of those assets, or that the company has no assets.

Where a petition is presented on the ground that it is just and equitable that the company should be wound up, the tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are Acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy. [Section 273(2)]

FILING STATEMENT OF AFFAIRS OF THE COMPANY

> In case, where the Company fails to file the statement of affairs, the tribunal shall forfeit the right of the company to oppose the petition and right of such directors and officers of the company as found responsible for such non-compliance.

Section 274 lays down that in case, where the Tribunal is satisfied that on a petition that the winding up of the company is to be made out, he may by an order direct the company to file its objections along with a statement of its affairs within thirty days of the order which can be allowed a further period of thirty days in a situation of contingency or special circumstances.

Further, the director or the officer of the company who is in default will be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

The complaint may be filed in this behalf before the Special Court by Registrar, provisional liquidator, Company liquidator or any person authorised by the tribunal.

COMPANY LIQUIDATORS AND THEIR APPOINTMENTS

For the purposes of winding up of a company by the tribunal, the tribunal at the time of the passing of the order of winding up, shall appoint an Official Liquidator or a liquidator from the panel maintained under sub-section (1) as the Company liquidator. [Section 275(1)]

The provisional liquidator or the Company liquidator, as the case may, shall be appointed by the tribunal from amongst the insolvency professionals registered under the insolvency and Bankruptcy Code, 2016. [Section 275(2)]

Where a provisional liquidator is appointed by the tribunal, the tribunal may limit and restrict his powers by the order appointing him or it or by a subsequent order, but otherwise he shall have the same powers as a liquidator. [Section 275(3)]

> **"Company Liquidator",**
>
> means a person appointed by the tribunal as the Company liquidator in accordance with the provisions of section 275 for the winding up of a company under this Act. [Section 2(23)].

The terms and conditions of appointment of a provisional liquidator or Company liquidator and the fee payable to him or it shall be specified by the Tribunal on the basis of task required to be performed, experience, qualification of such liquidator and size of the company. [Section 275(5)]

On appointment as provisional liquidator or Company liquidator, as the case may be, such liquidator shall file a declaration within seven days from the date of appointment in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the tribunal and such obligation shall continue throughout the term of his appointment. [Section 275(6)]

While passing a winding up order, the tribunal may appoint a provisional liquidator, if any, appointed under clause (c) of sub-section (1) of section 273, as the Company liquidator for the conduct of the proceedings for the winding up of the company. [Section 275(7)]

REMOVAL AND REPLACEMENT OF LIQUIDATOR

Section 276 lays down that in case where the reasonable cause being shown and for reasons to be recorded in writing, the tribunal may remove the provisional liquidator or the Company liquidator, on any of the following grounds:

- **(a) misconduct;**
- **(b) fraud or misfeasance;**
- **(c) professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;**
- **(d) inability to Act as provisional liquidator or as the case may be, Company liquidator;**
- **(e) conflict of interest or lack of independence during the term of his appointment that would justify removal.**

Further, in the event of death, resignation or removal of the liquidator the tribunal may transfer the work assigned to him or it to another Company liquidator for reasons to be recorded in writing.

INTIMATION FOR WINDING UP

Aaccording to Section 277, upon the order for appointment of provisional liquidator or for the winding up of a company, the tribunal shall within a period not exceeding seven days from the date of passing of the order give intimation of the appointment to the Company liquidator or provisional liquidator and the registrar.

The registrar on receipt of the copy of order of appointment of provisional liquidator or winding up order shall make an endorsement to that effect in his records relating to the company and notify in the Official Gazette that such an order has been made and in the case of a listed company, the registrar shall intimate about such appointment or order, to the stock exchange or exchanges where the securities of the company are listed.

Such winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the company, except when the business of the company is continued.

