

UNIT 05

WINDING UP

MEANING

The term winding up of a company may be defined as the proceedings by which a company is dissolved.

There are 3 ways in which a company may cease to exist in the eye of law; they are:

- (a) Under a scheme of reconstruction and amalgamation a company may be dissolved by the order to tribunal without being wound up (Sec 232)
- b) When the company becomes a defunct company, the Registrar may remove the name of the company from the register of companies. (Sec 248)
- c) Through winding up process.

Winding up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such a dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights. During the process of winding up the company still exists and has corporate powers until dissolution. Till dissolution the property of the company remains vested in the company.

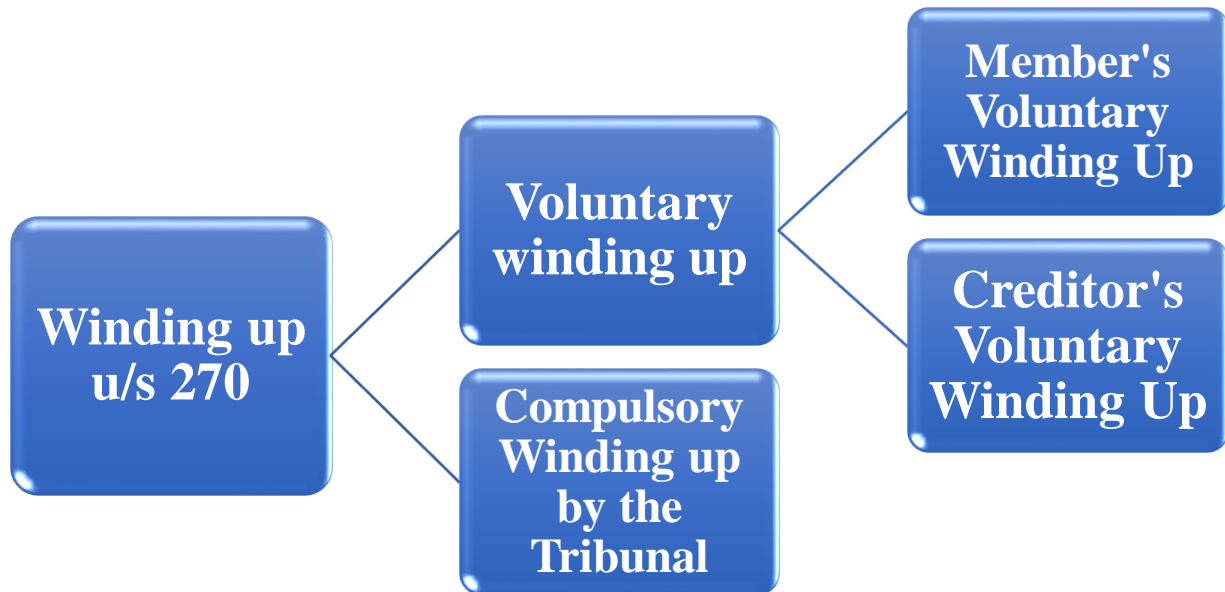
It is pertinent to note that the company is not dissolved immediately on the commencement of the winding up proceedings. As a matter of fact, the winding up of a company precedes its dissolution i.e., the winding up is the prior stage and the dissolution, the next. On the dissolution, the existence of the company comes to an end after an order for its dissolution is passed by the Tribunal except in a scheme of amalgamation, and its name is struck off by the Registrar from the register of companies. But on the winding up, company's name is not struck off from the register. Thus, in between, the winding up and dissolution the legal status of the company continues, and it can be sued in a Tribunal of Law.

However, there are marked distinctions between winding up and bankruptcy, which are:

1. In bankruptcy the property of the debtor is divested from him and rests in the official receivers or the official assignee, while in a winding up the property of the company is not divested from it.
2. An individual can be declared insolvent only when he is unable to pay his debts, whereas a company cannot be declared insolvent even if it is unable to pay its debts. It can only be wound up and this can be done even when it is solvent.
3. The doctrines of relation back and reputed ownership do not apply to winding up.

MODES OF WINDING UP (SECTION 270)

The following chart explains the various modes in which a company may be wound up.

**I. COMPULSORY WINDING UP BY TRIBUNAL (NCLT)**

A company may be wound up by an order of the Tribunal. This is called compulsory winding up. The Tribunal will make an order for winding up on an application by any of the person enlisted in Section 272.

Grounds for Compulsory Winding-up (Section 271)

Section 271 lays down the following grounds where a company may be wound up by the Tribunal.

- a) Special resolution.
- b) Inability to pay debts.
- c) Just and equitable.
- d) Default in filling P/L account and B/S or Annual Return.
- e) Acted against Sovereignty & Integrity of India.
- f) Sick Industrial Company u/s 424G.

1. Special resolution of the company. [Sec 271 (b)]

If the company has by a special resolution resolved that it may be wound up by the Tribunal, the Tribunal may pass a winding up orders.

The power of the Tribunal in such a case is discretionary and should be exercised only where a bona fide case is made out. The Tribunal may refuse to order winding up where it is opposed to public or company's interest.

