10
Winding Up

10.0 Introduction

Clarification on Companies (Second Amendment) Act, 2002


The Companies (Second Amendment) Act, 2002 (11 of 2003) received the assent of the President of India on 13.1.2003. Government has decided to bring into force the provisions of section 2 and 6 of the Companies (Second Amendment) Act, 2002 (11 of 2003) with effect from 1.9.2003. Notification has been published in the Official Gazette dated 31 March, 2003 as S.O.344 (E). This has been notified to enable the Government to initiate necessary steps to establish National Company Law Tribunal and make it operational.

For the sake of clarity it is stated that this Notification bringing into effect section 6 of the Companies (Second Amendment) Act, 2002 (11 of 2003) will only set in motion all preliminary steps required for establishment of National Company Law Tribunal. Upon establishment of the same a separate Notification regarding constitution of NCLT will be issued. Till such time, jurisdiction of Company Law Board will continue to remain unchanged.

We bring to the attention of students that though the Companies (Second Amendment) Act, 2002 has been passed by the Parliament, only a few provisions (Section 2 and 6) have been notified so far. In other words, despite, the Sick Industrial (Special Provisions) Act, 1985 [SICA] has been repealed, all the provisions of the said Amendment Act, 2002 have not come into force. The reason being though the Government has constituted the National Company Law Tribunal (NCLT) which shall deal with winding-up and rehabilitation of sick companies it has not yet become operational.

In view of the above situation, the provisions relating to winding-up of companies as contained in the legislation prior to the amendment are still having relevance and in view of the fact that entire provisions of the Companies (Second Amendment) Act, 2002 have not come into force, the provisions of the Amendment Act has not been included in this chapter.
10.2 Corporate and Allied Laws

10.1 Dissolution of Company

10.1.1 How dissolution is brought about: A company, being a body corporate, continues in existence until it is dissolved according to law. Dissolution can be brought about in the following ways.

a. By removal of the company's name from the register by the Registrar (without winding-up order) (Section 560): Explanation to this section is covered in Para 10.4 i.e. General Provisions on Winding Up.

b. By order of the Court or the order of the Central Government under Section 396: A company whose undertaking is being transferred to another company under a scheme in accordance with Section 394 may be dissolved by an order of the Court [Section 394 (1) (iv)].

The dissolution of existing two or more companies may take place when the Central Government, by virtue of Section 396, orders the amalgamation of the said existing companies in to a new single company in the public interest.

c. By winding-up: This method is by far the most common one and is followed when for any reason other than those mentioned above, the company's existence is not desired or ought to be terminated e.g., because the object for which the company had been formed has been accomplished, or because the company is insolvent.

d. Effect of dissolution: "The dissolution puts an end to the existence of the company. Unless and until it has been set aside, it prevents any proceeding being taken against promoters, directors, or officers of the company to recover money or property due or belonging to the company, or to prove a debt due from the company. Where, the company is dissolved, the statutory duty of the liquidator towards the creditors and contributories is gone; but if he has committed a breach of his duty to any creditor by distributing the assets without complying with the requirements of the Act, he is liable to damages to the creditor". (Halsbery's Laws of England, 3rd Edn. Vol. VI, Page, 370); Kanhaiya Lal Bhargava vs. Official Liquidator (1965) 35 Comp. Cas. 340)

e. Revival of company after dissolution: Where a company has been struck off the register, the company, or any member or creditor who feels aggrieved, may, within 20 years from the gazetting of the notice, apply to the court to have the company restored to the register. If the Court is satisfied that the company was carrying on business or was in operation when struck off or that it is otherwise just that it be restored to the register, it may make an order accordingly. When a certified copy of this order is delivered to the Registrar for registration, the company would be deemed to have continued in existence as if its name had not been struck off.

A letter or notice referred to above may be addressed to the company at its registered office. If there is no such office, it may be addressed to the company to the care of some director or other officer of the company. If there is no such director or officer whose name and address is known to the Registrar, it may be sent to each of the persons who
subscribed to the memorandum at the address mentioned in the memorandum [Section 560].

f. Revival of defunct company under Section 560 and dissolved company under Section 559:

Section 559

(i) Application for revival must be presented by the liquidator or other person who appears to the Court to be interested.

(ii) Limitation period for application is 2 years of the date of the dissolution.

(iii) Acts done after dissolution and before revival are not validated by order of revival.

10.1.2 Distinction between winding-up and dissolution: These two situations differ from each other in following respects:

(i) Winding-up precedes dissolution. In the former case, the company still remains in existence, while the latter implies that the company is not extant any more (Employer's Liabilities Assurance Corporation vs. Sedwitch....... Co., 1927 A.G.95).

(ii) Winding-up denotes and involves the liquidator's acts of realising and collecting the assets of the company, satisfying its debts and obligations, distributing its capital and surplus assets among the members of the company. But dissolution comes after the liquidator has done all this in the winding-up; ordinarily it implies that the company's affairs have been completely wound-up and that the company is no longer in existence [Kanhaiya Lal Bhargava's, Case / (1965) /35 Comp. Cas. 340].

(iii) The Liquidator, in the case of a winding-up, is the representative of the company on behalf of which he is appointed, but on dissolution he cannot any more represent a person not in existence. In the first case any creditor can prove a debt due to him from the company, while it is not possible to do so after dissolution (Kanhaiya Lal's Case Supra).

10.1.3 Implications of Winding-up  Winding-up more popularly known as liquidation of a company, relate to the proceedings by which (a) all its affairs are wound up, (b) its rights and liabilities are discerned, and (c) the claims of its creditors are settled either fully or to such an extent as may be warranted by the assets of the company. Having met all the obligations of the company out of the assets realised, the surplus assets of the company, if there be any, are distributed among its members in proportion to their rights laid down by the articles of association. On this being done and on compliance with certain other statutory requirements, the company is said to have been dissolved.
The term ‘winding-up’ should not be construed as synonymous with ‘bankruptcy’. In the matter of winding-up, the general rule is that a company may be wound if its members so desire or if it cannot pay its debts or if its extinction is considered desirable on any account. It thus follows that a company may be wound up even if it is otherwise solvent, for instance, winding-up for purposes of reconstruction.

Where a solvent company is being wound up, all debts payable on a contingency and claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company, a just estimate being made, as far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value (Section 528). As regards the right of the creditors of the company which is being wound up for its inability to pay its debts, the same rules prevail as in the case of insolvency law in respect of debts provable, the valuation of annuities and future and contingent liabilities and the respective rights of secured and unsecured creditors (Section 529).

Secured creditors may rely on the security and ignore the liquidation altogether, or value their security and prove for the balance of their debt, or give up their security and prove for the whole amount. Unsecured creditors are paid in the order prescribed by Section 530. Preferential creditors are paid first; liability for dividends is satisfied only if the claims of outsiders are fully met.

So far as the employees are concerned, a winding-up order by a Court operates as a notice of discharge to the employees and officers of the company except when the business of the company is continued [Section 445 (3)]. A voluntary winding-up which involves a discontinuation of the business also operates as a notice of discharge, and may also raise a claim for damage where there is an agreement for employment for a fixed time (Reigate vs. Union Manufacturing Co. (1918) 1KB).

10.1.4 Modes of winding-up: Part VII of the Act deals with the winding-up of a company. Under Section 425, a company may be winding-up either: (i) by a Court (compulsory winding-up) or (ii) voluntarily or (iii) subject to supervision of the Court. Whichever method is adopted, a liquidator or liquidators must be appointed to administer the property of the company, and they first apply the assets of the company towards the payment of debts which have statutory priority in a winding up, next to the payment of creditors in their order of precedence and then distribute the surplus, if any, among the shareholders according to their rights inter se.

10.1.5 Contributories: In a winding up, the term “contributory” means a past or present member. Strictly, it means every person liable to contribute to the assets of a company in the event of its being wound up, and includes holders of shares which are fully paid up and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of the persons who are to be deemed contributories. The term ‘contributory’ includes any person alleged to be contributory (Section 428).

If a member is once placed on the list of contributories, he is liable to the extent of original shares that remain unpaid, unless he proves that he should not have been placed on the list.
For instance, some applicants consented to become shareholders of a company on the condition that their suggestions should be included in the memorandum and articles of association. Their suggestions, however, were not carried out by the promoters but the applicants signed usual applications for shares which were allotted to them and thereby became shareholders of the company. It was held that it was not open to them to object subsequently to their being shareholders of the company on the ground that the condition had not been fulfilled (East Bengal Sugar Mills Ltd., In re. (1941) 11 Comp. Cas 169).

**Liability of contributories as present and past members (Section 426):** When a company goes into liquidation, every member, whether past or present, has to contribute to the assets of the company. However, a past member will not be required to contribute in the following circumstances:

(a) If he had ceased to be a member for a period of one year or upwards before the commencement of winding up;

(b) If the debt or liability of the company was contracted or incurred after he ceased to be a member;

(c) If the present members are able to satisfy the contributions required to be made by them under the Act.

There is, however, a limitation on the amount the members may be required to contribute. In the case of a company limited by shares, any past or present member is not required to contribute in excess of the amount, if any, unpaid on the shares in respect of which he is liable as such member.

In the case of a company limited by guarantee, a past or present member is not required to contribute an amount which is in excess of the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up. In the case of a company limited by guarantee but having a share capital, every member (present or past) of the company is liable, in addition to the guaranteed amount, to contribute to the extent of any sum unpaid on any shares held by him as if the company were a company limited by shares.

When any provisions are contained in a policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted whereby the funds of the company and alone made payable, the liability of the contributory will be subject to such a provision. Dividends, profits or other sums due to a past or present member, must not be treated as debts due from the company payable to that member for setting off the rights of members as against creditors claiming otherwise than in the character of past or present members. But such sums shall be taken in to account for finally adjusting the rights of the contributories *per se* [Section 426(f) and (g)]. According to Section 426 (g), any debt due to a past member in respect of unclaimed dividends cannot be admitted to rank in competition with the debts due to ordinary creditors [Re. Consolidated Goldfields of New Zealand Ltd. (1953) Ch. 689.]

The liability of a member to be included in the list of contributories is not ex contractu but ex lege. This is borne out by Section 426. It provides that the liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the time...
specified in the calls made on him by liquidator. In other words, the liability of a contributory though commencing at the date when he entered into the contract with the company under which he became a member, is only contingent upon the company being wound up, in as much as it is, until a call is made, nothing more than a mere liability to contribute, if necessary, to the assets of the company for payment of the debts due to its creditors and expenses of the winding up. Thus, the liability of a contributory arises \textit{ex lege} and not \textit{ex contractu}. The effect of this provision is to give to the liquidator a new cause of action which a company itself might not have. For instance, if the claim of a company for the realisation of any call from a member is barred by limitation, such member becomes liable to pay all that has remained unpaid on his shares including the unpaid calls when the company goes into liquidation \textit{[In re East Bengal Sugar Mills Ltd. Supra]}. This statutory liability of the contributory is a new liability which arises after the winding-up of a company has started. Therefore, it is no answer to a liquidator’s claim against any person whose name appears on the register of members that there was an agreement with the directors to exclude this statutory liability \textit{[Hansraj Gupta vs. Asthana (1932) P.C. 240]}. A director or manager—whether past or present—whose liability under the provisions of the Act is unlimited shall, apart from his liability to contribute as an ordinary member, be liable to make a further contribution as if he were a member of an unlimited company. No further contribution is required of him.

(a) if he has ceased to hold office for a year or more before the commencement of the winding-up;

(b) if the debt was one which the company had contracted after he had ceased to hold office;

(c) subject to the articles, the director or manager shall not be liable to contribute so as to satisfy his debt or liability of the company and the costs, charges and expenses of the winding-up unless the Court deems it necessary (Section 427).

\textit{Contributories in case of death or insolvency of member or winding-up of a body corporate which is a member:} In the case of death of a member, his legal representative will be liable as contributories whether the death took place before or after his name had been placed on the list of contributories. The assignees of insolvent members are liable as contributories subject to their power of disclaimer. When a body corporate which is a contributory is in the process of a winding-up, it will be represented by its liquidator in regard to its own liability, and the liquidator shall be a contributory subject, however, to his power of disclaimer (Sections 430, 431 and 432).

10.1.6 Official Liquidator

\textbf{a. Appointment of Official Liquidator:} In order that the debts and obligations of a company in liquidation may be satisfied, and the surplus assets distributed amongst the members according to their right to share in such surplus assets, there must be some person to discharge these duties. The person who does all these is called the liquidator.