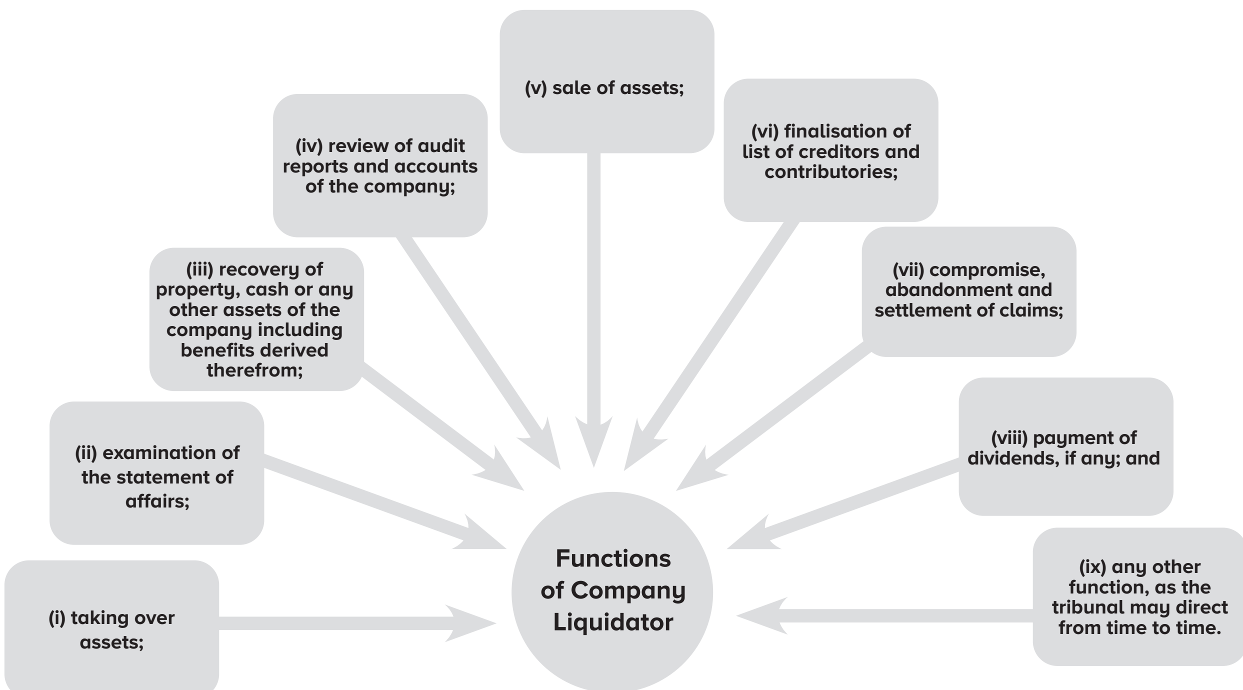
Within three weeks from the date of passing of winding up order, the Company liquidator shall make an application to the tribunal for constitution of a winding up committee to assist and monitor the progress of liquidation proceedings by the Company liquidator in carrying out the function as provided in sub-section (5) and such winding up committee shall comprise of the following persons, namely:—

(i) Official Liquidator attached to the Tribunal;

(ii) nominee of secured creditors; and

(iii) a professional nominated by the tribunal.

The Company liquidator shall be the convener of the meetings of the winding up committee which shall assist and monitor the liquidation proceedings in following areas of liquidation functions, namely:—



The Company liquidator shall place before the tribunal a report along with minutes of the meetings of the committee on monthly basis duly signed by the members present in the meeting for consideration till the final report for dissolution of the company is submitted before the Tribunal. He shall also prepare the draft final report for consideration and approval of the winding up committee. The final report, so approved by the winding up committee, shall be submitted by the Company liquidator before the tribunal for passing of a dissolution order in respect of the company.