2. Inability to pay debts [Sec 271 (2)].

The Tribunal may order for the winding up of a company if it is unable to pay its debts. The basis of an order for winding up under this clause is that the company has ceased to be commercially solvent i.e., it is unable to meet its current demands, although the assets when realised may exceed its liabilities. Thus, inability to pay debts is to be taken in the commercial sense. The test of inability to pay debts, therefore, is whether the company can pay its existing liabilities so long as it is a going concern. If the company is not in a position to meet its existing liabilities, a petition for winding up is maintainable even if it may have very valuable assets not presently realisable. According to section 271 of the Act a company shall be deemed to be unable to pay its debts in the following cases.

(a) Statutory notice: If a creditor to whom the company owes a sum of 1,00,000 or more has served on the company a notice at the registrar office for payment and the company has for three weeks neglected to pay or otherwise satisfy him.

[Note: 2013 Act has increased the limit to Rs.1 lacs from Rs. 500]

(b) Decreed debt: If execution or other process issued on a decree or order of any Civil Court in favour of a creditor is returned unsatisfied in whole or in part.

(c) Commercial insolvency: If it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts and in determining whether a company is unable to pay its debts, the Tribunal will take into account the contingent and the prospective liabilities of the company.

3. Just and equitable. [Sec 271 (g)]

The another ground on which the Tribunal can order the winding up of a company is when the Tribunal is of the opinion that it is just and equitable that the company should be wound up. This clause gives the Tribunal a very wide power to order winding up wherever the Tribunal considers it just and equitable to do. The Tribunal will consider such grounds to wind up a company for just and equitable reasons as are not covered by the preceding five clauses. What is just and equitable will depend upon the facts of each particular case.

Following are the instances where the Tribunals have dissolved the companies under the just and equitable clause.

(i) Loss of substratum. It is just and equitable to wind up a company where the company's main object or substratum is gone. The substratum of a company is deemed to be gone when (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss, or (d) the existing and the possible assets are insufficient to meet the existing liabilities of the company..

(ii) Deadlock in management. When there is a deadlock in the management of a company, it is a proper case for winding up under the just and equitable clause.

(iii) Oppression of minority. Where the majority shareholders have adopted an aggressive or oppressive policy towards the minority, it is a sufficient ground for winding up of the company under this clause.

(iv) Fraudulent purpose. Where the company was conceived and brought forth in fraud, or for illegal purposes, it is just and equitable to wind up a company.

(v) Incorporated or Quasi Partnership. Where a private company consisting of members of one or more families or a group of friends, is really in nature of partnership business, any circumstances justifying the dissolution of a partnership (such as misconduct of one or more partners) will constitute just and equitable ground for winding up of the company though they may not constitute sufficient grounds for winding up under the provision of the Companies Act.

(vi) Where the company is a bubble and has no business to carry on, it was wound up.

(vii) Where the company was insolvent and was being carried on for the benefit of the debenture holders, who had taken possession, a winding up order was made.

4. Non filing of Financial Statements or annual returns with the Registrar.

If the company has made a default in filing with the Registrar its balance sheet and profit & loss account or annual return for five consecutive financial years. [Section 271(f)]

5. If company acts against sovereignty and integrity of India. If the company has acted against the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality.

Provided that the tribunal shall make an order for winding up of a company on application made by the Central Government or a State Government. [Section 271(c)]

6. Sick Company. If Tribunal is of the opinion that the company should be wound up under chapter XIX i.e. Where a sick industrial company is not likely to become viable in future and that it is just and equitable that the company should be wound up.

EFFECT OR CONSEQUENCES OF WINDING UP ORDER

The consequences of the making of a winding up order relate back to an earlier date than that on which the order was actually made. This date is called the commencement of the winding up. The winding up commences from the time of the presentation of the petition or where, before the presentation of the petition, the company was in voluntary liquidation from the time of the passing of the resolution for voluntary winding up.

The various consequences of the winding up by the Tribunal are as under:

1. Intimation to Official Liquidator and Registrar. Where the Tribunal makes an order 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 cause intimation thereof to be sent to the official liquidator or provisional liquidator and the registrar. (Sec. 277). The object of intimation to official liquidator is that he may take up the administration immediately.

2. Copy of the winding up order to be filed with the registrar. Note: u/s 445 of 1956 Act, On the making of a winding up order it is the duty of the petitioner in the winding up proceedings and of the company to file with the registrar a certified copy of order within thirty days from the date of the making of the order. But section 277 of the 2013 Act, dispenses the requirement of filing of certified copy of winding up order with ROC by the petitioner and company. The Tribunal shall directly send a copy of winding up order to ROC.

3. Order for winding up deemed to be notice of discharge. Once such an order is made it shall be deemed to be notice of discharge to the officers and employees of company except when the business of the company is continued [Section 277 (3)] Where there is a contract of service for particular term, an order for winding up will amount to wrongful discharge of the appointee and damages will be allowed as for breach of contract of service. But carrying on the business by the liquidator for the beneficial winding-up of a company is not continuing the business of the company so as to prevent the winding up order operating as notice of discharge of the officers and employees.