For the purpose of the Companies Act and in so far as it relates to the winding-up of a company by the Court, there must be attached to each High Court, an Official Liquidator. He is appointed by the Central Government and is a whole time officer, unless the Central
Government thinks that there will not be sufficient work to justify a full-time appointment in which case a part-time officer may be appointed. The Official Receiver attached to a District Court for insolvency purposes, or if there is no such Official Receiver then such person as the Central Government may, by notification in the Official Gazette, appoint for the purpose shall be the Official Liquidator attached to the District Court [Section 448 (1)]. Also one or more Deputy or Assistant Official Liquidators may be appointed by the Central Government so as to assist the Official Liquidator in discharging his function [Section 448 (1-A)].

On a winding-up order being made in respect of a company, the Official Liquidator shall by virtue of his office, become the liquidator of the company [Section 449].

The legal position of an Official Liquidator is that he is public servant and an officer of the Court. Such a position requires him to be honest and impartial and to act in the interests of all concerned [Ripon Press vs. Cheti 55 Mad 180]. He has such powers as are prescribed by Section 457. Section 462 requires him to render account to the Court. In the case of government company, the liquidator shall forward a copy to the Central Government if that Government is a member of the Government company; or to any State Government, if that Government is a member of the Government company or to the Central Government and State Government if both are members, of the Government company.

He is not ‘trustee’, in the sense of the term; although he is sometimes described as such [ex parte Watkin 1857. 1 Dh. E. 130]. He stands in fiduciary relationship with the company he is appointed for [Black and Co., 1872, 8 Ch. 254]. He is debarred from making any secret profit. If he abuses his power and betrays his position, he shall be liable to make good any secret profits that he may have made as well as be liable to be removed by the Court. Thus, he is a trustee in the sense that he must act in the interest of the company, the creditors and the contributories. He should not act in his own interest [Silk Stone & Haigh Moor Co. 1900, 1 Ch. 167].

b. Appointment of Provisional Liquidator: After a winding-up petition has been presented, but before a winding-up order has been issued, the Court may appoint the Official Liquidator as the provisional liquidator. But prior to such an appointment being made, the Court is bound to give notice to the company and also a reasonable opportunity to make its representation. The Court may, however, raise this notice for special reasons which must be recorded in writing. The provisional liquidator will be vested with powers of liquidator, unless they are limited or restricted to any extent by the appointing Court. On winding-up order having been made, the Official Liquidator ceases to be provisional liquidator and becomes the liquidator [Section 450].

Generally, a provisional liquidator will not be appointed unless a strong case is made out by showing the necessity for such an appointment and unless it is proved that the property of the company needs be taken possession of immediately [In re-Dry Docks Corporation of London, 1886 39 Ch. D. 309; East Punjab Pictures vs. Jhabar Mal 1940 East Punjab 139]. His appointment is temporary and continues till the appointment of the Official Liquidator. The reason for his temporary appointment is that there must be some persons to take proper custody of the company’s property so that it debts and obligations are met with equitably and in accordance with the provisions of the Act and fraudulent preference is prevented [In re-Dry
A liquidator may be removed and replaced by another, if the Court is satisfied that it is for the general advantage of those interested in the assets of the company

*Re Adom Eytton Ltd. (1887) 36 Ch. D. 209.*

### c. Powers of Liquidator

A liquidator has the following powers which he must exercise with the sanction of the Court:

1. to institute or defend any suit, prosecution or legal proceeding, civil or criminal, in the name and on behalf of the company
2. to carry on the business of the company, so far as may be necessary for its beneficial winding-up,
3. to sell movable and immovable property and actionable claims of the company by public auction or private contract in whole or in parcels,
4. to raise any money required, on the security of the assets of the company
5. to do such other things as may be necessary for the winding-up of a company and the distribution of its assets [Section 457 (1)].

The Court may order that the liquidator can exercise the above powers without the sanction or intervention of the Court. However, in such cases, the liquidator, in exercising the aforementioned powers, will be subject to the control of the Court (Section 458).

The following is a list of powers which he can exercise without the consent of the Court:

1. do all acts and to execute deeds, receipt and other documents for and on behalf of the company and use for this purpose the company’s seal;
2. to inspect the records and returns of the company on the files of the Registrar without payment of any fee;
3. to prove rank and claim of the insolvency of any contributory for any balance against his estate and to receive dividends in his insolvency, in respect of that balance, as a separate debt from the insolvent, and rateably with the other separate creditors;
4. to draw, accept, make and endorse bills of exchange, hundi or promissory note in the name and on behalf of the company as if these have been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;
5. to take out in his official name, letters of administration to any deceased contributory and do any other acts needed for obtaining payment of money due from the contributory or his estate and
6. to appoint an agent to do any business which he himself is unable to do [Section 457 (2)].

All the above-mentioned powers, exercisable by the liquidator are subject to the control of the Court. Any contributory or creditor may apply to the Court in regard to the exercise of the powers conferred on the liquidator [Section 457 (2)].

A liquidator in a voluntary winding-up, with the sanction of a special resolution in case of member’s winding-up, and, or Court or Committee of Inspection or (if there is no such committee) of a meeting of the creditors in creditor’s voluntary winding-up, can exercise
powers specified under clauses (a) to (d) of Section 457 (1) [i.e., powers (i) to (iv) aforementioned which are exercisable with the sanction of the Court [Section 512 (1) (a)]. The exercise of these powers, however, will be subject to the control of the Court [Section 512 (2)]. The liquidator may

(i) without the sanction referred to in Section 512 (1) (a) exercise any of the other powers given by the Act to the liquidator in a winding-up by the Court;

(ii) exercise the power of the Court, under the Act, of settling a list of contributories which shall be prima facie evidence of the liability of the person named therein to be contributories

(iii) exercise the powers of the Court of making calls:

(iv) call general meetings of the company to obtain the sanction of the company by ordinary or special resolution as the case may require, or for any other purpose he may think fit [Section 512 (1) (b) to (c)].

A liquidator may (a) with the sanction of the Court when the Company is being wound up by or subject to the supervision of the Court and (b) with the sanction of a special resolution of the company in the case of the voluntary winding-up;

(i) pay any class of creditors in full;

(ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent; ascertained or sounding only in damages against the company or whereby the company may be rendered liable or

(iii) compromise any call or liability to call, debt and liability capable of resulting in a debt, and all claims, present or future, certain or contingent, subsisting or alleged to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way concerning or affecting the assets or liabilities or the winding-up on such terms and conditions as may be agreed, and take any security for the discharge of any such call, debts, liability or claim and give a complete discharge in respect thereof.

In the case of voluntary winding-up, the powers aforementioned exercisable by the liquidator are subject to the control of the Court. Any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of any such power [Section 546 (2) and (3)].

The Supreme Court may make rules under Section 643 as regards the manner in which the liquidator should exercise power under clauses (ii) and (iii) of Section 546 (1) without the sanction of the Court.

d. Duties of Liquidators: The following are the main duties of a liquidator or provisional liquidator, as the case may be, as contemplated by the Act.

(1) To take into custody or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled (Section 456). For this purpose, the liquidator, or provisional liquidator as the case may be, may in writing request the Chief
President Magistrate or the District Magistrate within whose jurisdiction such property, effect or actionable claims or any books of account or other documents of the company may be found to take possession thereof. Thereupon, the Chief Presidency Magistrate or the District Magistrate may after having given to any party such notice as he may think fit, take possession of them and deliver the same to the liquidator or the provisional liquidator [Section 456 (1A)].

For securing compliance with the provisions of Section 456 (1A), the Magistrate aforementioned may take or cause to be taken such steps and use or cause to be used such force as he considers necessary [Section 456 (1B)]. All the property and the effects of the company shall be deemed to be in the custody of the Court as from the date of the winding-up [Section 456 (2)].

(2) To submit a preliminary report to the Court giving the particulars mentioned in Section 455.

(3) To keep, in the manner prescribed, proper books in which he shall cause entries or minutes to be made of proceedings at meeting and of such matters as may be prescribed (Section 461).

(4) To summon meeting of the creditors and contributories in the manner hereinafter stated under the head “Committee of Inspection” [Section 464].

(5) To pay the moneys, received by him as liquidator, or any company into the Public Account of India in the Reserve Bank of India (Section 552) and not into his private bank account (Section 554). But the voluntary liquidator is to pay the moneys into a scheduled bank to the credit of “Liquidation Account of X & Co. Ltd./X & Co. Private Ltd/X & Co.” (Section 553).

(6) To pay forthwith dividends payable to creditors, which had remained unpaid for 6 months after the date on which they were declared and assets refundable to any contributory, which have remained undistributed for six months after the date on which they become refundable into the Public Account of India Companies Liquidation Account in the Reserve Bank of India in a separate account called “Company’s Liquidation Account” [Section 555 (1)].

(7) To summon meetings at such times as the contributories, by resolution, direct, or whenever requested to do so by not less than one-tenth in value of creditors or contributories, as the case may be [Section 460 (3) (b)].

(8) To obey directions given by resolutions of creditors or contributories or by the Committee of Inspection in the administration of the assets of the company and the distribution thereof among its creditors [Section 460 (1)]. Note that any directions given by the creditors or contributories at any general meeting shall in case of conflict, be deemed to override any direction given by the committee of inspection [Section 460 (2)].

(9) To submit the accounts for inspection to Committee of Inspection [Section 465 (2)].

(10) To account for secret profit made by him.

(11) To be impartial between creditors, members, etc.
(12) To obey the directions of the Court with regard to disposal of books of the company (Section 550).

(13) To file periodical report with the Court (Section 551).

(14) To notify on invoices that the company is in liquidation (Section 547).

(15) To duly observe all the requirements of the Act [Section 463 (1)].

(16) The Ministry of Corporate Affairs have been reported by the Official Liquidators that they are facing problem in e-filing of Income Tax Returns in compliance as they are required to mention PAN No. of the person who files the return, representing the company in liquidation. The Ministry has proposed following steps to be taken by Official Liquidators (OL) vide General Circular No. 41/2011 dated 6th July, 2011:

   (i) To check whether the company which has come in liquidation has a PAN and takes possession along with other records.

   (ii) If PAN is not available in the records, the PAN No. of the company shall be obtained from concerned ITO.

   (iii) There are cases where no certificate of Registration and/or Article of Association/Memorandum of Association are available. For this following action be taken:

      (a) If the company has no assets, it must be got liquidated and there is no need to apply for PAN.

      (b) If the company has assets, the concerned ROC be requested to send documents about the company for applying to concerned ITO for obtaining PAN.

   (iv) In the verification column of the ITR, OL will mention his personal PAN as this is only for the purpose of Verification Number obtained in official designation.

   (v) As Representative Assessee, (OL) official address should be given in Part A-General Information under column No.(b).i.e. address of Official Liquidator’s office would be mentioned as the address of the company under Liquidation.

   (vi) Since this is a regular activity, following actions be taken:

      (a) Staff be trained to prepare and file application for PAN with outsourced agencies of CBDT namely NSDL and UTI;

      (b) All IT Returns filing is now on-line. Hence staff be trained to do the same. No CA firms/consultants be employed for above tasks.

(17) To participate in public examination of directors, etc. (Section 481).

(18) To forward dissolution order to Registrar within 30 days from the date thereof [Section 481 (2)].

(19) The Ministry of Corporate Affairs has noticed that certain courts have not allowed fees to be paid to the Chartered Accountants from Common Pool Fund in cases where petitions are filed in respect of companies under liquidation having no assets.
The Ministry vide General Circular No. 42/2011 dated 7th July, 2011 has decided that in all such cases following steps be taken:

(i) OL will take permission of Court to appoint a Chartered Accountant.

(ii) OL will appoint Chartered Accountants for issuing necessary certificate.

(iii) The terms and conditions of payment of fees to the CAs in such cases will be decided by a Committee consisting of concerned OL and ROC, chaired by the RD.

(iv) Each OL will maintain a list of local CAs/CA firms and selection should be done from them only.

The payment of fees to CAs in this respect will be made out of the Budget Head “Office Expenses”.

Pro-active action in case of winding up petitions - The Ministry of Corporate Affairs has noticed that winding up petitions are filed by creditors, stake holders and management before Hon'ble High courts without providing full information. This leads to waste of valuable time of Hon'ble Court and also delays completion of winding up process as well. In order to speed up the winding up process and to introduce best international practices the winding up process, the Ministry vide General Circular No. 54/2011 dated 26th July, 2011 has decided that following actions will be taken by concerned OL:-

(a) OLs shall post one of the staff members to the Company Court to keep track of all cases where applications have been filed for winding up, but orders for winding up are yet to be issued by the Court.

(b) For all cases pending till date and in future as well, information shall be obtained by OL from “institution register” maintained in High Court and action as below must be taken in all cases.