STAY OF SUITS ON WINDING UP ORDER

When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the tribunal and subject to such terms as the tribunal may impose:

Provided that any application to the tribunal seeking leave under this section shall be disposed of by the tribunal within sixty days. [Section 279(1)]

Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court. [Section 279(2)]

Effect of winding up order

The order for the winding up of a company shall operate in favour of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories. [Section 278]

SUBMISSION OF REPORT BY COMPANY LIQUIDATOR

Aaccording to section 281(1), where the tribunal has made a winding up order or appointed a Company liquidator, such liquidator shall, within sixty days from the order, submit to the tribunal, a report containing the following particulars, namely:

(a) the nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company:

Provided that the valuation of the assets shall be obtained from registered valuers for this purpose;

(b) amount of capital issued, subscribed and paid-up;

(c) the existing and contingent liabilities of the company including names, addresses 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, whether by the company or an officer thereof, their value and the dates on which they were given;

(d) the debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof;

(e) guarantees, if any extended by the company;

(f) list of contributories and dues, if any, payable by them and details of any unpaid call;

(g) details of trademarks and intellectual properties, if any, owned by the company;

(h) details of subsisting contrActs, joint ventures and collaborations, if any;

(i) details of holding and subsidiary companies, if any;

(j) details of legal cases filed by or against the company; and

(k) any other information which the tribunal may direct or the Company liquidator may consider necessary to include.

The Company liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the tribunal. [Section 281(2)]

The Company liquidator shall also make a report on the viability of the business of the company or the steps which, in his opinion, are necessary for maximising the value of the assets of the company. [Section 281(3)]

The Company Liquidator may also, if he thinks fit, make any further report or reports. [Section 281(4)]

Any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this section and take copies thereof or extrActs therefrom on payment of the prescribed fees. [Section 281(5)]

DIRECTIONS OF TRIBUNAL ON REPORT OF COMPANY LIQUIDATOR

The Tribunal shall, on consideration of the report of the Company Liquidator, fix a time limit within which the entire proceedings shall be completed and the company be dissolved:

Provided that the tribunal may, if it is of the opinion, at any stage of the proceedings, or on examination of the reports submitted to it by the Company liquidator and after hearing the Company liquidator, creditors or contributories or any other interested person, that it will not be advantageous or economical to continue the proceedings, revise the time limit within which the entire proceedings shall be completed and the company be dissolved. [Section 282(1)]

The tribunal may, on examination of the reports submitted to it by the Company liquidator and after hearing the Company liquidator, creditors or contributories or any other interested person, order sale of the company as a going concern or its assets or part thereof:

Provided that the Tribunal may, where it considers fit, appoint a sale committee comprising such creditors, promoters and officers of the company as the Tribunal may decide to assist the Company Liquidator in sale under this sub-section. [Section 282(2)]

Custody of Company's Properties

Upon the winding up order made by the tribunal the Company liquidator or the provisional liquidator take into his or its custody or control all the property, effects and Actionable claims to which the company is or appears to be entitled to and take such steps and measures, as may be necessary, to protect and preserve the properties of the company which shall be deemed to be in the custody of the tribunal from the date of the order for the winding up of the company. [Section 283]

Where a report is received from the Company liquidator or the Central Government or any person that a fraud has been committed in respect of the company, the tribunal shall, without prejudice to the process of winding up, order for investigation under section 210, and on consideration of the report of such investigation it may pass order and give directions under sections 339 to 342 or direct the Company Liquidator to file a criminal complaint against persons who were involved in the commission of fraud. [Section 282(3)]

The tribunal may order for taking such steps and measures, as may be necessary, to protect, preserve or enhance the value of the assets of the company. [Section 282(4)]

The Tribunal may pass such other order or give such other directions as it considers fit. [Section 282(5)]

ADVISORY COMMITTEE

The tribunal may, while passing an order of winding up of a company, direct that there shall be, an advisory committee to advise the Company liquidator and to report to the tribunal on such matters as the tribunal may direct. [Section 287(1)]

The advisory committee appointed by the tribunal shall consist of not more than twelve members, being creditors and contributories of the company or such other persons in such proportion as the tribunal may, keeping in view the circumstances of the company under liquidation, direct. [Section 287(2)]

The Company liquidator shall convene a meeting of creditors and contributories, as ascertained from the books and documents, of the company within thirty days from the date of order of winding up for enabling the tribunal to determine the persons who may be members of the advisory committee. [Section 287(3)]

The advisory committee shall have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time. [Section 287(4)]

The provisions relating to the convening of the meetings, the procedure to be followed thereat and other matters relating to conduct of business by the advisory committee shall be such as may be prescribed. [Section 287(5)]

