Modes of Winding-Up of a Company

Two methods of Winding-up of a company i.e.

(A) Compulsory Winding-up by the Court, and

(B) Voluntary Winding-up

**A. Compulsory Winding-Up:**

It takes place when a company is directed to be wound-up by an order of the Court.

**Grounds for Compulsory Winding-up (Sec. 433):**

**A company may be wound-up by the Court under the following cases:**

 **(i) Special Resolution of the Company:**

If the company has, by special resolution, resolved that the Company be wound-up by the Court;

**(ii) Default:**

If a default is made in delivering the statutory report of the Registrar of Companies or in holding the statutory meeting of the company, the court may make a winding-up order;

 **(iii) Not commencing or suspending the Company:**

If the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

**(iv) Reduction of Members:**

If the number of members falls below seven in case of a public company or below two in case of a private company;

 **(v) Inability to pay Debts:**

If the company is unable to pay its debts;

**(vi) The Just and Equitable Clause:**

If the Court is of opinion that it is just and equitable that the company should be wound-up.

**Petition:**

**i.e., Who can apply for Winding-up? (Sec. 439)**

**A petition for the winding-up of a company may be presented by any one of the following entities:**

(a) By the Company [Sec. 439(1) (a)];

(b) By any Creditor [Sec. 439(1) (b)];

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(c) By any Contributory [Sec. 439(1) (c)];

(d) By a Registrar [Sec. 439(1)(e)]; and

(e) By any person authorized by the Central Government [Sec. 439(1) (f)].

**Commencement of Winding-Up:**

The winding-up of a company by the Court is deemed to commence from the time of the presentation of the petition for winding-up (Sec. 441). Where there is a resolution for voluntary winding-up, before the presentation of the petition to Court, the winding-up is deemed to commence from the date of the resolution. But the Court may direct otherwise in cases of fraud and mistake.

**Powers of Court on Hearing Petition (Sec. 443):**

**The court may, on hearing a petition:**

(a) Dismiss it with or without costs; or

(b) Adjourn the hearing conditionally or unconditionally; or

(c) Make any interim order that it thinks fit; or

(d) Make an order for winding-up of the company with or without costs or any other order as it thinks fit.

**Consequences of Winding-up Order:**

If the court makes an order for winding-up, its consequences date back to the commencement of winding- up.

**The other consequences of winding-up by the Court are:**

(a) Intimation to official liquidator and Registrar (Sec. 444);

(b) Copy of Winding-up order to be filed with the Registrar;

(c) Order for winding-up deemed to be notice of discharge [Sec. 445(2)];

 (d) Suits stayed [Sec. 446(1)];

(e) Powers of the Court [Sec. 446(2)];

(f) Effect of winding-up order (Sec. 447);

(g) Official Liquidator to be liquidator (Sec. 449).

**Procedure of Winding-Up Order by the Court [Official Liquidator (Sec. 448)]:**

**Appointment:**

The Companies Act, 1956, provides that in each High Court there must be attached an officer known as the Official Liquidator appointed by the Central Government. There may also be Deputy or Assistant Official Liquidator. Upon the presentation of a petition for winding-up, the Court may appoint the official liquidator as the provisional liquidator. When the winding-up order is passed, the official liquidator becomes the liquidator of the company (Sec. 449).

**Powers of the Liquidators (Sec. 457):**

**(1) The liquidator, in a winding-up by the Court, has power to do the following with the sanction of the Court:**

(a) To institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name and on behalf of company;

(b) To carry on the business of the company so far as may be necessary for the beneficial winding-up of the company;

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

(d) To raise on the security of the assets of the company any money requisites;

(e) To do all such other things as may be necessary for winding-up the affairs of the company and distributing its assets.

According to Sec. 546, the liquidator can pay any class of creditors in full, make any compromise or arrangement with creditors; and compromise any call or liability, with the sanction of the Court.

The liquidator can disclaim any onerous property or unprofitable contract.

**(2) The liquidator in a winding-up by the court has power to do the following things, without taking special permission from the court:**

(a) 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;

(b) To inspect the records and returns of the company on the files of the Registrar without payment of any fee;

(c) To prove, rank and claim in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency;

(d) To draw, accept make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the company;

(e) 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;

(f) To appoint an agent to do any business which the liquidator is unable to do himself.

The Court can limit or modify the exercise of any of the powers of the liquidator enumerated under (2) above.

**Duties of Liquidator:**

**The duties of a liquidator are enumerated:**

**(i) Proceeding in Winding-up:**

Sec. 451(1) states that the liquidator shall conduct the proceedings in winding-up the company and perform such duties as the Court may impose.