4. Suits stayed on winding up order. When a winding up order has been made, or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be proceeded with except by the leave of Tribunal. Further no suit or legal proceeding pending on the date of winding up order shall be proceeded with [Sec 279]. Any suit or proceeding instituted without leave of the Tribunal may be regarded as ineffective until leave is obtained.

Any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within 60 days.

5. Responsibility of directors and officers to submit to Tribunal audited books of account (Section 274): The directors and other officers of every company shall ensure that books of account of the company are completed and audited up to date of winding up order made by the Tribunal and submitted to it at the cost of the company, failing which such directors and officers shall be liable for punishment for a term not exceeding 6 months and a fine for an amount not less than 25,000 but which may extend to 5 lacs.

6. Powers of the Tribuna: The Tribunal which is winding up the company shall have jurisdiction to entertain or dispose of-

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company;
- (c) any application made under section 230 by or in respect of the company.
- (d) any question of priorities or any other question whatsoever which may arise in the course of the winding up of the company or which may relate to the winding up of the company.

The claim referred to above must be a claim enforceable at law at the date of the winding up order. A claim which had become time barred on the date of the presentation of the winding up petition cannot be described as a legally enforceable claim.

7. Effect of winding up order. An order for winding up of a company shall operate in favour of all the creditors and of all the contributories of the company as if it had been made on the joint petition of a creditor and of a contributory. (Sec. 278).

8. Official liquidator to be liquidator. On a winding up order being made in respect of a company official liquidator shall by virtue of his office become the liquidator of the company. No other person can be appointed as its liquidation. Every liquidator of a company which is being wound up, within 30 days of its liquidation, give notice of his appointment to the Assessing Officer who is entitled to assess the income of the company otherwise he will be personally liable for the payment of tax which the company will be liable to pay.

APPOINTMENT OF OFFICIAL LIQUIDATOR (SECTION 275)

Who can be appointed Official Liquidator

For the purposes of winding up of a company by Tribunal, there shall be an Official Liquidator who:

- (a) may be appointed from a panel of professional firms of chartered accountants, advocates, company secretaries, costs and works accountants or firms having a combination of these professions, which the Central Government shall constitute for the Tribunal or
- (b) may be body corporate consisting of such professionals as may be approved by the Central Government from time to time or
- (c) such professionals must have at least 10 years of experience in company matters.

Terms Conditions and Remuneration of Official Liquidator

The terms and conditions for the at appointment of the Official Liquidator and the remuneration payable to him shall be specified by the Tribunal, on the basis of the task required to be performed, experience and this qualification.

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.

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.

DUTIES / ROLES AND RESPONSIBILITIES OF THE LIQUIDATOR

The primary duty of a liquidator is to conduct equitably and impartially, and according to the provisions of the Act, the proceedings in the winding up of the company whose liquidator he is appointed. He shall perform all such duties as the Tribunal may impose.

The following are some important duties.

1. Submission of report by Company Liquidator

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.

In addition, section 281 of the 2013 Act also provides that the Company Liquidator shall also make a report on: (i) the viability of the business of the company; or (ii) the steps which, in his opinion, are necessary for maximizing the value of the assets of the company. This is a new requirement. There was no such requirement under the 1956 Act.

2. To take over company's assets.

On a winding up order being made the liquidator must be into custody all the property, effects and actionable claims to which the company is or appears to be entitled. On the passing of an order of winding up, the company's assets are to be treated as being in the custody of the Tribunal. [Section 283].

The liquidator can take the assistance of the chief presidency magistrate or district magistrate as the case may be to obtain possession of books, papers properties and assets of the company.

It may be noted that the official liquidator is only a custodian of the company's property, and the property does not vest in him. The liquidator is a trustee of the company's property for the creditors.

3. To comply with the directions.

The liquidator is bound to follow the directions given by the creditors, or contributories or by the committee of inspection. [Section 292(1)] Any directions given by creditors or contributories at general meetings shall be deemed to override any directions given by the committee of inspection in case of conflict. [Section 292(2)].

4. To summon meetings of creditors and contributories.

The liquidator may summon general meetings of the creditors or contributories whenever he thinks fit for the purpose of ascertaining the wishes. But he must summon such meetings at such times as the creditors or contributories 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)].

5. To keep proper books.

The liquidator must keep proper books and cause entries or minutes to be made of all proceedings at meetings and of such other matters as may be prescribed. Any creditor or contributory may, subject to the control of the Tribunal, inspect any such books, personally or by his agent. [Section 293].