(c) In each case the OL will file an application praying to the Court to direct the management of the company to submit following information duly verified by a chartered accountant:/ a Company Secretary/ a Cost Accountant in practice-

(i) The current addresses of the Directors, Company Secretary and Statutory Auditor of the company;

(ii) Location and physical details of each immovable asset of the company along with its current valuation;

(iii) The details of all the debtors and creditors with their complete addresses and occupations;

(iv) The details of each movable asset of the company along with value;

(v) The details of workmen/employees and any amount outstanding to them;

(vi) The details of all movable and immovable assets held in the personal names of director by providing its location, value, dates of acquisition and nature of right, title and interest therein;
(vii) Copies of last three years audited balance sheet of the company; and
(viii) The details of location of the registered office of the company.

(d) RDs will ensure that in all pending cases, the applications are moved by OL before the Court before the next date of hearing and in all new cases, these are filed before the Hon'ble Court before the second hearing of the case.

(e) RDs will ensure that a standard draft is prepared by them after taking legal advice and the same is used in all cases by OLs.

21 Scrutiny inspection and investigation in all winding up cases- The Ministry of Corporate Affairs has noticed that winding up petitions are being filed by management after having committed major violations under the Companies Act, 1956 as well as misappropriation of funds of the company. Winding up of such companies are also being filed by creditors. In order to curb such malpractices, Ministry vide General Circular No. 55/2011 dated 26th July, 2011 has decided that following procedure may be followed in all such cases:-

(a) The moment winding up petition is filed before the Court, Official Liquidator (OL) will obtain a copy of petition and forward the same to the Registrar of Companies (ROC) concerned.

(b) ROC will have a scrutiny of the details/documents available in respect of the company in MCA21 registry and will submit a preliminary report to the Ministry within a week time for inspection or investigation, if so required, containing following information for the past five years of the date of filing of petition:-

(i) History of the company, viz incorporation, maintenance of registered office, main object and present business activities;

(ii) Management pattern, including details of directors/nominee directors and their directorship in other companies;

(iii) Capital structure and shareholding pattern;

(iv) Financial position and working results;

(v) Comments on filing position and compliances of Schedule VI read with Accounting Standards;

(vi) Nature of complaints registered on MCA-21, their nature and any noticeable findings;

(vii) Whether any complaint was received alleging that the company is involved in fraudulent activities, siphoning of funds etc. If so, the details thereof.

(viii) Whether any scrutiny/inspection was carried out, if so, the details thereof;

(ix) Whether the company is having any holding or subsidiary company, if so, details thereof;
10.14 Corporate and Allied Laws

(x) Whether company has raised funds through IPO, if so, the utilization of amount collected, compliance of provisions of the Act for deviation from the object stated in Prospectus/Offer Document; transactions with related parties;

(xi) In case of public company, whether it has accepted public deposit. If so, whether the payment of matured amount including interest was made as per schedule. In case any amount is still pending, the details of amount and interest thereon.

(xii) The quantum of unsecured loan amount and related party transactions thereto.

(xiii) Secretarial reports and qualifications made by the auditors on accounts of the company;

(xiv) Whether company or its members/creditors have requested for investigation into the affairs of the company, if so, the details thereof.

(c) MCA will take a final view in the matter within a period of 15 days from the date of receipt of preliminary report from ROC. If any inspection under Section 209A and/or investigation under Section 235/237 of the Act are ordered, the same will be completed by the ROC and forwarded to the OL within 30 days.

(d) The OL will place the report before the Hon’ble High Courts for seeking appropriate order/action under Section 539 to 544 and other relevant provisions of the Act. Simultaneously, necessary action as per law will be initiated against the director, ex-director and key management of the company for any violation of law/Companies Act, 1956.

(e) These cases will be monitored in the monthly staff meeting of Regional Directors.

e. Information as to pending liquidations: Section 551 (1) prescribes that when the winding-up of a company is not concluded within one year after its commencement the liquidator shall, unless exempted from so doing by the Central Government/Regional Directors, within two months of the expiry of such year and thereafter, until the winding-up is concluded, at intervals of not more than one year or at such shorter interval, if any, as may be prescribed. The statement shall contain necessary particulars and be audited by a Chartered Accountant. These particulars must be with respect to the proceedings in and position of the liquidation. In the case of a winding-up being carried on by or under the supervision of the Court, the aforesaid statement is to be filed in the Court but in the case of a voluntary winding-up, it is to be filed with the Registrar. But an audit is not necessary in case of winding-up by the Court, where provisions of Section 462 apply.

Simultaneously with the filing of a copy of the statements of account in the Court, a copy shall be filed with a Registrar [Section 551 (2)]. In the case of a government company, the copy of the Statement of account shall be filed with the Central Government if that Government is a member, or to the State Government if that Government is a member or to the Central Government and any State Government if both are members of the Government Company [551 (2A)]. Any person stating himself in writing to be a creditor or contributory is entitled all
reasonable times on payment of the prescribed fee to inspect the foregoing statements of account and to receive a copy thereof or an extract therefrom [Section 551 (3)].

f. **Audit of Liquidator’s Accounts:** As has been stated earlier, Section 462 (1) prescribes that the liquidator shall, during his tenure of office, present to the Court an account of his receipts and payments.

Section 462 (3) prescribes that the Court shall cause the accounts to be audited as it thinks fit. A copy of the accounts must be filed and kept by the Court and the same be open to inspection by any creditor, contributory or any person interested [Section 462 (4)]. In the case of a government company, the liquidator shall forward a copy to the Central Government if that Government is a member of the Government company or to any State Government if that Government is a member or to the Central Government and State Government if both are members of the Government company [462 (4A)]. Section 462 (5) provides that the liquidator shall cause the account when audited, or summary thereof to be printed and shall send a printed copy of the accounts or summary by post to every creditor or to every contributory. But the Court is empowered to dispense with the compliance of this provision.

g. **Control exercisable by Central Government over Liquidator:** The Central Government, according to the provisions contained in Section 463, is empowered to take cognisance of the conduct of the liquidator of companies which are being wound-up by the Court. If, on the application of any creditor or contributory, it is found that a liquidator is not faithfully performing the duties and fully observing the requirements imposed on him by the Act, rules or otherwise the Central Government must enquire into the matter and take such action as it may think expedient. Also, the Central Government may at any time (a) require any liquidator to answer any enquiry in relation to any winding-up in which he is engaged; or (b) direct a local investigation to be made into the books and vouchers of the liquidator; or (c) apply to the Court to have him examined on oath concerning the winding-up.

### 10.2 Winding-Up By Court

#### 10.2.1 Circumstances:

Section 433 deals with the circumstances in which a company may be wound up by the Court. These are as follows:

(a) If the company has by a *special resolution* resolved that it shall be wound up by the Court;

(b) if the company defaults in delivering the statutory report to the Registrar or in holding the statutory meeting. But instead of ordering such a company to be wound up, the Court may direct the report to be filed or the meeting to be held;

(c) if the company does not commence its business within a year from its incorporation or suspends its business for a whole year. It should be noted that the power of the court to wind up, when the company has not carried on business for a year, is discretionary and it will not be exercised unless there are indications that the company has no intention to start or to continue its business. However, the Court would not grant an order against the wishes of a majority of the contributories if the delay in commencing, or the interruption of, the business is explained.
and if it is satisfied that business would be commenced or resumed. [Murtidhar vs. Bengal Steam Co. Ltd., (1921) I.L.R. 47 Cal. 654];

(d) if the number of members is reduced below seven in the case of a public company or below two in the case of a private company, the court would, however, permit the company to wind up itself voluntarily. In this connection, it is necessary to recall that according to the provisions contained in Section 45 of the Act a member is personally liable for the debts of the company if the membership falls below the statutory minimum and the business is carried on for more than six months after the number has been so reduced and such a fact is within the knowledge of the shareholders;

(e) if the company is unable to pay its debts. Under Section 434, a company is deemed unable to pay its debts in any of the following circumstances:

(i) If a creditor of the company, to whom the company by assignment or otherwise owes a sum exceeding Rs.500, has demanded the same in writing, and the company has for 3 weeks thereafter neglected to pay the amount or to secure or compound for it to the reasonable satisfaction of the creditor.

The above-mentioned letter of demand may be delivered by registered post or otherwise at the registered office of the company. The meaning of the word “delivered in respect of a registered letter cannot be limited to cases when the registered letter is accepted by the addressee. A tender of such a letter, even if it is refused by the assesse, is a good delivery. The refusal to take the delivery of the letter precludes the addressee from pleading ignorance of its contents.

Prior to an order for winding-up of a company being made, it is required to be shown that the debt due from the company is presently payable and that the title of the petitioner is complete. A petition cannot be supported on the allegation that some debt is due, unless it was debt for which a statutory demand was made. [In Re. Jambad Coal Syndicate Ltd. I.L.R. 62 Col 294].

The demand under clause (i) above is called statutory notice. Notice served at some place other than the registered office of the company will be invalid [Ankhtiarpur Bihar Light Railway Co. Ltd. vs. Union of India [1954] 93 Cal. L.J. 271]. But if the company has no registered office, then the notice of demand for the payment of the debt may be given at the place where the company carries on business [British & Foreign Apparatus Co., 1865), 12L.T. 368]. Where the debt is bona fide disputed, clause (i) does not apply:

(ii) If execution or other process issued on a decree or order of any Court in favour of the creditor of the company is returned unsatisfied in whole or in part; or

(iii) If it is proved to the satisfaction of the Court that the company is unable to pay its debts.

A company may be wound up even when its assets are valuable, if they are locked up in investments and the company is carried on at a loss. In considering whether a company is able to pay its debts, the company’s contingent and prospective liabilities have to be taken into account, and, therefore it may be unable to pay its debts, although it has paid its debts as they become due, if its existing and probable assets will be insufficient to meet its prospective liabilities.
To justify the application of clause (i) above, the company may be, in the words of Sir William James, V.C. “commercially insolvent”. Insolvency may be proved easily by notice under clause (i); under clause (ii), it is more difficult to prove to the satisfaction to the Court. For instance the fact that the liabilities of a company far exceed its assets does not ipso facto mean that the company is unable to pay its debts and does not give rise to a ground for compulsory winding up under Section 433. It is rather the “commercial insolvency” (i.e., the circumstances in which the existing assets and liabilities” are such as to make the Court feel satisfied that the existing and probable assets would be insufficient to meet the existing liability”) which affords an occasion for compulsory winding-up on the ground of inability to pay off its debts. A particular company may have the capacity to meet the demands of its creditors; in that case, a winding up order would be unjustified [Krishnaswamy vs. Stressed Concrete Construction (Pvt) Ltd. AIR. 1964 Mad. 191].

In the Registrar of Companies, Punjab vs. Ajanta Lucky Scheme and Investment Co. Private Ltd. and Others (1973), 43 Comp Cas. 314, the Registrar of Companies filed petition for the winding-up of the respondent company under Section 433 (e) read with Section 439 (5) of the Act on the ground that the company was unable to pay debts and that its liabilities exceeded its assets. The two issues that emerged therefrom were as follows, viz. (a) whether the company was unable to pay its debts and meet its liability; and (b) whether it was a proper case for winding-up. Held: (a) That for determining the company’s ability or otherwise to pay its debts, it was to be considered whether the company was able to meet its liability as and when they accrued due. Section 434 of the Act prescribes the circumstances in which a company was to be treated as unable to pay its debts. Admittedly, none of these circumstances was present in the case in question and no complaint had even been received by the company from its creditors as regards non-fulfilment of any of their claims against the company. In a case where no debt had been due, a demand therefore could not be made. The mere fact that certain liabilities might accrue due in future, which could exceed the existing assets of the company, would not necessarily lead to the conclusion that the company would be unable to meet its liabilities when they accrued due. The mere fact of the company’s liabilities being in excess of its assets could not ipso facto be a ground for putting the company into liquidation. The test would be that the company should be commercially solvent, i.e., the company ought to be on a position to meet its liabilities as and when they arose: (b) that there was no ground for winding-up, because it was shown that (i) the paid-up capital had augmented, every year the business flourished, there were additions to list profit and the subscribers’ claims on maturity had been met; and (ii) any creditor or contributory or even the Reserve Bank had never lodged any complaint against the financial stability of the company.

(f) “just and equitable” rule: Where there is a petition of the Court to wind up a company on the ground that it is “just and equitable”, the court has power to make a winding-up order in any case where the special circumstances are such that it appears just to make such an order. Such orders have been made by the Court in the following circumstances:

(i) Where the substratum of the company has disappeared, e.g., where the main object of the company was to acquire and work a mine or patent or concession which could not be obtained or where the mine was worthless or the patent was invalid or the concession has lapsed [Re, German Date Coffee Co. (1882) 20 Ch. D. 169].
A company will not be wound up because it has ceased to carry on one of several businesses authorised by its memorandum unless, upon a fair construction of the memorandum, that business is regarded as the main object of the company [Re. Amalgamated Syndicate (1897) 2 Ch. 600]. Similarly, a company which has amalgamated with another company cannot be wound up on the ground that it has ceased to carry on business as a separate company.