The meeting of advisory committee shall be chaired by the Company liquidator. [Section 287(6)]

POWERS AND DUTIES OF COMPANY LIQUIDATOR

Section 290 of the Companies Act, 2013 lays down that subject to directions by the tribunal, if any, in this regard, the Company liquidator, in a winding up of a company by the tribunal, shall have the power –

(a) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;

(b) to do all Acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use, when necessary, the company's seal;

(c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels;

(d) to sell the whole of the undertaking of the company as a going concern;

(e) to raise any money required on the security of the assets of the company;

(f) to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;

(g) to invite and settle claim of creditors, employees or any other claimant and distribute sale proceeds in accordance with priorities established under this Act;

(h) to inspect the records and returns of the company on the files of the Registrar or any other authority;

(i) to prove rank and claim in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(j) to draw, accept, make and endorse any negotiable instruments including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

Professional Assistance to Company Liquidator

The Company liquidator may, with the sanction of the tribunal, appoint one or more chartered accountants or company secretaries or cost accountants or legal prActitioners or such other professionals on such terms and conditions, as may be necessary, to assist him in the performance of his duties and functions under this Act. [Section 291(1)]

Aany person appointed under this section shall disclose forthwith to the tribunal in the prescribed form any conflict of interest or lack of independence in respect of his appointment. [Section 291(2)]

(k) 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 which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company liquidator himself;

(l) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company liquidator is unable to do himself;

(m) to take all such Actions, steps, or to sign, execute and verify any paper, deed, document, application, petition, affidavit, bond or instrument as may be necessary, –

  (i) for winding up of the company;

  (ii) for distribution of assets;

  (iii) in discharge of his duties and obligations and functions as Company liquidator. and

(n) to apply to the tribunal for such orders or directions as may be necessary for the winding up of the company.

EXERCISE AND CONTROL OF COMPANY LIQUIDATOR'S POWER

Sub-section (1) of section 292 lays down that subject to the provisions of this Act, the Company liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by the resolution of the creditors or contributories at any general meeting or by the advisory committee.

Any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the advisory committee. [Section 292(2)] The Company liquidator

(a) may summon meetings of the creditors or contributories, whenever he thinks fit, for the purpose of ascertaining their wishes; and

(b) shall summon such meetings at such times, as the creditors or contributories, as the case may be, may, by resolution, direct, or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories, as the case may be. [Section 292(3)]

Aany person aggrieved by any Act or decision of the Company liquidator may apply to the tribunal, and the Tribunal may confirm, reverse or modify the Act or decision complained of and make such further order as it thinks just and proper in the circumstances. [Section 292(4)]

AUDIT OF COMPANY LIQUIDATOR'S ACCOUNTS

The Company liquidator shall maintain proper and regular books of account including accounts of receipts and payments made by him in such form and manner as may be prescribed. [Section 294(1)]

The Company liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Tribunal an account of the receipts and payments as such liquidator in the prescribed form in duplicate, which shall be verified by a declaration in such form and manner as may be prescribed. [Section 294(2)]

The Tribunal shall cause the accounts to be audited in such manner as it thinks fit, and for the purpose of the

Books to be kept by Company Liquidator

The Company liquidator shall keep proper books in such manner, as may be prescribed, in which he shall cause entries or minutes to be made of proceedings at meetings and of such other matters as may be prescribed. [Section 293(1)]

Any creditor or contributory may, subject to the control of the tribunal, inspect any such books, personally or through his agent [Section 293(2)] audit, the Company liquidator shall furnish to the tribunal with such vouchers and information as the tribunal may require, and the tribunal may, at any time, require the production of, and inspect, any books of account kept by the Company liquidator. [Section 294(3)]

When the accounts of the company have been audited, one copy thereof shall be filed by the Company Liquidator with the tribunal, and the other copy shall be delivered to the registrar which shall be open to inspection by any creditor, contributory or person interested. [Section 294(4)]

Where an account referred to in sub-section (4) relates to a Government company, the Company liquidator shall forward a copy thereof –

(a) to the Central Government, if that Government is a member of the Government company; or