6. To submit accounts.

The liquidator shall at least twice in any year present to the Tribunal an account of his receipts and payments as liquidator. The accounts must be in the prescribed form and shall be made in duplicate and duly verified. The Tribunal must cause the accounts to be audited. For the purpose of the audit the liquidator shall furnish the Tribunal with such vouchers, information and the books as the Tribunal may require. When the accounts have been audited, one copy thereof shall be filed and kept by the Tribunal and other copy shall be delivered to the registrar. Each copy shall be open to inspection of any creditor, contributory or person interested. The liquidator shall cause the account when audited or a summary thereof to be printed and shall send the printed copies by post to every creditor and contributory. (Sec. 294)

7. Appointment of committee of inspection.

Where a direction is given by the Tribunal for the appointment of a committee of inspection to act with the liquidator it is the duty of the liquidator to convene a meeting of the creditors, within two months from the date of such direction, for the purpose of determining who are to be the members of the committee. He shall also, within fourteen days from the date of the creditors' meeting convene a meeting of the contributories to consider the decision of the creditors meeting with respect to the membership of the committee. It is open to the meeting of the contributories either to accept with or without modifications or reject the decisions of the creditors meeting. In the case of rejection, it shall be the duty of the liquidator to apply to the Tribunal for directions. (Section 287).

8. To submit information in pending liquidation.

Where the winding up of a company is not concluded within one year of its commencement, the liquidator shall, unless exempted by the Central Government within two months after the expiry of such year, and thereafter until the winding up is concluded, at intervals of not more than one year or at such intervals as may be prescribed, file a statement duly audited with respect to the position of the liquidation. Such report shall be filed in the Tribunal in case of winding up subject to the supervision of the Tribunal and with the registrar in case of voluntary winding up. The statement is open to inspection by a creditor or contributory. Failure to comply with the above provision makes the liquidator liable for a fine which may extend to 1 lac or imprisonment of 6 months or both for every day during which the failure continues (Sec. 348).

9. Making payments into the Public Accounts of India.

The official liquidator shall pay all moneys received by him as liquidator of the company into the public account of India in the Reserve Bank of India in such manner and at such times as may be prescribed (Sec. 349).

POWERS OF COMPANY LIQUIDATOR [S. 290]

The section has abolished the distinction between powers which could be exercised with sanction and those without such sanction. Now subject to directions of the Tribunal, the company liquidator can exercise following powers:

- (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, and for that purpose, to use, when necessary, the company's seal.
- (c) to sell the immovable and moveable property and actionable claims of the company; he may make the sale by public auction or by private contract and shall have the power to transfer the whole in one lot or in parcels.
- (d) to sell whole of the undertaking of the company as a going concern.
- (e) to raise on the security of the assets of the company any money requisite:

- (f) to invite and settle claims of creditors employees or any other claimant and distribute sale proceeds in accordance with priorities provided in the Act.
- (g) to inspect the records and returns of the company or the files of the Registrar or any other Authority.
- (h) to prove and claim in the insolvency of any contributory for any balance against his estate and to receive dividends in the insolvency.
- (i) to draw, accept and endorse any negotiable instruments on behalf of the company with the same effect as if done in the course of business.
- (j) 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.
- (k) to obtain any professional assistance from any person or appoint any professional in discharge of his duties.
- (l) to take all such actions or sign any paper etc. as may be necessary for winding up company, for distribution of assets and in discharge of his duties and obligations and of the functions as company liquidator.
- (m) to apply to the Tribunal for such orders or directions as may be necessary for winding up of the company.

In the exercise of these powers the liquidator is subject to overall control of the Tribunal.

II. VOLUNTARY WINDING UP

A voluntary winding up of a company is entirely different from a compulsory winding up. Voluntary winding up is winding up by the members or creditors of a company without interference by the Tribunal.

A company may be wound up voluntarily when-

- a) the period fixed by the articles for the duration of the company has expired or an event upon which the company is to be wound up has happened and the company in general meeting has passed ordinary resolution.
- b) the company has for any cause whatever passed a special resolution to wind up voluntarily [Section 304]. The company may be wound up by special resolution even if it is prosperous. No articles of the company can prevent the exercise of this statutory right.

A voluntary winding up commences from the date of the passing of the resolution. [Section 308]. The date of commencement of winding up is important for various matters, such as liability of past members who will not be affected if, on the date of commencement of winding up, a year had elapsed after they ceased to be members.

CONSEQUENCES OF VOLUNTARY WINDING UP

(1) Effect on status of a company.

In the case of a voluntary winding up, the company ceases to carry on the business from the commencement of the winding up except so far as may be required for the beneficial winding up of the business. However, the corporate status and the corporate powers of the company will continue until it is dissolved. (Section 309).

A voluntary winding up does not necessarily operate as notice of dismissal to the company's employees, but there is no change in the personality of the employer. But where the circumstances of the winding up are such that the company can no longer carry on business, its contracts and its servants will necessarily cease, leaving the employees free to claim damages if they are so entitled.

(2) Board's power to cease on appointment of a liquidator.

On the appointment of a liquidator the powers of the board of directors, managing or whole-time directors and the manager. If there be any of these shall cease, except for the purpose of giving notice to the registrar of the appointment of the liquidator. (Sec. 313).

In the appointment of a liquidator the powers of the board of directors cease except so far as the company in general meeting or the liquidator (in a members voluntary winding up) or the committee of inspection or if there is no such committee, the creditors (in a creditors voluntary winding up), sanction the continuance. (Sec. 313).