Thus the substratum of a company is deemed to have disappeared or gone, if the main object for which the company was formed has become impracticable, i.e., permanently impracticable. “Usual tests for determining whether the substratum of the company has disappeared are whether: (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, which means that there is no reasonable hope that the object of trading at a profit can be attained or (d) the existing and probable assets are insufficient to meet the existing liabilities” [In re Kaithal and General mills Co. Ltd., 1951, 31, Comp. Cas. 461].

Where the substratum has gone, the Court can wind-up the company, even though the majority of shareholders oppose the winding-up order. But before the Court can wind-up on this account, it must be proved that the whole of the business of the company has become impossible of being carried on. The question whether the substratum has gone or not would depend not on the intention of the Board of Directors or of the shareholders, but would depend upon, and should be decided by the Court, on a true and accurate construction of the memorandum of association and the actual facts of the case [Mohan Lal Mehta vs. Chunilal Mehta (1962) 32 Comp. Cas. 970]. If there are two or more main objects and some are frustrated and some are pursued, the company cannot be wound up. All the main objects must be destroyed in order to justify winding-up [Kitson & Co. (1946) I.A.E.R. 435 (C.A.)]. It should be noted that even if the substratum is gone, if the members do not ask for winding-up, carrying on of the other objects of the memorandum will not be ultra vires.

(ii) Where there is a deadlock or a crisis in the management of a company, e.g., where the two sole shareholders, who were also directors, were not on speaking term owing to disagreement [Re. Yenidje Tobacco Co. 1916, 2 Ch. 426]; Where there is a deteriorating state of management and control of business owing to sharp differences between the members as reflected in their resolutions at their meetings [Vijayalakshmi Talkies vs. Rao. A.I.R. 966 Andh.Pr.285]; where the mismanagement is such that there is no practicability of remedying it [Rajamundry Electric Corporation vs. Rao, A.I.R. 1955 S.C. 213]. However, factions, quarrels; etc., among shareholders are not sufficient grounds [S.S. Raj Kumar vs. Project Castings Private Ltd. (1968) I Comp. L.J. 41].

(iii) Where the company has been formed to carry on a fraudulent or an illegal business.

(iv) If the company is a “bubble”, i.e., if it never had any business to carry on [Re London & Country Coal Co. 1867, 3 Eq. 355].

(v) Where the company is insolvent and is being carried on for the benefit of the debenture holders [Re. Clandown Colliery Co. (1915), I Ch.369].

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(vi) Where the petitioner was excluded from all participation in the business.

(vii) Where preponderance of voting power was permanently vested in a Board in which minority shareholders had justifiable no confidence [Loch vs. John Blackwood Ltd. (1924) A.C. 783].

Clause (f) of Section 433 should not be construed as ejusdem generis [i.e. of the same kind or natural with the other clauses [a] to [c] of that Section. The ground need not at all be similar to any of the other grounds mentioned in Sectioned in Section 433.

10.2.2 Alternative remedy to winding-up in cases of Oppression: Cases have arisen from time to time where minority shareholders have found it difficult to resist oppression by the majority. Section 397 provided that where the affairs of a company are being conducted in a manner oppressive to some members the Company Law Board may, with a view to bringing to an end the matters complained of make such order as it think fit to remedy the position, when the winding-up of the company would unfairly prejudice the complaining members. A similar relief can be applied for in the case of mismanagement, where the affairs of the company are being conducted in a manner prejudicial to the interests of the company, or when a material change in the management or control of the company or in its constitution is likely to prejudice the interest of members of the company [Section 398].

10.2.3 Who may petition for winding-up? [Section 439]: The various persons who can make an application for the winding-up a company through Court are:

(1) the company;

(2) any creditor or creditors, including any contingent or prospective creditor or creditors;

(3) any contributary or contributories;

(4) all or any of the above parties, together or separately;

(5) the registrar; and

(6) any person authorised by the Central Government in a case falling under Section 243 of the Act (i.e., when the Central government is satisfied that it is just and equitable that the company should be wound up on the ground that the business of the company is being conducted in a fraudulent or unlawful or oppressive manner or that the company was formed for any fraudulent or unlawful purpose, etc.

A creditor has a right ex debito justitiae [i.e., a remedy which the applicant gets as a right] to a winding-up order if he can prove that he claims an undisputed debt and that the company has failed to discharge it. Under Section 439 (8), a contingent or prospective creditor, however, must obtain leave of the Court, give security for costs and the Court must be satisfied that there is a prima facie case for winding-up of the company. The Central Government or any State Government or Municipal or other local authority to whom any tax or other public charge is due is also an entity comprised in the term creditor. It has been held in Hari Nagar Sugar Mills Co. Ltd. vs. M.W. Pradhan (1962), 2 Com. LJ. 17 S.C that a receiver of creditors, properties is also a creditor and as such he has a right to present a petition. He is creditor by statutory assignment. A secured creditor, the holder of any debentures [including
debentured stock] whether or not trustees have been appointed in respect of such and other like debentures and also the trustee for the debenture-holders are creditors and hence entitled to present a petition for winding-up [Section 439 (2)].

A contributory can present a petition only when: (i) the number of members falls below 7 or below 2 in the case of a public or private company respectively or (ii) he holds shares which were originally allotted to him or has held shares for six out of the eighteen months prior to the commencement of winding-up or the shares have devolved on him through the death of a former holder [Section 439 (4)]. A holder of fully paid-up shares is also entitled to present a petition. This right of his as a contributory cannot be excluded on the ground that the company has no assets at all or that it may not have any surplus assets left for distribution among the shareholders after the satisfaction of its liabilities [Section 439 (3)].

The Registrar may present a petition for winding-up only on the ground that default has been made in delivering that statutory report to him or in holding the statutory meeting, or that the company has not commenced its business within a year from its incorporation, or that from the financial condition of the company as disclosed in its balance sheet or from the report of an inspectors appointed under Section 235 or 237, or the report of a special auditor appointed under Section 233A, that the company is unable to pay its debts. But such a partition can be made only with the previous approval of the Regional Directors [Section 439 (5)].

The Official Liquidator may also present a petition for winding-up by the Court, where the company is being wound up either voluntarily or subject to the supervision of the Court. And the Court, before making a winding-up order on such petition, must be satisfied that in the circumstances such a winding-up cannot be continued, due regard being had to the interest of the creditors or contributories or both (Section 440).

10.2.4 Powers of Court on hearing petition (Section 443): On hearing a winding up petition, the Court may

(i) dismiss it, with or without costs; or

(ii) adjourn the hearing conditionally or unconditionally; or

(iii) make an interim order that it thinks fit; or

(iv) make an order for winding-up of the company with or without costs, or any other order that it thinks fit.

It must not refuse to make a winding-up order on the ground only that the company’s assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

If a petition for winding-up is presented on “just and equitable” ground the Court 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 winding-up instead of pursuing that other remedy.

Where the petition is presented on the ground of default in delivering the statutory report to the Registrar or in holding the statutory meeting, the Court may direct that the report be
delivered or that meeting be held instead of making the winding-up order. The person considered responsible for the default may be charged with the costs involved.

10.2.5 Date of commencement of winding-up by Court (Section 441): Where, before the presentation of a petition for the winding-up of a company by the Court, a resolution has been passed by the company for voluntary winding-up, the winding-up of the company shall be deemed to have commenced at the time the resolution was passed. Unless the Court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding-up shall be deemed to have been validly taken. In any other case, the winding-up of the company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.

This date is important for several reasons. Some of the immediate effects are that the Official Liquidator becomes the liquidator of the company (Section 449). A statement as to the affairs of the company has to be submitted to him and he has to report thereon to the Court (Section 454 and 455). The winding-up order constitutes a notice of discharge to the officers and employees of the company except when the business of the company is continued [Section 445(3)]. The Court has to communicate winding-up order forthwith to the Official Liquidator and the Registrar (Section 444).

Within 30 days from the date of the making of a winding-up order, a certified copy of the order must be filed with the Registrar by the petitioner and the company [Section 445(1)]. In computing this period of 30 days, the time required for obtaining a certified copy of the order is to be excluded. Then the Registrar shall make a minute thereof of in his book relating to the company and shall notify in the Official Gazette that a winding-up order has been made.

When the winding-up order has been made or the Official Liquidator has been appointed as provisional liquidator no suit or other legal proceeding can be commenced or if pending at the date of the order, shall be proceeded with against the company except by leave of the Court and subject to terms imposed by it [Section 445(1)]. The expression: "or other legal proceeding", in Section 446 does not mean a legal proceeding analogous to a suit (Shaikh Mansoor vs. Government A.I.R. 1952 T.C. 14). An award under the Industrial Disputes Act is not a legal proceeding (Price vs. Chandrashekharan A.I.R. 1951 Mad 987). Leave of Court will be granted where a shareholder applies for rescission or the suit is for specific performance.

A regards the ‘Leave of the Court’ appearing in Section 446 (1) the Supreme Court decision is that the Court has the jurisdiction to grant leave to proceed with a suit or other proceedings against a company in liquidation, even if such leave was not obtained for the commencement of the suit or proceeding. “The proceedings may at best be regarded as instituted on the date on which the leave was obtained from the Court” [Hansidhar Shankaril vs. Mohammed Ibrahim (1971) Comp. Cas. 21]. But the Court does not grant this leave as a matter of course. The facts and circumstances of each case have to be probed into by the Court. The discretion of the Court must be exercised judicially but not capriciously or arbitrarily. Usually, leave is granted where outsiders get linked up with some dispute with the company and the Court thinks it fit that the dispute should be settled in an action by the ordinary Civil Court. It has been held that against an order refusing leave to institute a suit, an appeal lies under Section 483 (Balakrishan vs. Indian Association Chemical Industries Ltd. A.I.R. (1959) Bom. 41
Suppose, RC, a labourer of GD & Co. Ltd. which is in liquidation, prays for permission of the Court to implead the Official Liquidators as the party respondent in a claim petition made before the Labour Court subsequent to the winding-up order. Should the leave be granted in this case? It has been held \([R. Chidambaranathan vs. Gannon Dunkerly& Co. (Madras) Ltd. (1973) 43, Comp. Cas. 500]\) that the prayer for leave under Section 446 (1) was misconceived. In the event of such leave being granted, a flood gate of litigation would be opened before the Labour Court and every labourer would be filing petitions and drawing the Official Liquidator to the Labour Courts for defending the case of the company. The purpose and the intention of the Act was that all such claims against the company which has been wound up would have to be filed before the Official Liquidator who was empowered to decide such claims. The petition was, therefore, dismissed. It has, however, been held that RC could withdraw the proceedings before the labour Court and file the same before the Official Liquidator for appropriate reliefs.

It has been held that the following proceedings are not affected by [Section 446]: (a) a private sale outside the Court by public auction by a mortgagees [Ranganathan vs. Govt. or Madras 1955, S.C. 604 ]; (b) a defendants plea of set-off or counted claim in defence [Andhra paper Mills Co. Ltd. vs. Anand Bros. (1951) I.M.L.T. 340 ]; (c) proceeding by persons out of jurisdiction on a foreign country [Re. Voclain (Foreign) Ltd. (1932) 2, Ch. 196 ]; (d) a claim petition by a third party where a company in winding-up has attached the property of a judgement debtor [Seiva Lyer vs. Mathura Mercantile bank (1962) 32, Comp Cas. 47].

It may be noted that the proceedings for assessing a company to income tax under the Income tax Act are not legal proceedings and hence are not affected by Section 446. Until the I.T.O. makes an assessment order, he is not a creditor, and as such can not prove his claim in the winding-up [Tilk Ram and Sons (Private) Ltd. vs. Commissioner of Income-tax (1964) 4 Comp. Cas. 151]. However, it has been held in [Rele vs. Deshpande, (1967) Comp., L.J. 210] that the re-assessment proceedings by the Income-tax authorities cannot be commenced or continued without the leave of the Court.

It may further be noted that if a secured creditor realises his security without intervention of the Court, he will be outside the jurisdiction of the Court in the winding up. But where the secured creditor invokes the aid of the Court and takes any legal proceeding against the company within the meaning of Section 446, it will be necessary for him to seek leave of the Court [Ranganathan vs. Government of Madras, Supra].

In the winding-up, the Court which is winding up the company shall have the jurisdiction to entertain or dispose of; (i) any suit or proceeding by or against the company; (ii) any claim made by or against the company including claims by or against any of its branches in India; (iii) any application made under Sections 391 by or in respect of the company; (iv) any question of priorities or any other question of law or fact which may relate to or arise in the course of the winding-up of the company [Section 446 (2)]. Any such suit or proceeding pending in any other Court may be transferred to or disposed of by the Court in which the winding-up proceedings are taken [Section 446 (3)]. The provisions contained in sub-section (1) or (3) as aforementioned, shall not be applicable to any proceeding in appeal either before the Supreme Court or a High Court [Section 446 (4)].
Section 446 is designed to safeguard the assets of the company in winding-up against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding-up Court itself “An even-handed justice requires that the Court should have power to intervene at an early stage for the protection of the assets, and this power is given by Section 446.”

