

COMPARISON BETWEEN COMPANIES ACT, 2013 AND INSOLVENCY AND BANKRUPTCY ACT, 2016 W.R.T. WINDING UP

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INTRODUCTION

The whole process of putting a legal end of organization is separated into two phases. These two phases are winding up and dissolution. Winding up of organization is characterized as a procedure by which the life of an organization is conveyed to an end and its property directed for advantage of its individuals and banks. It is the last stage, putting a conclusion to life of an organization. The principle motivation behind winding up is to value the existing assets and paying off organization's obligations decently. In this way, winding up is the procedure by which management of an organization's undertakings is removed from its chiefs or in other words, directors, its assets are valued by an authorized officer, i.e., the liquidator and its obligations are released out of the valued assets. So firstly, we need to understand the difference between Winding Up and dissolution:

- ⤴ Winding Up is dissolution of company where all the assets are sold off, liabilities are paid off and surplus is distributed and by dissolution, one can understand that it means the company has come to an end.
- ⤴ Winding up is a process which happens before the dissolution and dissolution can be considered as the last stage for the ending of a company.
- ⤴ A liquidator is appointed for the proceedings of winding up of a company while a liquidator is not needed for the dissolution of a company.
- ⤴ If someone wants to wind up the company, then he doesn't need to take orders of the court but for the dissolution of a company court orders are must.
- ⤴ When the process of winding up is started then the company doesn't cease to exist and anyone can start proceedings against the company. It's just that now the all the

administration part of the company is handled by the liquidator and all the assets still belong to the company.¹

In *Pierce Leslie & Co. Ltd. V. Violet Ouchterlony*² the Supreme Court held that winding up goes before the dissolution. There is no statutory arrangement vesting the properties of broke down organization in a trustee or having the impact of repealing. The investors or lenders of a broke up organization can't be viewed as its beneficiaries and successors. On disintegration, its properties, assuming any, vest in the administration.

WINDING UP UNDER COMPANIES ACT, 2013

Companies Act, 2013 gives two methods of winding up:

- ▲ Winding up by tribunal
- ▲ Voluntary winding up

Winding up by Tribunal

The process of Winding Up of a company can be initiated by filing a petition in NCLT. The application for winding up can only be filed in NCLT. There should be proper and strong reason that why a company should be wind up as it is the last resort for a company. If the judicial mind found out that there is no proper reason than the petition can be canceled and proceedings of winding up won't be starting.³

There are some grounds under which a company can be wound up by the Tribunal

Under Section 271, a company may be wound up by the tribunal if-

- Company is unable to pay the debts

¹ Anubhav Pandey, *A comparative analysis of winding up of a company – Companies Act, 1956, Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016*, (October 23, 2017), https://blog.ipleaders.in/comparative-analysis-winding-company-companies-act-1956-companies-act-2013-insolvency-bankruptcy-code-2016/#_ftnref1

² Sec. 271(1), the Companies Act, 2013

³ Supra note at 1

- If the company has, by special resolution, resolved that the company be wound up by the Tribunal;
- If the company has acted against the interests of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order;
- If the Tribunal has ordered the winding up of the company under Chapter XIX;
- If on an application made by the Registrar or any other person authorized by the Central Government by notification under this Act, the tribunal is of opinion that affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent or unlawful purpose or the persons concerned in formation misfeasance or misconduct in connection therewith and that it is proper that company be wound up;
- If the company has made default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years;
- If the tribunal is of the opinion that it is just and equitable that the company should be wound up.⁴

Inability to pay debts: Under Section 271(1) of Companies Act, 2013, if a creditor to whom company has to pay an amount exceeding Rs. 1 lakh has served a notice at the registered office of the company by registered post or otherwise, which requires the company to pay the due amount and the company has failed to pay the sum within 21 days or If any execution or other process issued by decree of court or order in creditor's favour is returned unsatisfied in whole or in part or if the tribunal is satisfied that the company is unable to pay its debts and the Tribunal shall take into account the contingent and prospective liabilities of the company while determining whether the company is unable to pay its debts.⁵

The petition for winding up can be given under Section 272 of the Companies Act, 2013 by:

- The company; or

⁴ Supra note at 1

⁵ Supra note at 2

- Any creditor or creditors, including any contingent or prospective creditor or creditors; or
- Any contributory; or
- All or any of the above three specified parties; or
- The Registrar; or
- Any person authorised by Central Government in this behalf;
- By the Central Government or State Government in case of Company acting against the interest of sovereignty and integrity of India.⁶

According to Section 274 of the Companies Act, 2013, a person other than the company can also file petition for winding up of a company and if court deems fit then court can give notice of 30 days to the company and that can be extendable for 30 more days in special circumstances.