(3) Avoidance of transfer etc. after commencement of winding up.

In the case of a voluntary winding up, any transfer of shares in the company, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of the winding up, shall be void. (Sec. 334).

(4) Discharge of Employees

A resolution to wind up voluntarily operates as notice of discharge to the employees of the company except.

- (a) When the liquidation is only with a view to 'reconstruction'.
- (b) When business is continued by the liquidator for the beneficial winding-up of the company.

It may be noted, that employees have a right to claim damages for premature termination of their services.

TYPES OF VOLUNTARY WINDING UP

A voluntary winding up may be:

- (A) A members' voluntary winding up.
- (B) A creditors' voluntary winding up.

A. MEMBERS' VOLUNTARY WINDING UP

A member's voluntary winding up takes place only when the company is solvent. It is initiated by the members and is entirely managed by them. The liquidator is appointed by the members. No meeting of creditors is held and no committee of inspection is appointed. To obtain the benefit of this form of winding up, a declaration of solvency must be filed.

Declaration of Solvency. Section 305 provides that where it is proposed to wind up a company voluntarily the directors or a majority of them, may, at a meeting of the Board, make a declaration verified by an affidavit that the company has no debts or that it will be able to pay its debts in full within a period not exceeding 3 years from the commencement of winding up as may be specified in the declaration

(i) Such declaration shall be made within five weeks immediately preceding the date of the passing of the resolution for winding up.

(ii) Shall be delivered to the Registrar before that date.

(iii) Shall also be accompanied by a copy of the auditors on the profit and loss account and the balance sheet of the company prepared upto the date of the declaration and must embody a statement of the company's assets and liabilities as on that date.

PROVISIONS APPLICABLE TO MEMBERS' VOLUNTARY WINDING UP

1. Appointment of liquidator. [Section 310].

The company in general meeting shall appoint one or more liquidators for winding up the affairs of a company and for distributing the assets. The company shall also fix his remuneration and unless his remuneration is not fixed, he will not take charge of his office. Such remuneration cannot be increased in any circumstance whatsoever. The liquidator may be appointed at the meeting at which the resolution for voluntary winding up is passed.

2. Board's power to cease. [Section 313].

On the appointment of a liquidator all the powers of the board and other managerial personnel shall come to an end, except in so far as the company in general meeting or the liquidator sanctions the continuance thereof. However, a resolution for voluntary winding up does not automatically dismiss all servants but if it takes place because the company is insolvent it does operate as a discharge.\

3. Power to fill vacancy in the office of liquidator. [Section 311].

Where a vacancy for whatever cause occurs in the office of the liquidator the company in general meeting subject to any agreement with the creditors fill the vacancy. The general meeting may be called by any contributory or by any continuing liquidator.

4. Notice of appointment of liquidator to registrar. [Section 312].

The company shall give notice to the registrar of the appointment of a liquidator. The company shall also give notice of every vacancy occurring in the office of liquidator and of the names of the liquidators appointed to fill every such vacancy. The notice shall be given by the company within 10 days of the event to which it relates. If default is made in complying with these provisions, the

company and its officers who are in default shall be punishable with fine upto 1000 for every day during which the default continues.

5. Duty of the Liquidator to inform the Assessing officer.

Every Liquidator of a Company being wound up is to give notice of his appointment as liquidator to the Assessing officer, having jurisdiction to assess the income of the company, within 30 days of his appointment. It may also be noted that the official liquidator has been held to be principal officer of the company for income tax assessment purposes."

6. General meeting at the end of each year. [Section 316].

The Company Liquidator shall report quarterly on the progress of winding up of the company in such form and in such manner as may be prescribed to the members and creditors and shall also call a meeting of the members and the creditors as and when necessary but at least one meeting each of creditors and members in every quarter and apprise them of the progress of the winding up of the company in such form and in such manner as may be prescribed. If the liquidator fails to comply with the above-mentioned provisions, he shall be punishable in respect of each failure with fine which may extend to Rs. 10 lakhs.

7. Final meeting and dissolution. [Section 318].

When the affairs of the company are fully wound up, the liquidator shall perform the following duties:

(a) He shall make up an account of the winding up, showing how the same has been conducted and how the property has been disposed of.

(b) He shall call a general meeting of the company for laying before it the said accounts. This meeting is the final meeting of the company. The meeting shall be called by advertisement specifying the time, place and object thereof. The advertisement shall be made not less than one month before the meeting in the official gazette and also in some local newspaper where the registered office of the company is situated. Failure to call meeting is punishable with fine which may extend to 1 lac rupees.

(c) Within one week after the meeting, the liquidator shall send a copy of the account to the registrar and the official liquidator and also a return of the holding of the meeting and the date thereof. If the copy is not so sent or the return is not so made, the liquidator shall be punishable with fine which may extend to 1 lac rupees.