The winding-up order operates in favour of all the creditors and contributories of the company as if it had been made on the joint petition of a creditor and of a contributory [Section 477].

10.2.6 Statement of Affairs: Where winding-up order has been made or the Official Liquidator has been appointed as provisional liquidator by the Court, a statement as regards the affairs of the company in the prescribed form shall be delivered to the Official Liquidator. Such a statement shall have to be verified by an affidavit and shall contain particulars of

(i) the assets of the company stating separately the cash balance in hand and at the bank, negotiable securities;
(ii) its debts and liabilities;
(iii) the names, residence and occupations of the creditors (secured debts being segregated from those considered unsecured) and in the case of secured debts the particulars of the securities given whether by the company or an officer there of, their value and the dates on which they were given;
(iv) the debts due to the company and the names, and residences, and occupations of the persons from whom they are due and the amount likely to be realized on account thereof and
(v) such further or other information as may be prescribed or as the Official Liquidator may required [Section 454(1)].

The aforementioned statement is required to be made and verified by one or more of the directors and by the person who, at the date of winding-up order or the appointment of the provisional liquidator, as the case may be, the manager, secretary or other chief officer of the company. Also, it may be made by the following persons if the Official Liquidator so requires, subject to the directions of the Court;

(i) who are or have been officers of the company;
(ii) who have participated in the formation of the company at any time within one year before the relevant date;
(iii) who are in the employment of the company or have been so within the said year and are in the opinion of the Official Liquidator, capable of giving the information required;
(iv) who are or have been within the said year, officers of, or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates [Section 454(2)].

The above mentioned statement is required to be submitted within 21 days of the winding-up order of the appointment of the provisional liquidator, as the case may be, or within such extended time, not exceeding three months, as may be fixed by the Official Liquidator or the Court for special reasons. The persons, preparing the statement and affidavit shall be allowed
such costs and expenses incurred in connection therewith as the Official Liquidator may deem reasonable, subject to an appeal to the Court [Section 454 (3) and (4)].

Non-compliance with any of the requirements of Section 454, without a reasonable excuse, shall render the defaulter liable to be punished with imprisonment to the extent of two years or with a fine extending upto ₹ 1000 per day during which the default continues or with both [Section 454 (5)].

The Court concerned may take cognizance of an offence, mentioned above, upon receiving a complaint of facts constituting such an offence and try the offence itself in accordance with the procedure laid down in the Criminal Procedure Code, 1898 for the trial of summons cases by Magistrates [Section 454 (5A)].

The Statement of affairs must be open to inspection by any one stating himself in writing to be a creditor or contributory. Also he is entitled to a copy thereof or as extract there from. For both inspection and copy or extract, the prescribed fee is to be paid [Section 454 (6)].

(Note: The expression ‘the relevant date’ in a case where a provisional liquidator is appointed, is the date of his appointment and in a case where no such appointment is made, the date of the winding-up)

Section 511A extends the provisions of Section 454 to every voluntary winding-up in the same way as they are applicable to a winding-up by the Court. For construing these provisions, references in the Section to (a) the Court shall be omitted; (b) the Official Liquidator or the provisional liquidator shall be construed as references to the liquidator; (c) the ‘relevant date’ shall be construed as references to the date of commencement of the winding-up.

The afore-mentioned provisions of Section 454 are intended to enable the liquidator to have information as regards the affairs of a company, so that the liquidator may know something about the property and the assets of the company, the names, addresses and occupations of the creditors, the debts due to the company and the persons from whom they are due. The statement of affairs of the company is intended to afford facility to the liquidator in his management of the company’s affairs in discharging the company’s obligations, realising its assets, and distributing surplus assets (if any) among its members.

The Ministry of Corporate Affairs has observed that companies are not filing Statement of Affairs (SOA) in time in terms of section 454 of the Companies Act, 1956. This delays the process of liquidation considerably. It has, therefore, been decided vide General Circular No. 56/2011 dated 28th July, 2011 to give the companies and the directors of such companies where winding up orders have been passed by the Hon’ble Court, one months notice to file SOA before action for blocking their DIN is initiated by the Ministry.

Official Liquidators shall furnish list of all such directors who have failed to furnish SOA (giving their details) to the Ministry on 3rd working day of every month starting from 5th September, 2011 by e-mail to respective RD, ROC, e-Governance Cell and Insolvency Section of this Ministry.

MCA 21 cell in the Ministry would block DIN of all such directors on getting information after approval of the competent authority concerned and intimate the same to all.
10.2.7 Official Liquidators report (Section 455): The Official Liquidator must, as soon as practicable after the receipt of the statement of affairs under Section 454 but, not later than six months from the date of the winding-up order or such extended period as may be allowed by the Court, or where the Court orders that no statement of affairs need be submitted as soon as practicable, after the date of the order, submit a preliminary report to the Court:

(a) as to the amount of capital issued, subscribed, and paid-up and the estimated amount of assets and liabilities, giving separately under the heading of assets, particulars of, (i) cash and negotiable securities; (ii) debts due from contributories; (iii) debts due to the company and securities (if any) available in respect thereof; (iv) movable and immovable properties belonging to the company; and (v) unpaid calls;

(b) if the company has failed, as to the causes of the failure; and

(c) whether a further inquiry is desirable as to the company’s failure, promotions or formation or the conduct of the business thereof.

If the Official Liquidator thinks fit, he may make a further report or report, stating 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 formation or promotion or by any officer of the company in relation to the company since the formation and any other matters which, in his opinion, it is desirable to bring to the notice of the Court. Such further report may lead to the public examination of a person or officer in accordance with Section 478 (Section 455).

A person ordered by the Court to be examined will be entitled to obtain a copy of the report of the Official Liquidator at his cost and to employ an advocate to enable him to explain or qualify any answer given by him. The person so charged may apply to the Court to be exculpated from any charges made or suggested against him and, if he does so, it shall be the duty of the Official Liquidator to appear on the hearing of the application and call the attention of the Court to any matters which appears to the Official Liquidator to be relevant [Section 478 (6) & (7)].

10.2.8 Final Winding-up: When the affairs of a company have been completely wound up or when the Court is of the opinion that the liquidator cannot proceed with the winding-up of the company for want of funds and assets or for any other reason whatsoever and it is just and reasonable in the circumstances of the case that an order of dissolution should be made, then the Court shall make an order that the company be dissolved from the date of the order and the company shall be dissolved accordingly [Section 481 (1)]. A copy of the order must be forwarded within 30 days from the date of the order by the liquidator to the Registrar who shall enter in his books a minute of the dissolution of the company [Section 481 (2)].

If the liquidator makes default in forwarding a copy as aforesaid, he shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues. [Section 481(3)]

10.2.9 Committee of Inspection: Either at the time of making an order of the winding-up of a company or at any time thereafter, the Court may direct that a Committee of Inspection shall be appointed in order to act with the liquidator. In the event of such a direction being given, the liquidator is bound to convene a meeting within 2 months from the date of such
10.26 Corporate and Allied Laws

direction, of the creditor (as ascertained from the company’s books and documents) with a view to determine who are to be members of the committee [Section 464 (1)]. Within 14 days from the date of the creditor’s meeting or such further time as extended by the Court, the liquidator shall convene a meeting of the contributories so as to consider the decision taken at the creditor’s meeting in regard to the membership of the committee. This decision may either be altogether rejected with or without any modifications [Sub-Section (2)]. If the decision taken at the first meeting is either rejected or accepted with modification, the liquidator shall be duly bound to seek the Court’s, direction as regards the composition [sub-section (3)].

A committee of inspection shall consist of not more than 12 members, being the creditors and contributories or their attorneys. The proportions of the members of the committee; if not decided upon by the creditors and contributories themselves, shall be determined by the Court. Its function is to assist the liquidator and to inspect his accounts. The committee must meet at such times as and may from time to time appoint; the liquidator or any member may also summon a meeting as and when he thinks necessary. The quorum is 1/3rd of total numbers of member or two, whichever is higher. The committee acts only if there is a quorum and by a majority of members present. A member of the committee ceases to act: (i) when he resigns by notice in writing signed by him and delivered to the liquidator; (ii) when he is adjudged an insolvent or compounds or arranges with his creditors; (iii) when he is absent from five consecutive meetings of the committee without leave of those members who together with himself, represent the creditors or contributories; (iv) when he is removed by ordinary resolution of which 7 day’s notice has been given by the creditors, if he represents the creditors, or by the contributories, if he represents the contributories.

If any vacancy occurs in the committee, the liquidator must immediately summon a meeting of the creditors or contributories, as the case may be, to fill the vacancy unless he thinks it unnecessary to fill in the vacancy and obtains the leave of the Court in regard thereto (Section 465). A member of the committee of inspecting is in fiduciary position and cannot buy any of the company’s property from the liquidator (In re Blumer (1937) Ch. 489). Similarly, where a member of the committee purchases the property of a company, such as purchase was held to be bad, in as much as he occupied a fiduciary position in relation to the company (Durga Prasad vs. Official Liquidator, Benaras Bank Ltd. A.I.R. 1959 All. 196).

10.3 Voluntary Winding Up

10.3.0 Introduction: The object of a voluntary winding-up is to enable the members and creditors to settle their affairs among themselves without seeking assistance of the Court but they may apply to the Court for any directions or orders if and when necessary (Section 518). A voluntary winding-up does not necessarily, imply that the company’s business has ceased since such a winding-up may also be necessary in the case of reconstruction or an amalgamation of a company.

10.3.1 Procedure for voluntary winding-up: A company may be wound-up voluntarily under Section 484, according to the following procedures

(a) By passing an ordinary resolution at a general meeting in any of the following circumstances: (i) When the period (if any) fixed for the duration of the company by its
Articles has expired. (ii) When the Articles provide for the dissolution of the company on occurrence of an event and the event has occurred e.g. if a company is formed to construct a particular bridge and the same has been built.

(b) By a special resolution: When the company for any reason which need not be disclosed, decides that it should be wound-up voluntarily. A company may be prosperous, yet it may desire to wind-up its affairs as a matter of convenience. It can do so if it passes a special resolution to that effect.

The members of a company cannot be divested of their right to pass a resolution calling for a voluntary winding-up by including in the Articles, a special provision in this regard because such a provision would be repugnant to the express provisions of this Act. Notices of the meeting where it is intended to propose an ordinary or a special resolution as the case may be, must be given, and the meeting should be held in the manner laid down by the Act and the articles of the company. Upon the passing of a resolution for voluntary winding-up, the company must within 14 days thereof, give notice of the resolution by an advertisement in the Official Gazette and also in some newspapers circulating in the district where the Registered Office of the company is situated (Section 485). A printed or typewritten copy of every winding-up resolution passed in pursuance of Section 484 (duly certified under the signature of an officer of the company) must within thirty days after the passing thereof be filed with the Registrar who shall record the same (Section 192).

10.3.2 Commencement of voluntary winding-up: Voluntary winding-up is deemed to have commenced at the time when the resolution for the voluntary winding-up is passed (Section 486). Even if the company is subsequently wound-up by the Court, the commencement of the winding-up would be taken to be as from the date of the passing of the resolution (Section 441).

10.3.3 Effects of voluntary winding-up: With the commencement of voluntary winding-up, the following situations arise

(1) The company ceases to carry on its business except for the purposes of beneficial winding-up of such business (Section 487). It still maintains its corporate personality and its corporate power, until it is dissolved (Section 487). This is so even if the Articles provide to the contrary [Hari Prasad Jayantilal & Co. vs. I.T.O. Ahmedabad. 9.LR. (1966) S.C 148.11]. The liquidator represent the company in liquidation and the functions as its agent for purposes of winding-up [Official Liquidator vs. Commissioner of Income Tax (1971) 41 Comp. Cas. 226].

(2) Any transfer of shares made without the sanction of the liquidator is invalid and alteration in the status of the members made after the commencement of the winding-up is void (Section 536).

(3) On the appointment of a liquidator under Section 490 or 502, as the case may be, the powers of the directors, or managing or whole time director, or manager cease except in so far as the company in general meeting or liquidator, may sanction that the same be continued or for the purpose of giving notice of liquidator’s appointment to the Registrar under Section 493. In the event of a creditors’ winding-up, the powers of directors cease
except in so far as the Committee of Inspection, or if there is no such Committee, the creditors in general meeting may sanction that the same may be continued (Sections 491 & 505).

(4) Every invoice, order for goods, or business letter issued by or on behalf of the company or a liquidator or a receiver or manager, in which the company's name appears must contain a Statement that the company is being wound-up (Section 547).