Voluntary Winding Up

In this, company doesn't go to the court and matter is simply solved between the company and the shareholders in a general meeting. Official Liquidator is appointed by the company who handles the affairs. The process of voluntary winding up will start from the day of passing of resolution in general meeting. According to Section 304:⁷

- If a company in general meeting passes a resolution requiring the company to be wound up voluntarily as a result of the expiry of the period for its duration, if any, fixed by its articles or on occurrence of any event in respect of which the article provide that the company should be dissolved;
- If the company passes special resolution that the company is wound up voluntarily.⁸

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

⁶ Supra note at 1

⁷ Section 304 (1), the Companies Act, 2013

⁸ ibid

The definition of Winding Up is a little changed as the winding up means winding under the Companies Act, 2013 and the process of liquidation under Insolvency and Bankruptcy Code, 2016. Modes of winding up which are discussed in section 270 of the Companies Act, 2013 is now 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.⁹

The procedure for winding up under the new court is as follows:

A declaration has to be submitted with the registrar of the companies, stating that company is not a fraud and will pay its dues and debts. Special resolution has to be passed within 4 weeks of approval of voluntary liquidation and appointment of liquidator, public announcement has to be made in newspaper within 5 days, intimation should be given to ROC within 7 days, estimates of assets and liabilities should be given to a corporate person within 45 days, uncalled capital is realized, the realized amount should be given to shareholders within 6 months, the final report should be sent to corporate person, ROC, the board and application to NCLT and at last within 14 days of receipt the order of resolution has to be submitted.¹⁰

Amendments brought in other relevant Acts

⁹ Supra note at 1 and Companies Act, 2013

¹⁰ Supra note at 1

- In SARFAESI Act, the legislature added the words “subjected to the provisions of the Insolvency and Bankruptcy Code, 2016” to Section 13 (9) in order to avoid any conflict for the line of order at the time of distribution of the proceeds.
- Amendment to RDDBFI ACT, 1993. Section 249 R/w Fifth Schedule of the IBC • In the title, after the words financial institutions, the words, insolvency resolution and bankruptcy of individuals and partnership firms shall be inserted.
- Amendment to Sick Industrial Companies (Special Provisions) Repeal Act, 2003 • Section 252 R/w Eighth Schedule of the IBC. • Section 4B has been amended and same has given liberty to companies before BIFR and AAIFR to file a reference before NCLT within one hundred and eighty days. • No fees is payable for making reference under Insolvency and Bankruptcy Code, 2016 by a Company whose appeal or reference or inquiry stands abated under this clause.
- Amendment to The Indian Partnership Act, 1932 • Section 41(a) of Indian Partnership Act provides for Compulsory dissolution which reads as under: A firm is dissolved- (a) by the adjudication of all the partners or of all the partners but one as insolvent. • Part III of the IBC (Section 78-187) deals with Insolvency Resolution and Bankruptcy for Individuals and Partnerships Firms and accordingly Section 41(a) has been omitted by virtue of Section 245 R/w First Schedule of IBC.
- Amendment to The LLP Act, 2008 • Section 64(c) of LLP Act 2008 which provided for inability to pay debt as a Circumstance in which LLP may be wound up by Tribunal has been omitted by virtue of Section 254 R/w Tenth Schedule of IBC. • The definition of Corporate persons as provided under Section 3(7) of IBC includes a LLP, as defined in the LLP Act. • Ground inability to pay debt no longer subsists and a creditor (financial and operational) can initiate insolvency proceedings against a LLP only before NCLT under IBC.

Conclusion

In the year 1999, according to Justice Eradi Committee Report, 473 winding up cases were pending for over 25 years and in 2015; there were 1479 winding up cases pending for over 20 years, according to information outfitted by the Department of Financial Services. The Insolvency and Bankruptcy Code, 2016 was enforced to ensure time bound settlement of indebtedness which would truly help in taking care of India's bad debt problem.

To assist the procedure of intentional winding up, Government had presented New Regulations as the procedure for willful ending up under Companies Act, 1956 was tedious and there was no stated eligibility of a liquidator. The Code orders that indebtedness experts are to be delegated as Liquidators, such a move is welcome by corporates and experts.

The Code and Regulations give an ideal system to organizations and constrained obligation associations. In spite of the fact that the procedure remains practically like past administration, however the real change has occurred in initiation of winding up process. Prior, organization or any of its lenders could record an intentional winding up request but now organization, chiefs, assigned accomplices or people in charge of practicing its corporate forces can start the twisting up process. Additionally, consent of two thirds of creditors is mandatory under the Code for initiation of voluntary winding up procedure.

To sum it up, now every organization who proposes to wind up is required to abide by the Insolvency and Bankruptcy Code, 2016. The Code is very extensive as against Companies Act, 1956. It is normal that Code would help in defeating deferrals and complexities engaged with the procedure because of quality of four settling experts, High Court, Company Law Board, Board for Industrial and Financial Reconstruction and Debt Recovery Tribunal. It would likewise reduce the workload of courts as all the cases will be registered under the Code.

There are certain amendments in the Insolvency and Bankruptcy Code, 2016 from time to time as there are new issues coming or if felt by the authorities. The power of winding up under supervision of court is still under High Court. Cases of Voluntary winding up will be filed under NCLT after 1st April, 2017. Winding up for inability to pay, will go to NCLT where petition has not been served, it has to be treated as an application under IBC and will go to High Court where petition has been served on the Respondent. Court will wind up cases only those cases where petition has not been served on Respondent.¹¹

¹¹ Supra at 1