(b) to any State Government, if that Government is a member of the Government company; or

(c) to the Central Government and any State Government, if both the Governments are members of the Government company. [Section 294(5)]

The Company liquidator shall cause the accounts when audited, or a summary thereof, to be printed, and shall send a printed copy of the accounts or summary thereof by post to every creditor and every contributory:

Provided that the tribunal may dispense with the compliance of the provisions of this sub-section in any case it deems fit. [Section 294(6)]

PAYMENT OF DEBTS BY CONTRIBUTORY AND EXTENT OF SET-OFF

The Tribunal may, at any time after passing of a winding up order, pass an order requiring any contributory for the time being on the list of contributories to pay, in the manner directed by the order, any money due to the company, from him or from the estate of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act. [Section 295(1)]

The Tribunal, in making an order, under sub-section (1), may, –

(a) in the case of an unlimited company, allow to the contributory, by way of setoff, any money due to him or to the estate which he represents, from the company, on any independent dealing or contrAct with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and

(b) in the case of a limited company, allow to any director or manager whose liability is unlimited, or to his estate, such set-off. [Section 295(2)]

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 way of set- off against any subsequent call. [Section 295(3)]

POWER TO SUMMON PERSONS SUSPECTED OF HAVING PROPERTY OF COMPANY

The Tribunal may, at any time after the appointment of a provisional liquidator or the passing of a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property or books or papers, of the company, or known or suspected to be indebted to the company, or any person whom the tribunal thinks to be capable of giving information concerning the promotion, formation, trade, dealings, property, books or papers, or affairs of the company. [Section 299(1)]

The Tribunal may examine any officer or person so summoned on oath concerning the matters aforesaid, either by word of mouth or on written interrogatories or on affidavit and may, in the first case, reduce his answers to writing and require him to sign them. [Section 299(2)]

Power to order costs

The Tribunal may, in the event of the assets of a company being insufficient to satisfy its liabilities, make an order for the payment out of the assets, of the costs, charges and expenses incurred in the winding up, in such order of priority inter se as the tribunal thinks just and proper. [Section 298]

The Tribunal may require any officer or person so summoned to produce any books and papers relating to the company in his custody or power, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to such lien, and the tribunal shall have power to determine all questions relating to that lien. [Section 299(3)]

The Tribunal may direct the liquidator to file before it a report in respect of debt or property of the company in possession of other persons. [Section 299(4)]

If the Tribunal finds that –

(a) a person is indebted to the company, the tribunal may order him to pay to the provisional liquidator or, as the case may be, the liquidator at such time and in such manner as the tribunal may consider just, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Tribunal thinks fit, with or without costs of the examination;

(b) a person is in possession of any property belonging to the company, the tribunal may order him to deliver to the provisional liquidator or, as the case may be, the liquidator, that property or any part thereof, at such time, in such manner and on such terms as the tribunal may consider just. [Section 299(5)]

If any officer or person so summoned fails to appear before the Tribunal at the time appointed without a reasonable cause, the tribunal may impose an appropriate cost. [Section 299(6)]

Every order made under sub-section (5) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure, 1908 (5 of 1908). [Section 299(7)]

Any person making any payment or delivery in pursuance of an order made under sub-section (5) shall by such payment or delivery be, unless otherwise directed by such order, discharged from all liability whatsoever in respect of such debt or property. [Section 299(8)]

EXAMINATION OF PROMOTERS, DIRECTORS, ETC.

As per Section 300(1) of the Act, upon the report of the Company liquidator to the tribunal stating that in his opinion a fraud has been committed by any person in the promotion, formation, business or conduct of affairs of the company since its formation, the tribunal may, after considering the report, direct that such person or officer shall attend before the Tribunal on a day appointed by it for that purpose, and be examined as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as an officer thereof.