The registrar on receiving the account and either of the returns shall forthwith register the same. The official liquidator on receipt of the account and the return is required to make a scrutiny of the books and papers of the company. The liquidator of the company, its past and present officers. shall afford an opportunity to the official liquidator for this purpose. The official liquidator shall send a report of the scrutiny to the Tribunal. If the report shows that the affairs of the company have been conducted bonafide i.e. not in a manner prejudicial to the interests of its members or public interest. then from the date of the submission of the report to the Tribunal, the company shall be deemed to be dissolved.

If the report shows that the affairs of the company have been conducted in a manner prejudicial to the interests of members or public interest, the Tribunal shall by order direct the official liquidator to make a further investigation of the affairs of the company. For this purpose the Tribunal shall invest him with all such powers as it may deem fit. On receipt of the report of the official liquidator on such further investigation the Tribunal may either make an order that the company shall stand dissolved or make such other order as the circumstances of the case brought out in the report permit.

Dissolution of a Company.

The word 'dissolution' implies bringing the existence of the company to an end.

A dissolved company cannot hold any property or be sued in Tribunal of law. Any property still remaining shall vest in the government on dissolution.

B. CREDITORS' VOLUNTARY WINDING UP

Where a company proposes to wind up voluntarily and the directors are not in a position to make the statutory declaration of solvency, the winding up is a creditor's voluntary winding up. The provisions for creditors voluntary winding up are similar to those applicable to the member's voluntary winding up except that in the former, it is the creditors who appoint the liquidator, fix his remuneration and generally conduct the winding up.

PROVISIONS OF CREDITOR'S VOLUNTARY WINDING UP.

They are discussed as under:

1. Meeting of creditors. (Section 306).

When the declaration of solvency is not made by the directors, the company shall cause a meeting of the creditors of the company to be called on the day or next following day on which the resolution for voluntary winding up is to be proposed. Notice of the meeting of creditors shall be posted to creditors simultaneously with notice of the meeting of the company. The notice calling the meeting of the creditors shall be advertised in the official gazette and once at least in two newspapers circulating in the district where the registered office of the company is situated. The board of directors shall lay before the meeting of the creditors a full statement of the position of the company's affairs together with the list of its creditors and the estimated amount of their claims. One of the directors must preside at the meeting.

Section 306 of the 2013 Act provides that company cannot be wound up voluntarily unless two-thirds in value of creditors of the company are in favour of that. If two thirds in value of creditors of the company are of the opinion that the company will not be able to pay for its debts in full from the proceeds of assets sold in voluntary winding up and pass a resolution that it will be in interest of all parties if the company up by the Tribunal, the company shall within 14 days thereafter file an before the Tribunal. This is a new requirement which was not there in the 1956 Act.

2. Notice to registrar. [Section 306).

The company shall give notice of resolution passed at the creditors meeting to the registrar within 10 days of its passing. If the company fails to send the notice, within the prescribed period, the

registrar of companies, the company, every officer of the company and the liquidator shall be punishable with fine which may extend to 50,000 to 2 lacs for every day during which the default continues.

3. Appointment of liquidator. [Section 310].

The creditors and the company shall appoint a person to be the liquidator. If different persons were nominated, the person nominated by the creditors shall be the liquidator. Any director, member or creditor of the company may within 7 days of the nomination made by the creditors, apply to the Tribunal for an order that the person appointed by the company shall be the liquidator. Where no person is nominated by the creditors, the person nominated by the company shall be the liquidator. On the other hand, if no person is nominated by the company, the person nominated by the creditors shall be the liquidator.

4. Committee of inspection. [Section 315].

The creditors at their meeting may appoint a committee of inspection consisting of not more than five persons. Where such a committee is appointed, the company may also appoint at a meeting such number of persons not exceeding five to act as the members of the committee. The creditors may resolve that any of the person appointed by the company ought not to be the members of the committee of inspection. In such cases, unless the Tribunal otherwise directs, they cannot act on the committee. The Tribunal may appoint other persons in place of persons objected to.

5. Liquidator's remuneration. [Section 310].

Remuneration of the liquidator may be fixed by the committee of inspection or the creditors if there is no committee of inspection. Otherwise, the Tribunal may fix his remuneration. Remuneration fixed as above cannot be increased in any circumstances.

6. Power of board to cease. [Section 313].

The board usually ceases to function on appointment of the liquidator. The board may act in so far as the committee of inspection (if any) or the creditors in general meeting may sanction the continuance thereof.

7. Vacancy in office of liquidator. [Section 311].

The creditors in general meeting may fill up any vacancy caused in the office of the liquidator other than a liquidator appointed by or by the direction of the Tribunal.

8. Meeting at the end of each year. [Section 316].

Where the winding up continues for more than a year, the liquidator shall call a general meeting of the company and a quarterly meeting of the creditors. The liquidator shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year. The object of these provisions is to give regular information to the creditors and shareholders. If the liquidator fails to comply with these provisions he is liable to be fined upto 10 lacs in respect of each failure.

9. Final meeting and dissolution. [Section 318].

As soon as the affairs of the company are wound up, the liquidator shall make up the account of the winding up showing how the winding up has been conducted and property of the company has been disposed of. He shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the accounts before the meetings. Each such meeting shall be advertised in the official gazette and also in some newspaper circulating in the district where the registered office of the company is situated. Within a week after the meeting, the liquidator shall send to the registrar a copy of the account and a return which will be registered. Thereafter the procedure is the same as in member's voluntary winding up.