**(ii) Report:**

After receipt of the Statement of Affairs of the company the liquidator must submit a preliminary report to the Court not later than 6 months from the date of the order of winding-up.

**(iii) Additional Reports:**

Sec. 455(2) also provides that the official liquidator may make, if he thinks fit, further report stating the manner in which the company was promoted or formed. He may also state if any fraud has been committed by any person relating to formation or any other matters which it is desirable to bring to the notice of the Court.

**(iv) Custody of Company’s Property:**

Sec. 456 (1) states that where a winding-up order has been made or where a provisional liquidator has been appointed, the liquidator, or the provisional liquidator, as the case may be, shall take into his custody all the property, affects and actionable claims to which the company is entitled.

**(v) Control of Powers:**

Sec. 460(1) provides that the liquidator shall, in the administration of the asset of the company and the distribution thereof among creditors, have regard to any directions which may be given by the committee of inspection.

**(vi) Meeting of Creditors and Contributories:**

According to Sec. 460(3), the liquidator may summon general meeting of the creditors/contributories as soon as he thinks fit in order to ascertain their wishes. He shall summon such meeting at such times as the creditors/contributories may, by direct resolution or whenever requested in writing, to do so by not less than 1/10th in value of creditors/contributories, as the case may be.

**(vii) Directions from the Court:**

Sec. 460(4) (4) provides that the liquidator may apply to the Court for directions in relation to any particular matter arising in a winding-up.

**(viii) Proper Books:**

Sec. 461(1) states that the liquidator shall keep proper books for making entries or recording minutes of the proceeding at meetings and such other matters as may be prescribed.

**(ix) Audit of Accounts:**

Sec. 462(1) also provides that the liquidator shall, at such times as may be prescribed but at least twice each year during his tenure of office, present to the court an account of his receipts and payments as liquidators. The account must be in the prescribed form, shall be made in duplicate and duly verified [Sec. 462(2)].

**(x) Appointment of Committee of Inspection:**

Sec. 464(1)(b) provides that the liquidator shall, within two months from the date of duration by the Court, convene a meeting of the company’s creditors to determine the members of the committee of inspection.

**Statement of Affairs:**

When the liquidator has been appointed, a Statement of Affairs of the company is to be made to him in the prescribed form, verified by an affidavit, and containing particulars regarding the assets, liabilities, names and addresses of the creditors, etc.

The statement shall be verified by a Director and the Manager, Secretary, or other chief officer of the company. The Statement of Affairs is required in both compulsory and voluntary winding-up [Section 454 and 511 A].

**Statement of Affairs Contains:**

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

(ii) Names, addresses, occupations of its creditors (showing separately the secured and unsecured debts);

(iii) Its debts and liabilities;

(iv) In case of secured debts, particulars of the securities held by the creditors, their value and dates on which they were given.

(v) The debts due to the company and names and addresses of persons from whom they are due and the amount likely to be realized.

(vi) And any such further information as may be required by the official liquidators [Sec. 454(1)].

According to Sec. 455, the official liquidator must, after the receipts of the statement, within 6 months (or such extended time as may be allowed by the Court) of the order, submit to the Court a preliminary report as to the amount of capital issued, subscribed and paid-up, and the estimated amounts of the company’s assets and liabilities if the company has failed, the causes of its failure and whether, in his opinion, any further enquiry is desirable.

**B. Voluntary Winding-Up:**

**Circumstances:**

**According to Sec. 484 of the Companies Act, a company can be wound-up voluntarily under the following circumstances:**

**(1) By an Ordinary Resolution (passed in a general meeting in the following cases):**

(a) Where the duration of the company was fixed by the articles and the period has expired; and

(b) Where the articles provided for winding-up on the occurrence of any event and the specified event has occurred.

**(2) By a Special Resolution (passed by the members in all other cases):**

When a resolution is passed for voluntary winding-up it must be notified to the public by an advertisement in the Official Gazette and in a local newspaper (Sec. 485).

**Types of Voluntary Winding-Up:**

**Voluntary winding-up is of two types:**

(a) Members’ Voluntary Winding-up; and

(b) Creditors’ Voluntary Winding-up.

**(a) Members’ Voluntary Winding-up:**

If the company is, at the time of winding-up, a solvent company, i.e., able to pay its debts and the directors make a declaration to that effect; it is called a Members’ Voluntary Winding-up. The declaration must be verified by an affidavit.

**The declaration must be:**

(a) Made within the five weeks immediately preceding the date of passing of the resolution of winding-up by the company and delivered to the Registrar for registration before that date; and

(b) Accompanied by a copy of the report of the auditors of the company on the Profit and Loss Account of the company from the date of the last Profit and Loss Account to the latest practicable date immediately before the declaration of solvency, the Balance Sheet of the company; and a statement of the company’s assets and liabilities as on the last mentioned date.