(5) As to whether a voluntary winding-up discharges the servants of the company, it would depend upon whether the business of the company has ceased or is being continued. Thus, it would depend on the facts of each case. A voluntary winding-up coupled with immediate cessation of the company's business has been held to operate as a dismissal of the company's servants [Reigate vs. Union Mfg. Co. (1981) I.K.B., 592 (Ch.)].

(6) Suits and other legal proceedings against the company are not automatically stayed but an application may be made by the liquidator or any creditor or contributory to the Court to determine any question arising in the winding-up, e.g. enforcing of calls, staying of proceeding or any other matter. Generally, such an application can be made for exercising all or any of the powers which the Court might exercise, if the company was being wound-up by the Court (Section 518).

(7) A voluntary winding-up shall not be a bar, enter alia, to the right of any creditor or contributory to have the company wound-up by the Court; but in the case of such an application the Court shall have to be satisfied that the rights of the creditors or contributories or both would be prejudiced by a voluntary winding-up (Section 440).

10.3.4 Position of various parties

10.3.4.1 Shareholders and contributories: A shareholder of a company is liable to pay the full amount on the shares held by him but nothing more. This liability continues even after winding-up, but for the purposes of winding-up, he is described by the Act as a contributory. Prior of a shareholder to the assets of the company is measured by the from membership. However, winding-up creates a new cause of action for the liquidator and the liquidator can demand of him the payment of the unpaid calls even if they had become time-barred before liquidation [Re. East Bengal Sugar Mills Ltd. (1982) 1 Cal. 1321]. The liability arises from the fact that his name appears on the register of members [K.L. Goenka vs. S.R. Majumdar (1958) 28 Comp. Cas. 536]. According to Section 429, the liability of a contributory shall create a debt accruing due from him at the time when his liability commenced, but payable at the time specified in the calls made on him for enforcing that liability (by the liquidator). Thus, the liability of a contributory, though commencing at the date of the winding-up, is only contingent during the winding-up, since until a call is made, it is nothing more then a mere liability to contribute, if necessary, to the company for payment of the debts due to its creditors and expenses of the winding-up. Such liability, however, creates a debt under Section 429 and it does not become payable until a call is made. It may be noted that the liability under this Section stands in striking contrast with the liability of a shareholder under Section 36(2) according to which all moneys payable by any member, to the company under the Memorandum or Articles shall be a debt due from him to the company. The debt under
Section 36(2) arises *ex-contractu*, whereas the debt under Section 429 arises *e-x-lege* i.e. as a result of the statute on the company going into liquidation. Thus, Section 429 gives the liquidator a new cause of action which a company itself might not have.

The estate of the deceased shareholder is liable to the same extent as, it would have been if he had been alive (Section 430). Section 431 lays down that if a contributory becomes insolvent after the commencement of the winding-up, he becomes a stranger to the company; although his name remains on the list of contributories, his assignee in insolvency represents him for all purposes and is to be deemed a contributory. Under Section 432, where a body corporate which is a contributory in itself is ordered to be wound-up, either before or after it has been placed on the list of contributories, the liquidator of body corporate shall represent it for all the purposes of winding-up of the company and shall be deemed a contributory.

A shareholder on the A list of contributories is liable to the extent to which his shares are not fully paid up. But the liability of a member on the B list arises only in certain specific circumstances, mentioned in Section 426. The A list comprises the present members and the B list the past members, who ceased to be members within one year prior to the winding-up. A past member is liable to contribute only when the present members have been unable to satisfy the contribution required from them in respect of their shares.

A person who is both a contributory and a creditor of the company (in respect of dividends, profits or otherwise), cannot set off the debt due and owing from the company against his liability for call even if there is an express agreement to do so. In other words, the contributory has to make his contribution to the assets of the company without any right to claim a set-off in regard to the amount due to him from the company [Pure Milk Supply Co. Ltd. vs. Hari Singh A.I.R. (1963) Punj 22].

In addition to the aforesaid liabilities, Section 536 imposes a sort of restriction on the members; namely that in the case of voluntary winding-up, no transfer of share except transfers made to or with the sanction of the liquidator shall be made and that every alteration in the status of the members after the commencement of such winding-up shall be void. In the case of winding-up by or subject to the supervision of the Court, every disposition of the property including actionable claims of the company and every transfer of shares or alteration in the status of its members made after the commencement of the winding-up shall be void unless the Court otherwise directs.

**10.3.4.2 Creditors:** A company can never be declared insolvent, although it may have become insolvent in the sense that it is unable to pay its debts. Where a solvent company is being wound-up all the debts payable on a contingency and claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company. A just estimate should be made of the possible value of such debts or claims as may be subject to any contingency or may sound only in damages or for some other reason may not bear a certain value (Section 528). As regards the rights of the creditors, company which is being wound-up for its inability to pay its debt, the same rules prevail as in the case of insolvency law in respect of debts provable, the valuation of annuities and future and contingent liabilities and the respective rights of secured and unsecured creditors (Section 529).
The secured creditor may rely on the security and ignore the liquidation altogether, or value his security and prove for the balance of his debt, or give-up his security and prove the whole amount. Unsecured creditors are paid in the order prescribed by Section 530. Preferential creditors are paid first; liability for dividends is satisfied only if claims of outsiders are fully met.

10.3.4.3 Employees: A winding-up order by a Court operates as a notice of discharge to employees and officers of the company, except when the business of the company is continued [Section 445(3)]. A voluntary winding-up which involves a discontinuation of the business also operates as a discharge, and may also give rise to a claim for damage where there is an agreement for employment for a fixed time [Reigate vs. Union of Manufacturing Company (1918) I.K.B. 592].

10.3.5 Types of voluntary winding-up: There are two types of voluntary winding-up, viz. Members’ voluntary winding-up and Creditors’ voluntary winding-up. Where the directors are in a position to make the statutory declaration of solvency required under Section 488 of the Act, the winding-up would be conducted as a Members’ voluntary winding-up and would be controlled by the members themselves, the creditors would have no voice in the proceedings. If the directors do not make such a declaration, the winding-up would be conducted as a creditors voluntary winding-up and the creditors shall have a controlling voice in the procedure. In both the cases, the process of liquidation would be normally conducted without reference to the Court; although the Court shall have the power to determine any matter the liquidator or any creditor or contributory might refer to it.

10.3.5.1 Members’ voluntary winding-up—declaration of solvency: In respect of a members’ voluntary winding-up, two directors, where there are only two directors, and a majority of directors, where there are more than two, should make a declaration, called ‘declaration of solvency’. In the declaration, the following matters are required to be stated, namely, (i) that they have made a full enquiry into the affairs of the company, and (ii) that having made such enquiry, they have formed the opinion that the company has no debts or that it will be able to pay its debts in full within a period not exceeding three years from the commencement of the winding-up. To be effective:

(a) it must have been made and filed with the Registrar within the five weeks immediately preceding the date of passing of the winding-up resolution; and

(b) it must be accompanied by a copy of the auditor’s report on the profit and loss account of the company for the period commencing from the date of the company for the last account to the latest practicable date immediately before the making of the declaration and the balance sheet of the company made out as on the last-mentioned date and, also, embodies a statement of the company’s assets and liabilities as at that date. The report of the auditor must be prepared, as far as circumstances permit, in the manner laid down by the Act (Section 488). This accompaniment is intended to be an additional safeguard.

Unless the above mentioned conditions are complied with, the resolution passed for voluntary winding-up would be invalid and the members’ voluntary winding-up cannot be effected [S.P. Bhargava vs. Rameswar A.I.R. (1952) M.P. 3]
Where the declaration of solvency is made by the directors without any reasonable grounds that the company will be able to pay its debts in full within the period specified in the declaration, it would render them liable to imprisonment which may extend to 6 months and or to pay a fine exceeding ₹ 50,000. If the company is wound-up in pursuance of such a resolution within a period of 5 weeks after the declaration was made, but its debts are neither paid off nor provided for in full within the period specified in the declaration, it would be presumed, till the contrary is shown, that the directors did not have reasonable ground to form the opinion as to company’s solvency [Section 488(3) & (4)].

10.3.5.2 Creditors’ voluntary winding-up: Where the declaration of solvency, referred to under members’ voluntary winding-up has not been made by the directors and filed with the Registrar, the winding-up is known as a Creditor’s voluntary winding-up [Section 488(5)].

10.3.6 Procedure of winding-up: The procedure applicable to the two types of voluntary winding-up is somewhat different. The provisions under Sections 490 to 498 are applicable to a members’ voluntary winding-up, whereas Sections 511 to 521 apply to both types of voluntary winding-up.

10.3.6.1 Procedure of members’ voluntary winding-up: The procedure for a member’s voluntary winding-up of a company is narrated below:

(i) At the Board’s meeting, the directors have to make a declaration of solvency under Section 488 of the Companies Act, 1956. If there are more than 2 directors then the said declaration must be made by a majority of them. This declaration has to be filed with the Registrar of Companies together with the auditor’s report on the balance sheet and profit and loss account or income and expenditure account of the company made upto the date of the Board’s meeting, the time limit for such filing being 5 weeks before the passing of the resolution for the winding-up.

(ii) Next, the company has to pass at its general meeting a special resolution called “resolution for voluntary winding-up” (Section 454). At this very meeting or at any meeting subsequent thereto, one or more liquidators are to be appointed by the company; also his or their remuneration, if it is to be given, should be fixed at the said meeting (Section 490).

(iii) Under Section 485, the aforesaid resolution to wind-up the company voluntarily has to be published in Official Gazette as also in a newspaper circulating in the district where the Registered Office of the company is situated. This is required to be made within 14 days of the passage of the resolution.

(iv) Under Section 493, the company has to give notice of appointment of the liquidator to the Registrar. The notice is to be given in form No. 36(b) of the Companies (Central Government’s) General Rules and Forms. The liquidator has also to separately notify the Registrar, under Section 516, about his appointment.

(v) The liquidator is then required to do the following things, namely, speedy realisation of assets, preparation of list of creditors, admission of proof, settlement of lists of contributories, making of such calls as are necessary, payment to secured creditors of costs including the liquidator’s own remuneration, payment of preferential claims and
distribution of the surplus *pro rata* amongst the contributories after meeting all the claims of creditors and after adjusting all rights and claims. For resolving any doubts and difficulties, application may be made to the Court.

(vi) *Duty of liquidator to call general meeting:* In the event of a voluntary winding-up being continued for more than a year, the liquidator shall call a general meeting of the company at the end of the first year from the commencement of the winding-up and at the end of each succeeding year within three months from the end of each or such longer period as the Central Government may allow. Also, he shall lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year together with a statement in the prescribed form containing stipulated particulars in respect of winding-up proceedings and the position of the liquidation. Any failure on the part of the liquidator in complying with these provisions shall render him liable to a fine to the extent of `1000 in respect of each failure (Section 496). The liquidator has to keep all moneys in a scheduled bank; he must strictly adhere to the provisions of Section 553. Where the winding-up of a company is not concluded within one year after its commencement, Section 551 requires that a statement in the prescribed form by the liquidator should be filed with the Registrar within 2 months of the close of such year (if he is not exempted from so doing by the Central Government) and thereafter until the winding-up is concluded, at intervals of not more than one year or such shorter interval as may be prescribed. The statement should be audited by a chartered accountant.

(vii) *Final meeting and dissolution:* When the winding-up is complete, the liquidator shall, subject to the provisions contained in Section 498, make-up an account of the winding-up which must show as to how the winding-up has been conducted and the property of the company has been disposed of, also he shall call a general meeting of the company to place before it the account. Such a meeting is required to be called by *advertisement* which must specify the time, place and object of the meeting and published, not less than one month before the meeting, in the Official Gazette as well as some newspapers circulating in the district where the registered office of the company is situated. Besides, he shall, within one week of the meeting, send to the Registrar and the Official Liquidator a copy of the account and also a return to each of them as regards the holding of the meeting and of the date thereof [Section 497(2) & (3)]. Where the meeting is not held for want of quorum, the liquidator shall, instead of the said return, make a return, to the effect that the meeting was duly called but no quorum was present thereat [Section 497(4)]. Upon receiving the account and either of the returns under Sub-section (3) or (4), the Registrar must immediately register them, with a view to ensuring that the winding-up process of the companies which have been voluntarily wound-up should not be conducted in a manner prejudicial to the interest of the shareholders or of the public.

On receipt of the final statement of accounts and the returns from the liquidator, the Official Liquidator shall make a scrutiny of the books and papers of the company. For the purpose, he shall be provided with all reasonable facilities by the liquidator and all officers (past and present) of the company.
Where the Official Liquidator, after scrutiny of the returns and accounts, reports to the Court
that the affairs of the company have not been conducted in a manner prejudicial to the
interests of its members to public interest, the company is deemed to have been dissolved
from the date of the submission of the report.