DIFFERENCE BETWEEN MEMBER'S VOLUNTARY WINDING UP AND CREDITOR'S VOLUNTARY WINDING UP

1. Declaration of solvency is a must in a member's voluntary winding up, whereas it is not necessary in a creditor's voluntary winding up.
2. It is not necessary to have a creditor's voluntary meeting in the case of member's voluntary winding up, whereas in the case of creditor's voluntary winding up, it is a statutory duty of the company to call a meeting of the creditors.
3. The liquidator is approved by the members in case of member's voluntary winding up whereas both members and creditors appoint liquidator in case of creditor's voluntary winding up.
4. There is no committee of inspection in case of member's voluntary winding up, but in case of the latter there is one.
5. In the case of member's voluntary winding up it is the members who control the winding up, and the creditors do not play an active role as the company is solvent. In the case of creditor's voluntary winding up, it is the creditors who control the winding up as the company is considered to be insolvent.
6. In a member's voluntary winding up, the liquidator can exercise some of the powers with the sanction of a special resolution of the company. In a creditor's voluntary winding up, he can do so with the sanction of the Tribunal or the committee of inspection or of meeting of creditors.

LIQUIDATORS' IN VOLUNTARY WINDING UP**APPOINTMENT OF LIQUIDATOR**

In a member's voluntary winding up, the company in general meeting shall appoint one or more liquidators for the purpose of collecting the company's assets and distributing the proceeds among creditors and contributories. If a vacancy occurs by death or resignation or otherwise in the office of the liquidator, the company in general meeting may fill the vacancy. (Section 310 and 311).

In the case of a creditors voluntary winding up, the creditors and the members at their respective meetings, may nominate a person to be the liquidator of the company. However, the creditors are given a preferential right in the matter of the appointment of the liquidator with a power to the Tribunal to vary the appointment on application made within seven days by a director, member or creditor. (Section 310).

Power of Tribunal to Appoint and Remove Liquidator in Voluntary Winding Up

1. If from any cause whatever; there is no liquidator acting, the Tribunal may appoint the Official Liquidator or any other person as a liquidator.
2. The Tribunal may, on cause shown, remove a liquidator and appoint the Official Liquidator or any other person as a liquidator in place of the removed liquidator.
3. The Tribunal may also appoint or remove a liquidator on the application made by the Registrar in this behalf.
4. If the Official Liquidator is appointed as liquidator under section 310 or under this section, the remuneration to be paid to him shall be fixed by the Tribunal and shall be credited to the Central Government.

Notice by liquidator of his appointment.

When a person is appointed the liquidator and accepts the appointment, he shall publish in the official gazette notice of his appointment, in the prescribed form. He shall also deliver a copy of such notice to the registrar. The liquidator shall do this within 30 days of his appointment. Where the liquidator fails to comply with the above provision, he is liable to a fine which may extend to 500 for each day of default. (Section 312).

Effect of the appointment of liquidator.

On the appointment of a liquidator, in a member's voluntary winding up all the powers of the directors, including managing director, whole time directors as also the manager shall cease except so far as the company in general meeting or the liquidator may sanction their continuance. (Section 313).

In the appointment of a liquidator in creditor's voluntary winding up, all the powers of the board of directors shall cease. The committee of inspection or if there is no such committee, the creditor's meeting by resolution may sanction continuance of the powers of the board. (Section 313).

Remuneration of liquidator.

In a member's voluntary winding up, the general meeting shall fix the remuneration to be paid to the liquidators. Unless the question of remuneration is resolved the liquidators shall not take charge of his office. Once remuneration is fixed it cannot be increased. (Section 310).

In a creditors voluntary winding up, the remuneration of the liquidator is fixed by the committee of inspection and if there is no committee of inspection then by the creditors. In the absence of any such fixation, the Tribunal shall determine his remuneration. Any remuneration so fixed shall not be increased (Section 310).

All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall subject to the rights of secured creditors, be payable out of the assets of the company in priority to all other claims. (Section 323).

Removal of liquidator.

In either kind of voluntary winding up, the Tribunal may, on cause shown, remove a liquidator and appoint the official liquidator or any other person as a liquidator in place of removed liquidator. The Tribunal may also remove a liquidator on the application of the registrar.

The term 'on cause shown' does not necessarily mean personal misconduct or unfitness. It means any conduct which would make the liquidator no longer fit to act as such. Where the liquidator disregards the wishes of creditors in an insolvent company and the wishes of contributories in a solvent company, it may be sufficient cause on which Tribunal may remove a liquidator.

A liquidator should not be removed arbitrarily. In *Hardit Singh Giani v. Registrar of Companies, Delhi High Tribunal* ordered the removal of a liquidator on the grounds that:

- (i) he had not deposited certain amounts as required by section 350 of the Companies Act.
- (ii) he had been unco-operative and defiant regarding the recovery of the company's claim.
- (iii) the process of liquidation was a collusive affair between the ex-managing director and the liquidator.