**The Members’ Voluntary Winding up is done by the following successive steps:**

(i) Declaration of solvency;

(ii) Statutory Declaration to the Registrar;

(iii) A resolution in general meeting of the company within 5 weeks of declaration of solvency;

(iv) Appointment of Liquidator;

(v) Collecting the company’s assets, pay the liabilities of the company and pay the balance of the proceeds to the contributories.

**(b) Creditors’ Voluntary Winding Up:**

If the declaration of solvency is not made and filed with the Registrar, it may be presumed that the company is insolvent. In that case, the company must call a meeting of its creditors (for the day or the day next following the day fixed for the company’s general meeting) for passing the resolution for winding-up.

**The Creditors’ Voluntary Winding-up is done by the following successive steps:**

(i) A resolution for the winding up of the company in a general meeting of the company.

(ii) On the same day or the following day there must be a meeting of the creditors and a list of creditors must be furnished by the Directors.

(iii) A liquidator or liquidators are appointed by the meeting of members and the meeting of the creditors.

(iv) A committee of inspection.

(v) The work of winding-up according to statute.

**(c) Voluntary Winding-up under the Supervision of Court:**

At any time after a company has passed a resolution for voluntary winding-up, the Court may make an order that the voluntary winding-up shall continue but subject to the supervision of the court (Sec. 522). A supervision order is usually made for the protection of the creditors and contributories of the company. A petition for the continuance of a voluntary winding-up subject to the supervision of the Court is deemed to be a petition for winding-up by the Court (Sec. 523).

**Consequences of Winding-Up:**

**The consequences of winding-up may be explained under the following heads:**

**(a) Consequences as to Shareholders:**

A shareholder is liable to pay the full amount up to the face value of the shares held by him. The liability of the shareholder on this account continues even after the company goes into liquidation although he is, in this case, unknown as a contributory. The liability of a present contributory is the amount remaining unpaid on the shares held by him. A past contributory can only be called upon to pay if the present contributory is unable to pay.

**(b) Consequences as to Creditors:**

A company often goes into compulsory winding-up when it is unable to pay its debts. But it may be wound-up on other grounds as well even though it is solvent. Where a solvent company is wound-up, all claims of its creditors, when proved, are fully met. When a company is insolvent and is wound-up, the same rule prevails as in the case of Law of Insolvency (Sec. 529). Creditors are of two types, viz. Secured and Unsecured.

**An unsecured creditor may:**

(1) Rely on security and ignore the liquidation, or

(2) Value his security and prove for the deficit, or

(3) Surrender his security and prove for the whole debt.

But as regards unsecured creditors and/or debts of an insolvent company, preferential payments are made first, and then other debts are paid pari passu.

**The order of priority in paying-off debts in a winding-up is as:**

(a) Secured Creditors;

(b) Costs and charges for winding-up;

(c) Preferential debts;

(d) Floating charges;

(e) Unsecured creditors.

At the same time, if there is any surplus, the same is returned first to preference shareholders and then to equity shareholders.

**(c) Consequences as to Proceedings against the Company:**

If a winding-up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceedings against the company can be commenced except by the leave of the Court. Similarly, if a suit is pending against the company at the date of the winding-up order, it cannot be proceeded with against the company, except by the leave of the Court [Sec. 446(1)].

**(d) Consequences as to Costs:**

According to Sec. 476, if assets are insufficient to satisfy liabilities, the Court may order for payment for the costs, charges and expenses of the winding-up out of assets. The payment must be made in such order of priority, inter se, as the Court thinks just. Similarly, all costs, charges and expenses properly incurred in a voluntary winding-up, including the remuneration of the liquidator, are paid out of the assets of the company in priority to all other claims. The payment is, however, subject to the rights of secured creditors (Sec. 520).

**Winding-Up of Unregistered Companies:**

**According to Sec. 582, the expression ‘unregistered company:**

(a) shall not include:

(i) A railway company incorporated by any Act of Parliament of the U.K.;

(ii) A company registered under this Act; or

(iii) A Company registered under any previous companies’ law and not being a company the registered office whereof was in Burma (Myanmar), Aden, or Pakistan immediately before the separation of that country from India, and

(b) Save as aforesaid, shall include any partnership, association or company consisting of more than 7 members at that time when the petition for winding-up the partnership, association, or company, as the case may be, is presented before the Court.

An unregistered company can wind-up under the Companies Act. The procedure is similar to the compulsory winding-up with certain minor exceptions. Such companies cannot be wound-up voluntarily. If a foreign company, carrying on business in India, ceases to do so, it can be wound-up according to the procedure applicable to unregistered companies.