The Company liquidator shall take part in the examination, and for that purpose he or it may, if specially authorised by the tribunal in that behalf, employ such legal assistance as may be sanctioned by the tribunal. [Section 300(2)]

The person shall be examined on oath and shall answer all such questions as the tribunal may put, or allow to be put, to him. [Section 300(3)]

A person ordered to be examined under this section -

(a) shall, before his examination, be furnished at his own cost with a copy of the report of the Company liquidator; and	(b) may at his own cost employ chartered accountant or company secretaries or cost accountant or legal practitioners entitled to appear before the tribunal under section 432, who shall be at liberty to put to him such questions as the tribunal may consider just for the purpose of enabling him to explain or qualify any answers given by him. [Section 300(4)]

DISSOLUTION OF COMPANY BY TRIBUNAL

When the affairs of a company have been completely wound up, the Company Liquidator shall make an application to the tribunal for dissolution of such company. [Section 302(1)]

The Tribunal shall on an application filed by the Company Liquidator under sub-section (1) or when the Tribunal is of the opinion that it is just and reasonable in the circumstances of the case that an order for the dissolution of the company should be made, make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly. [Section 302(2)]

A copy of the order shall, within thirty days from the date thereof, be forwarded by the Company liquidator to the registrar who shall record in the register relating to the company a minute of the dissolution of the company. [Section 302(3)]

If the Company Liquidator makes a default in forwarding a copy of the order within the period specified in sub- section (3), the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues. [Section 302(4)]

Arrest of person trying to leave India or abscond

The Tribunal, if satisfied that a contributory or a person having property, accounts or papers of the company in his possession is about to leave India or otherwise to abscond, or is about to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, the tribunal may cause – (a) the contributory to be detained until such time as the tribunal may order; and (b) his books and papers and movable property to beseized and safely kept until such time as the tribunal maythink fit. [Section 301]

Keraela High Court in the matter of **[Mathew Philip v. Malayalam Plantation Ltd.]** 1994 held that there are three contingencies for dissolution of company:

(1) When company has been completely wound-up	(2) When the court is of the opinion that liquidator cannot proceed with the winding-up of company for want of funds and assets	(3) When the court is of the opinion that liquidators cannot proceed with the winding-up for any other reason.

FRAUDULENT PREFERENCE

Section 328 of the Companies Act, 2013 deals with fraudulent preference. Sub-section (1) of section 328 provides that where a company has given preference to a person who is one of the creditors of the company or a surety or guarantor for any of the debts or other liabilities of the company, and the company does anything or suffers anything done which has the effect of putting that person into a position which, in the event of the company going into liquidation, will be better than the position he would have been in if that thing had not been done prior to six months of making winding up application, the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

According to sub-section (2), if the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

Liabilities and Rights of Certain Persons Fraudulently Preferred

Where a company is being wound up and anything made, taken or done after the commencement of this Act is invalid under section 328 as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, then, without prejudice to any rights or liabilities arising, apart from this provision, the person preferred shall be subject to the same liabilities, and shall have the same rights, as if he had undertaken to be personally liable as a surety for the debt, to the extent of the mortgage or charge on the property or the value of his interest, whichever is less. [Section 331(1)]

The value of the interest of the person preferred under sub-section (1) shall be determined as at the date of the transaction constituting the fraudulent preference, as if the interest were free of all encumbrances other than those to which the mortgage or charge for the debt of the company was then subject. [Section 331(2)]

On an application made to the tribunal with respect to any payment on the ground that the payment was a fraudulent preference of a surety or guarantor, the tribunal shall have jurisdiction to determine any questions with respect to the payment arising between the person to whom the payment was made and the surety or guarantor and to grant relief in respect thereof, notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose, may give leave to bring in the surety or guarantor as a third party as in the case of a suit for the recovery of the sum paid. [Section 331(3)]

The provisions of sub-section (3) shall apply *mutatis mutandis* in relation to transactions other than payment of money. [Section 331(4)]

COMPANIES (WINDING-UP) RULES, 2020

Ministry of Corporate Affairs notified Companies (Winding-Up) Rules, 2020 through Notification No. G.S.R. 46(e) on 24th January, 2020. These rules shall apply to winding-up under the Companies Act 2013. These rules came into force from 1st April, 2020.