CONSEQUENCES OF WINDING UP

Winding up affects a number of parties. The consequences of winding up are as under

1. Consequences as to shareholders

A member of a company is liable and bound to pay the full amount on the shares held by him. This liability continues even after the company goes into liquidation; for the purposes of winding up, he is described by the Act as a contributory. The term 'contributory' means a person liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of any shares which are fully paid up. Contributory may be present or past. The liability of a present contributory is limited to 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.

2. Consequences as to creditors

The object of winding up is to realise the assets and discharge the liabilities and then if there be any surplus, to pay it off to the shareholders. It is the duty of the liquidator to pay off the liabilities of the company, In order to ascertain the liabilities, the Act requires that all persons having claims of whatever nature against the company should submit proofs of what is due to them. Every kind of a liability, whether present or future, certain or contingent and however difficult of valuation is provable and has got to be proved. This Section applies to proofs of debts where a company is solvent i.e. where its assets are sufficient to pay all its debts and liabilities as well as the costs of the winding up.

Where an insolvent company is being wound up, the insolvency rules will apply and only such claims shall be provable against the company as are provable against an insolvent person.

Right of secured creditors.

The position of a secured creditor in relation to the winding up of a company is quite different from that of an unsecured creditor. He can stand wholly outside the winding up proceedings unless he abandons his security and joins the ranks of unsecured creditors.

A secured creditor has three alternatives before him.

- (i) He may rely on his security for the payment of all that may be due to him and ignore the liquidation altogether; or
- (ii) he may value or realise the security and prove for the deficiency in the winding up, or
- (iii) he may give up the security and prove for the whole amount.

Where the secured creditor proceeds to realise the security, he is liable to pay all the expenses incurred by liquidator for the preservation of the security before its realisation.

Right of unsecured creditors.

All debts due to unsecured creditors are to be treated equally.

When the list of claims is settled the liquidator has to commence making payments.

The assets available to the liquidator are applied in the following orders:

- Overriding preferential payments.
- Cost of the liquidation.
- Preferential payments.
- Debenture holders secured by a floating charge.
- Unsecured creditors.
- Balance returned to the contributories.

3. Consequences as to servants and officers.

A winding up order by a Tribunal operates as a notice of discharge to the employees and officers of the company except when the business of the company is continued. The same principle will apply as regards discharge of employees in a voluntary winding up. Where there is a contract of service for a particular period, an order for winding up will amount to wrongful discharge and damages will be allowed as for breach of contract of service.

4. Consequences of proceedings against the company.

When a winding up order is made, or an official liquidator has been appointed as provisional liquidator no suit or legal proceeding can be commenced, and no pending suit or legal proceeding continued against the company except with the leave of the Tribunal and on such terms as it may impose. In the case of a voluntary winding up, the Tribunal may restrain proceedings against the company if it thinks fit.

It may be noted that law does not prohibit proceedings being taken by the company against others including directors, or officers or other servants of the company.

5. Consequences as to costs.

Where the assets of the company are insufficient to satisfy the liabilities, the Tribunal may make an order for payment out of the assets of the costs, charges and expenses incurred in the winding up. The Tribunal may determine the order of priority in which such payments are to be made. (Section 298).

6. Consequences as to documents.

When a company is being wound up whether by Tribunal or voluntarily, the fact must be made known to all those having any dealing with the company; every document in the nature of an invoice, order for goods or business letter issued in the name of the company, after the commencement of winding up must contain a statement that the company is being wound up. (Sec. 344).

Where a company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, be prima facie evidence of the truth of all matters recorded therein. (Sec. 345). Where an order for winding up of the company by Tribunal is made, any creditor or contributory of the company may inspect of the books and the papers of the company, subject to the provisions made in the rules by the central government in this behalf.

When the affairs of a company have been completely wound up, and it is about to be dissolved, its books and papers and those of the liquidator may be disposed of in such manner as the Tribunal directs. This applies to a winding up by Tribunal.

In the case of a member's voluntary winding up, they may be disposed of in the manner directed by a special resolution of the company and in the case of a creditor's voluntary winding up, in the manner directed by committee of inspection or if there is no such committee by the creditors. (Sec. 347).

QUESTIONS

SECTION – A

1. Define Winding Up.
2. What do you mean by Compulsory Winding up?
3. What do you mean by Voluntary Winding up?
4. Mention the Types of Voluntary Winding up.
5. Who are the liquidator in Voluntary Winding up.

SECTION – B

1. Who can be appointed as Official Liquidator?
2. Explain the Terms Conditions & Remuneration of Official Liquidator?
3. Explain the powers of Company Liquidator?
4. Explain the Consequences of Voluntary Winding up?
5. Explain the Types of Voluntary Winding up.

SECTION – C

1. Briefly explain the Modes of Winding Up?
2. Briefly explain the Effect / Consequences of Winding up Order?
3. Briefly Explain the Roles & Responsibilities of Official Liquidator?
4. Briefly Explain the Consequences of Winding up.