If the official Liquidator, on such a scrutiny, reports to the Court that the affairs of the company
have been conducted in a manner prejudicial to the interest of its members or the public, the
Court shall direct the Official Liquidator to make a further investigation into the affairs of the
company, and for that purpose, he shall be invested with all such powers as the Court may
decide fit [Section 497(6A)]. On receipt of the report as regards further investigation, the Court
may either make an order that the company shall stand dissolved with effect from the date
which it shall specify or shall make such other order as the circumstances of the case might
justify [Section 497(6B)].

10.3.6.2 Procedure of creditors’ voluntary winding-up: (1) The creditors of a company
would be mainly concerned if the company arrives at the decision that it should wind-up itself
because of its inability to meet its liabilities. The company in that case must call a meeting of
the creditors to be held on the day or the day next following the next date on which there is to
be held a general meeting of the company at which the resolution for voluntary winding-up is
to be proposed [Section 500 (1)].

(2) Notice of the meeting is to be sent to the creditors and it must also be advertised once at
least in the Official Gazette and in two newspapers circulating in the district where the
registered office of the company is situated [Section 500(2)].

At the meeting of the creditors, the Board of Directors must cause a full statement of the
company’s affairs, and a list of the company’s creditors and the estimated amount of their
claims, to be laid before the meeting of the creditors. The Board of directors also must
appoint one of their members to preside over the said meeting [Section 500(3)].

If the meeting of the company for passing the winding-up resolution, is adjourned and at the
adjourned meeting the resolution is passed, then any resolution passed at the creditors
meeting, though prior in date to that for winding-up would nevertheless be valid and effective
as if it had been passed after the passing of the winding-up resolution [Section 500(5)].

The resolution passed at the creditors” meeting shall be notified by the company to the
Registrar within ten days of the passing thereof (Section 501).

In a creditors voluntary winding-up, the creditors and the members appoint a liquidator in their
respective meetings. If different persons are nominated, the creditors’ nominee shall become
the liquidator. However, any director, member or creditor may, within seven days after the
nomination has been made by the creditors, apply to the Court for an order that the company’s
nominee shall be the liquidator instead of, or jointly with, the creditor’s nominee.

(3) If a vacancy occurs by death, resignation or otherwise in the office of a liquidator (other
than the one appointed by or by the direction of the Court) the creditors in general meeting
may fill in the vacancy (Section 506).
10.34 Corporate and Allied Laws

(4) The creditors at the first meeting under Section 500, or at a subsequent meeting may appoint a Committee of Inspection consisting of not more than five persons [Section 503]. The members of the Committee are to be nominated by the company at a general meeting. If any of the nominees is not acceptable to the creditors, they may by resolution choose any person in his place. However, the Court is empowered to direct otherwise.

(5) The Committee of Inspection and, if there is no such Committee, the creditors, may fix the remuneration of the liquidator. If they do not fix the remuneration, the Court would do so (Section 504). Section 465(2) to (10) applicable to Committee of Inspection appointed in a compulsory winding-up will also apply to the Committee of inspection under Section 503, subject to such rules as may be made by the Central Government [Section 503(5)].

(6) Where the voluntary winding-up continues for more than a year, the liquidator must call a general meeting of the company, as in the case of members’ winding-up as well as meeting of the creditors at the end of the first year of the commencement of winding-up within three months from the end of each year or such longer period as the Central Government may allow, Such a meeting also must be called at the end of each succeeding year in the same manner. The liquidator must lay before the meeting an account of his acts and dealings and of the conduct of the winding-up during the preceding year and also a statement in the prescribed form (Section 508).

(7) As soon as the affairs of the company have been wound-up, the liquidator shall: (a) make-up an account of the winding-up showing how the winding-up has been conducted and the property of the company has been disposed of, and (b) call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meeting and giving any explanation thereof.

10.3.7 Duties and responsibilities of liquidator in creditors’ voluntary winding-up: The liquidator in a creditors’ voluntary winding-up administers the company is very much the same way in which the directors administer it before the commencement of winding-up. To that extent a liquidator can rightly be described as the agent of the company.

The liquidator owes certain duties towards the creditors and contributories under the statute, including that of administration of the assets of the company. These he holds in trust for them. To this extent he is trustee and he must discharge his fiduciary duties honestly. If he neglects these duties, he may be held personally liable by the party prejudiced or for misfeasance proceedings, under Section 543. Thus the liquidator in a creditor’s voluntary winding-up has a dual status both as agent and trustee.

Like any other liquidator, it is also his duty to take into his custody or under his control all the property, effects and actionable claims to which the company is or appears to be entitled. To discharge this responsibility, it is his duty to take the aid, if need be, if the Chief Presidency Magistrate or the District Magistrate within whose jurisdiction the aforesaid property, etc. are found (Section 456).

As regards the distribution, on realisation, of the assets of the company, the liquidator is under an obligation to apply such assets subject to the provisions of the Act as to preferential payment, in satisfaction of its liabilities pari passu. He must thereafter distribute the residue
among the members according to their rights and interest in the company (Section 511). For the purpose, the liquidator has to ascertain the assets and liabilities of the company and draw-up a scheme of distribution.

It is the liquidator’s duty to compel the directors or the officers of the company in liquidation to supply him with a statement as to the affairs of the company verified by an affidavit containing the particulars relating, inter alia, to:

(i) the assets of the company, stating separately the cash balance in hand and at banks and the negotiable securities held by the company;

(ii) its debts and liabilities;

(iii) names, residence and occupations of all creditors and amounts standing to their credit together with dates and amounts of securities given therefor; and

(iv) debts due to the company and the amount likely to be realised on their account (Section 511A read with Section 454).

Within 30 days of his appointment, the liquidator is duty-bound to publish his appointment in the Official Gazette and notify the same in the prescribed form to the Registrar (Section 516).

On the detection of a fraud having been committed by promoters, directors, etc., it is the liquidator’s responsibility to invoke the aid of Section 519 and apply to the Court for the public examination of them.

For the determination of any question arising in the winding-up or for getting the rights and powers of the Court regarding enforcement of calls, staying of proceedings or other matters exercised by it, it is the responsibility of the liquidator to apply to the Court (Section 518).

Where the voluntary winding-up continues for more than a year, the liquidator must call a general meeting of the company and a meeting of the creditors at the end of the first year of the commencement of winding-up and at the end of each succeeding year, or as soon thereafter as may be convenient within 3 months from end of year or such longer period as the Central Government may allow. The liquidator must lay before the meetings an account of his acts and dealings and of the conduct of the winding-up during the preceding year and also a statement in the prescribed form. (Section 508.)

As soon as the affairs of the company have been wound-up, the liquidator shall:

(a) make-up an account of the winding-up showing how the winding-up was been conducted and the property of the company has been disposed of, in the prescribed Form; and

(b) call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meeting and giving any explanation thereof. Besides, the liquidator, within one week from the date the meeting is held, must send to the Registrar and the Official Liquidator a copy of each of the account and also a return to each of them regarding the holding of the meeting and of the date thereof. Where the meeting is not held for want of quorum, the liquidator shall, instead of the said return, make a return to the effect that the meeting was duly called but no quorum was present thereat.
10.36 Corporate and Allied Laws

Under Section 512(3), it is the liquidator’s duty to pay the debts of the company and to adjust the rights of the contributories themselves.

10.3.8 Position of a ‘voluntary’ liquidator: It has been held that a voluntary liquidator is not an officer of the Court, [Re. Hills Waterfall etc. Co. (196) Ch. 946, 954]—also that he can more rightly be described as the agent of the company [Knowles Scott (181), I Ch. 717].

The status of a liquidator as an agent of the company can be appreciated if one considers that in a voluntary winding-up the liquidator is appointed by the shareholders, at a general meeting, both in the case of members’ and the creditors’ winding-up, the only difference between the two is that where the person nominated by the creditors at their separate meeting is different from the one proposed by the members, the nominee of the creditors takes the office of the liquidator. Further, under Section 512 of the Companies Act, a liquidator can exercise certain powers, with the sanction of a special resolution of the company, in the case of a members winding-up and in the case of creditors’ winding-up with the sanction of the court or the Committee of Inspection or (if there is no such committee) of the meeting of the creditors’ be also has the right to exercise a number of powers on his own as the agent of the company. A company in voluntary winding-up thus is administered by the liquidator in very-much the same way as it is done by the directors, before the commencement of winding-up.

It must, however, be remembered that the liquidator owes certain duties towards the creditors and contributories under the statute including that of administration of the assets of the company. These he holds in trust for them. In so far as this, he is a trustee. If he neglects these duties, he may be held personally liable by the party prejudiced, or misfeasance proceedings under Section 543 can be taken against him. Thus the liquidator has a dual status both of agent and trustee.

10.3.9 Steps to be taken in a case where the company is solvent but the business for which it was formed has been completed

(a) Prepare a statement of its assets and liabilities [Section 488(2)].

(b) Prepare and file with the Registrar of Companies a statutory declaration by directors that the company will be able to pay its debts in full within such period not exceeding three years from the commencement of the winding-up as may be specified in the declaration.

This must be done within five weeks before that date of the passing of the winding-up resolution, and must be delivered to the Registrar before that date. It may be accompanied by a copy of the report of the auditors of the company on the profit and loss account of the company (for the period commencing from the date up to which last such account was prepared and ending with the latest practicable date immediately before the making of the declaration) and the balance sheet of the company (made out as on the last-mentioned date). It must also embody a statement of the company’s assets and liabilities, as at that date [Section 488(3)].

(c) Call a general meeting of the company to pass a resolution for the winding-up of the company (Section 484). As to resolution, it should be in accordance with the provisions of Section 189(1).

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(d) Hold meeting of shareholders in accordance with notice so as to pass the resolution referred to in (c) above.

(e) Appoint liquidator for the purpose of winding-up the affairs and distributing the assets of the company (Section 490).

(f) The company must give notice of appointment of liquidator to the Registrar of Companies (Section 493).

**10.3.10 Provisions applicable to every voluntary winding-up:** These provisions are contained in Sections 510 to 521. These are summarised below:

(a) As regards the distribution, on realisation of the assets of the company in liquidation, such assets should be applied subject to the provisions of the Act, as to preferential payment in satisfaction of its liabilities pari passu and the residue will be distributed among the members according to their rights and interests in the company (Section 511). For the purpose the liquidator has to ascertain the assets and liabilities of the company and draw-up a scheme of distribution.

(b) The liquidator in all cases is entitled to be supplied with a statement as to the affairs of the company verified by an affidavit containing the particulars relating, inter alia, to:

(i) the assets of the company stating separately the balance in hand and at banks, and the negotiable securities held by the company.

(ii) its debts and liabilities;

(iii) names, residence and occupations of all creditors and amounts standing to their credit together with dates and amounts of securities given therefor; and

(iv) debts due to the company and the amount likely to be realized on their accounts.

The liquidator can compel one or more directors or other officer of the company to submit such a statement within 21 days from the date of the commencement of the winding-up. He may also extend the time up to a maximum period of 3 months from that date (Section 511A read with Section 454).

(c) A body corporate cannot be appointed as a liquidator (Section 513).

(d) If for any reason whatever there is no liquidator to act, the Court may appoint the Official Liquidator or any other person as a liquidator and appoint in his stead the official Liquidator. The Registrar is also empowered to apply to the Court for such appointment or removal so that the liquidation proceedings be accelerated and the proper conduct of the liquidation by a competent liquidator be ensured (Section 515).

(e) Within 30 days of his appointment, the liquidator is required to publish his appointment, in the Official Gazette and notify the same in the prescribed form to the Registrar (Section 516).

(f) Section 518 empowers the liquidator or any contributory or creditor to apply to the Court to have questions determined or to exercise the powers as specified in the Section.
Section 519 empowers the liquidator to apply to the Court for public examination of promoters, directors, etc. on the detection of a fraud having been committed by them.

All costs charges and expenses properly incurred in the winding-up are required to be paid, subject to the rights of secured creditors, out of the assets of company in priority to all other claims (Section 520).

**10.3.11 Summary procedures for winding-up**

**10.3.11.1 Members’ voluntary winding-up:**

(i) Directors (both where 2 directors majority where more than 2 directors) have to make a declaration of solvency under Section 488 at the Board Meeting. This declaration together with the auditors report on the balance sheet and profit and loss account (or income and expenditure account) of the company made-up to the date of the Board Meeting shall be filed with the Registrar, the time-limit for such filing being 5 weeks before the passing of the resolution for winding-up;

(ii) Company has to pass at its meeting a special resolution (Section 484) and appoint one or more Liquidators, at this or at subsequent meeting and fix remuneration if to be paid (Section 490);

(iii) Company has to publish the said resolution in the Official Gazette as also in newspaper circulating in the district where its Registered Office is situated, within 14 days of the passage of the resolution (Section 485);

(iv) Company is required to give notice of the appointment of Liquidator to the Registrar (Section 493) and the Liquidator to separately communicate his appointment to the Registrar under Section 516;

(v) Then the Liquidator has to do the following things e.g., speedy realisation of assets, preparation of list of creditors, admission of proof, settlement of List of contributories, making of necessary calls, payment to secured creditors, payment of costs, payment of preferential claim, etc.;

(vi) Liquidator has to call general meeting at the end of each year under Section 496;

(vii) Liquidator has to file with the Registrar a Statement as required by Section 551, where the winding-up is not concluded within one year after its commencement;

(viii) Liquidator has to call final meeting for the purpose of dissolution of the company, and for that matter to proceed according to the provisions contained in Sections 497 and 498.