The rules are applicable to companies going into winding-up for the circumstances mentioned under section 271 as well as summary procedure for liquidation under section 361 of the Companies Act, 2013. The summary procedure entails appointment of an official liquidator by the Central Government, followed by the official liquidator immediately thereafter taking into his custody all the assets, effects and Actionable claims to which the company is or appears to be entitled, who will then submit a report to the Central Government within 30 days of his appointment. The rules have been divided into 6 parts comprising of 191 rules and 95 forms.

'Winding-up Rules' among other things provide for summary procedure for winding-up of companies having specified thresholds. The winding-up of companies falling within the specified thresholds will henceforth require the approval of the Central Government instead of the National Company Law Tribunal (NCLT).

Notification of these rules is expected to reduce the burden at the level of NCLT as summary procedure for liquidation can now be filed with the Central Government.

> An important feature of these Rules is the summary procedure for liquidation introducedthrough Part V. An important factor for such summary winding-up is that the Central Government will provide required approvals to such companies for the normal winding-up process which is otherwise undertaken throughthe NCLT, thereby reducing the burden on NCLTand greatly shortening the overall winding-uptimelines.

Currently, the proceedings pertaining to voluntary winding up and winding up on the grounds of inability to pay debts are governed by the insolvency and Bankruptcy Code 2016, which provides for time-bound speedy dissolution of a company.

However, winding-up proceedings on the ground other than inability to pay debts continues to be governed by the Companies (Court) Rules, 1959 which were notified nearly 60 years ago by the Supreme Court and required suitable amendments in view of the notification of the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016.

Summary Procedure for liquidation

These rules allow following classes of companies to close their business by making a winding-up application to Central Government without going to NCLT.

Companies accepting deposit and having total outstanding deposits	upto Rs.25 lacs*
Companies having total outstanding loan including secured loan	upto Rs.50 lacs*
Companies having total turnover	upto Rs.50 Crores*
Companies with paid-up capital	upto Rs.1 Crore*

based on latest audited balance sheet.

- In addition, companies having book value of assets upto Rs.1 Crore (currently specified under section 361(1) (i)) of the Companies Act, 2013, can also approach Central Government for liquidation.
- The provisions of the Rules related to filing and audit of the Company Liquidator's accounts and its procedure (rule 91 to 99 of the rules) and disposing of assets (rule 165 to 167 of the rules) shall be applicable to above class of companies with modification that the word 'Tribunal' shall be considered as 'Central Government'.

Other procedural aspects are as under:

- The rules lay down the process for meeting of creditors and contributories of the company, and specify the scenarios in which creditors can vote.
- The rules make it necessary for all the money lying in the bank account of Company liquidator which is not immediately required for the purposes of winding up, to be invested in government securities or in interest bearing deposits in any scheduled bank.
- The rules lay down the procedure for maintenance of registers and books of accounts by the Company liquidator.
- The rules also outline the procedure for creditors to prove their debts and claims against the company and if the proof of such debt gets rejected by the Company liquidator, there is also a provision and process for creditor to make an appeal to tribunal.

CASE LAWS

Case-1

In the matter of ***'Indiabulls Housing Finance Ltd. v. Shree Ram Urban Infrastructure Ltd.',*** the Indiabulls Housing Finance Ltd. (appellant) had initiated Corporate insolvency resolution Process against Shree Ram Urban Infrastructure Ltd. (Corporate debtor) under Section 7 of the Insolvency and Bankruptcy Code, 2016.

The National Company law tribunal, Mumbai Bench by impugned order dated 18th May, 2018 dismissed the application as not maintainable in view of the fact that the winding-up proceeding against the Corporate Debtor had already been initiated by the High Court of Bombay.

Thus, the issue that fell for consideration before the National Company Law Appellate Tribunal was whether an application under Section 7 of the Code is maintainable when winding-up proceeding against the Corporate debtor has already been initiated?

NCLAT decision

In the said appeal the NCLAT examined judgments governing the issue to hold that the High Court of Bombay has already ordered for winding-up of Corporate debtor, which is the second stage of the proceeding, thus question of initiation of 'Corporate Insolvency Resolution Process' which is the first stage of resolution process against the same Corporate debtor does not arise.

While arriving at its judgment, the NCLAT relied on the case of Forech India Pvt. ltd. Vs. Edelweiss assets reconstruction Company Ltd. & Aanr., wherein the NCLAT observed that if a Corporate insolvency resolution has started or on failure, if liquidation proceeding has been initiated against the Corporate debtor, the question of entertaining another application under Section 7 or Section 9 against the same very Corporate debtor does not arise, as it is open to the 'Financial Creditor' and the 'Operational Creditor' to make claim before the Insolvency Resolution Professional/Official Liquidator.

The NCLAT further opined that once second stage i.e. liquidation (winding-up) proceedings has already been initiated, the question of reverting back to the first stage of Corporate Insolvency Resolution Process or preparation of Resolution Plan does not arise.

In view of the facts of the present case, the NCLAT concluded that as the High Court of Bombay had already ordered winding-up of Corporate debtor and the same has been initiated, therefore, initiation of Corporate Insolvency Resolution Process against the Corporate debtor did not arise.

Case-2

In the matter of ***'Amar Remedies Limited',*** the applicant filed an application before NCLT, Mumbai Bench under section 110 of the Insolvency and Bankruptcy Code, 2016 suppressing the material facts that liquidation order had been passed in a winding-up petition against the corporate debtor.

The NCLAT lt Mumbai Bench observed: "...the corporate applicant suppressed this material fact, knowing it to be material, and filed the petition under section 10 and in contravention of Rule 10 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The alleged Act of the corporate applicant is punishable under section 77(a) of the Iinsolvency and Bankruptcy Code 2016.

Accordingly, it directed the Registrar of Companies to lodge prosecution against the applicant under section 77(a) of the Code. Iit rejected application with costs of Rs.10 lakh, which shall be paid by the applicant in the account of the Prime Minister's National Relief Fund.

LESSON ROUND-UP

- The Companies Act, 2013 contains provisions relating to winding-up of companies. However, IBC has made substantial changes in these provisions.
- The main purpose of winding-up of a company is to realize the assets and pay the debts of the company expeditiously and fairly in accordance with the law.
- Winding-up means winding-up under the Companies Act, 2013 or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.
- The Companies Act, 2013 shall continue to govern winding-up of companies on various other grounds excluding inability to pay debts, which shall be dealt under the Insolvency and Bankruptcy Code, 2016.
- Sections 270 to 288, Sections 290 to 303, Section 324 and Sections 326 to 365 of Chapter XX of the Companies Act, 2013 contain the provisions related to winding up of the company.
- Section 271 of the Companies Act, 2013 contains circumstances under which a company may be wound-up by the Tribunal (NCLT).
- Section 275 contains provisions relating to the appointment of liquidator.
- Section 281 provides the particulars that a report submitted by liquidator shall contain. Section 287 contains provisions relating to the Advisory Committee.
- Section 290 provides for the powers and duties of the Company liquidator.

- The Companies Act, 2013 has only provisions relating to winding-up of solvent companies through the NCLT, and winding-up of unregistered companies.
- The Companies (Winding-up) Rules, 2020 under the Companies Act, 2013 have been notified by the Ministry of Corporate Affairs on 24th January 2020. These Rules have come into force from 1st April, 2020.

TEST YOURSELF

(These are meant for recapitulation only. Answer to these questions are not to be submitted for evaluation).

1. What are the important changes brought about by the Insolvency and Bankruptcy Code, 2016 in the provisions relating to winding-up under the Companies Act, 2013?
2. Discuss with the help of a decided case law whether a profit making company can be wound-up for just and equitable reasons.
3. Eexplain the constitution and role of the Advisory Committee in the winding-up process.
4. Ddiscuss the powers and duties of Company liquidator under section 290 of the Companies Act, 2013.
5. Examine whether a secured creditor is entitled to file a winding-up petition after having obtained a decree from the Debt Recovery Tribunal.
6. Workmen can be heard but they cannot file petition for winding-up of a company. Discuss.
7. Discuss the provisions of Companies (Winding-up) Rules, 2020.