**10.3.11.2 Creditors’ voluntary winding-up:** The creditors would be mainly concerned if the company arrives at the decision that it should wind-up itself because of the inability to meet its liabilities. Therefore:

(i) the company has to call creditors’ meeting to be held on the day or the day next following the date on which there is to be held a general meeting of the company at which the resolution for voluntary winding-up is to be proposed [Section 500(1)];
(ii) the company has to send notice of the meeting to creditors and also advertise the notice in two newspapers circulating in the district of its registered office [Section 500(2)];

(iii) the Board of Directors, in the creditors’ meeting, has to cause a full statement of the position of the company’s affairs and a list of company’s creditors and the estimated amount of their claims to the laid [Section 500(3)];

(iv) the company has to notify the resolution passed thereat to Registrar within 10 days of the passing thereof [Section 501(1)];

(v) creditors’ nominee as Liquidator to call meeting of the company and of creditors at the end of each year in compliance with the requirements of Section 508;

(vi) the liquidator has to call the final, meeting in compliance with the provisions of Section 509.

10.4 General Provisions on Winding-Up

Sections 528 to 560 contain provisions applicable to every mode of winding-up. Some of the important provisions are stated below:

1) Section 551 prescribes that information as to the pending liquidation, unless exempted by the Central Government, shall be given by the liquidator within 2 months of the expiry of the first year and thereafter at intervals of not more than one year, by filing a statement in the prescribed form; also that the statement shall be audited by a Chartered Accountant. The statement shall have to be filed (a) in the case of a winding-up by or subject to the supervision of the Court, in the Court; and (b) in case of a voluntary winding-up, with the Registrar.

N.B. Students should note that this requirement is over and above the requirements under Sections 497 (in the case of members voluntary winding-up) or 508 and 509 (in the case of creditors voluntary winding-up).

2) Debts that are payable: Debts of all descriptions in a winding-up are payable only when these have been proved. All debts payable on a contingency and claims against the company, whether present or future, certain or contingent, ascertained or unascertained, can be proved against a company; when the amount of a debt cannot be ascertained, a fair estimate thereof may be made for purposes of proof (Section 528). This Section applies to proof of debts when the company is in a solvent state i.e. when its assets are sufficient to pay all its debts and liabilities and the costs of the winding-up. Where the company is insolvent, Section 528 would be applicable. In the winding-up of an insolvent company, the same rules are applicable as regards: (i) debts provable; (ii) the valuation of annuities and future and contingent liabilities and (iii) the respective rights of secured and unsecured creditors, as those in the case of an estate of person adjudged insolvent under the Insolvent Law. [Section 529(1)]. However, the security of every secured creditor shall be deemed to be subject to a pari passu change in favour of the workmen to the extent of the workmen’s portion therein, and, where a secured creditor instead of relinquishing his security and proving his debt, opts to realise his security, then (a) the liquidator shall be entitled to represent the workmen and enforce such charge; (b) any
amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen’s dues, and (c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen’s portion in his security, whichever is less shall rank pari passu with the workmen’s dues for the purposes of Section 529A. [Proviso added to Sub-section (1) of Section 529 by the Companies (Amendment) Act, 1985].

All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up, and make such claims against the company as they respectively are entitled to make by virtue of this Section [Sub-section (2)]. If, however, a secured creditor, instead of relinquishing his security and proving for his debts, proceeds to realise his security, then he shall be liable to pay his portion of the expenses incurred by the liquidator (including a provisional liquidator) for the preservation of the of a security before it is realised by the secured creditor for the purpose of sub-section (2), the portion of expenses which the secured creditor shall be liable to pay shall be the expenses less an amount which bears to such expenses the same proportion as the workmen’s portion in relation to the security bears to the value of the security.

For the purposes of Section 529, Section 529A and Section 530:

(a) ["workmen" in relation to a company, means the employees of the company being workmen within the meaning of the Industrial Disputes Act, 1947 i.e., any person (including an apprentice) employed in any industry to do any skilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, but does not include any such person:

(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950, or the Navy ( Discipline) Act, 1934; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a management or administrative capacity, or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand rupees per-mensum or exercise, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.];

(b) “workmen’s dues” means the aggregate of the following sums due from the company to its workmen, namely:

(i) all wages, salaries including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workmen, in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947;
(ii) all accrued holiday remuneration becoming payable to any workman, or in the case of his death to any other person in his right, at the termination of, the winding-up other or resolutions;

(iii) unless the company is being wound-up voluntarily merely for the purposes of reconstruction or of amalgamation with another company or unless the company has, at the commencement of the winding-up, under such a contract with insurers as mentioned in Section 14 of the Workmen’s Compensation Act, 1923, rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company. In other words, in the absence of alternative circumstances mentioned in the beginning of this clause the provision of this clause will fall within the provision of the phrase “workmen’s dues”;

(iv) all sums due to any workman from a provident fund, a gratuity fund or any other fund for the welfare of the workman maintained by the company.

(c) “workmen’s portion”, in relation to the security of any secured creditor of a company, means the company which bears to the value of the security the same proportion as the amount of the workmen’s dues bears to the aggregate of (i) the amount of workmen’s dues, and (ii) the amounts of the debts due to the secured creditors. It has been exemplified by the following statutory illustration.

Illustration

The value of the security of a secured creditor of a company is ₹ 1,00,000. The total amount of the workmen’s dues is ₹ 1,00,000. The amount of the debts due from the company to its secured creditors is ₹ 3,00,000. The aggregate of the amount of workmen’s dues and of the amounts of debts due to secured creditors is ₹ 4,00,000. The workmen’s portion of the security is therefore 1/4th of the value of the security, i.e. 25,000. [Sub-section (3) added to Section 529 by the Companies (Amendment) Act, 1985].

Now let us illustrate the significance of the Explanation aforementioned by reference to the statutory illustration stated above.

The facts given in the above illustration remain the same. The liquidators incur ₹ 10,000 for the preservation of the security before it is realised by the secured creditor. Now what is the portion of ₹ 10,000 that should be borne by the secured creditors? It is equal to the following equation:

\[
\text{Whole of expenses} - \frac{\text{Whole of expenses} \times \text{Workmen ’s portion}}{\text{Value of the security}} = ₹ 10,000 - \frac{10,000 \times 25,000}{1,00,000} = ₹ 10,000 - 2,500 = ₹ 7,500.
\]

This is the amount to be borne by the secured creditors.

♦ **Overriding preferential payment:** Under Section 529A (incorporated by the 1985 Amendment Act), notwithstanding anything contained in other provisions of this Act
or any other law for the time being in force in the winding-up of a company – (i) workmen’s dues and (ii) debts due to secured creditors to the extent such debts rank, under clause (c) of the proviso to Sub-section (1) of Section 529, pari passu with such dues, shall be paid in priority to all other debts. These debts payable under (i) and (ii) above shall be paid in full, unless the assets are insufficient to meet them, in which case they shall be paid in equal proportions.

Note: The aforesaid rules of insolvency as contained in Section 529 will be applicable only in respect of the three matters specified under paragraph (i), (ii) and (iii) but no further; and they apply except in so far as special provisions are contained in the Companies Act Italia vs. Free Press Journal (1956) M.L.J. 463. Further Section 529 shall cease to be applicable as soon as it is found that the company in the course of winding-up is not insolvent [Re. Fine Industrial Commodities Ltd. (1953) 3 A.E.R. 707].

(3) Preferential payments: Subject to the provisions of Section 529A (discussed earlier), the following debts must, according to provisions contained in Section 530, as amended by the 1996 Amendment Act, be paid in priority to the claims of unsecured creditors:

(a) All revenues, taxes, cesses and rates due to the Central or State Government or a local authority, having become due and payable within the twelve months before the relevant date;

(b) All wages and salaries of an employee for service rendered for a period not exceeding four months within the preceding 12 months next before the relevant date, but not exceeding ₹ 20,000 in any one case;

(c) All accrued holiday remuneration;

In case of (b) and (c) where amount is paid out of money advanced by another person for that purpose, that person, is subrogated to rights of employee who has been paid [Section 530(4)];

(d) Unless the winding-up is merely for purposes of amalgamation or of reconstruction employer’s contribution to the State Insurance Scheme under the Employees’ State Insurance Act, 1948 payable during 12 months before the relevant date and all amounts due in respect of any compensation or liability for compensation in respect of death or disablement compensation under the Workmen’s Compensation Act, 1923;

(e) All sums due to any employee from any fund including a provident, pension or a gratuity for the welfare of the employees, maintained by the company; and

Expenses payable by any company in respect of an investigation held under Section 235 or 237 of the Act.

For the purposes of Section 530:
(i) Any remuneration in respect of a period of holiday or of absence from work through sickness or other good causes shall be deemed to be wages in respect of services rendered to the company during that period;

(ii) The expression “accrued holiday remuneration” includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any enactment), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday;

(iii) The expression “employee” does not include a workman (added by the Companies (Amendment) Act, 1985 (w.e.f. 29.5.85); and

(iv) The ‘relevant date’ means in the case of winding-up by the Court:
   (a) the date of the appointment of first appointment of a provisional liquidator;
   or
   (b) if no such appointment was made, the date of the winding-up order, Unless, in either case the company had commenced to be wound-up voluntarily before that date.

In all other cases, it means the date of voluntary winding-up resolution.

If the assets are insufficient to pay the foregoing preferential debts in full they abate in equal proportions. If necessary, these debts may be paid out of the proceeds of any assets subject to a floating charge.

The order of priority in paying off debts in a winding-up may be roughly worked out as follows: (i) Secured creditors (mortgagees); (ii) costs and charges of winding-up [In a voluntary winding-up automatically this has priority. In a compulsory winding-up, Court has to give it priority by order] (See Section 576 and 520); (iii) preferential debts (Section 530); (iv) floating charges [See Section 530(5)(b)]; and (v) unsecured creditors.

The above does not affect debts that are secured by a fixed charge which have to be paid up to the value of the property concerned.

If there is any surplus, capital is returned to preference shareholders first and then to equity shareholders. If there is still any surplus left, it depends on the articles whether preference shareholders are entitled to share that surplus.

Section 530(1) requires that the revenues, taxes, etc. should have become due and payable within the period of 12 months immediately preceding the relevant date. The arrears of sales tax not to be paid preferentially under Section 530 although the same become ‘recoverable’ as arrears of land revenue under the Sales-tax Act. The words ‘recoverable’ and ‘payable’ have got completely different connotations. The word ‘revenues’ used in Section 530(1)(a) of the Companies Act means revenues which have become due and payable as revenues within the next 12 months before the relevant date, and not revenues which are recoverable as arrears of land revenue. Sales tax, assessed after
winding-up, is not revenue, which has become due and payable within 12 months next before the relevant date. Therefore, it cannot be paid preferentially under Section 530. [Sales-tax Officer, Kanpur vs. Official Liquidator (1968) 38 Comp. Case 430].

Advance income tax demanded and due under the Income-tax Act, 1961 is to be paid preferentially under Section 530(1)(a) of the Companies Act, 1956 provided it becomes due and payable within the twelve months next before the relevant date. [Joint Official Liquidator vs. Comm. Of Income-tax (1954) I.M.L.J. 282 – AIR 1954 Mad. 858]. But the Calcutta Court has held a contrary view [Suburban Bank Ltd. AIR (1953) Cal. 487].

Ex-gratia payments to employees of the company are not within the ambit of Section 530(1)(b) [Vijay Card Board Co. Ltd. vs. Collector, District Hyderabad AI (1957) Andhra Pradesh 725].

Under Section 530(4), the bank which provided an overdraft for making money available for payment of wages, is entitled to preferential payment for the money so advanced and paid [Re. Rampgill Mill Ltd. (1967) Comp. L.J. 262].

‘Bonus’ payable to staff appears to be covered by the expression ‘all wages’ occurring in Section 530(1)(b) and therefore, is to be paid preferentially to the extent laid down in Section 530(1)(b) especially if it is due under the Payment of Bonus Act. The company’s contribution payable to the Employees State Insurance Corporation is, for the purposes of Section 530, a preferential payment [Re. Bihar Bolts Engineering Works Ltd. Air 1959 Pat. 417].

In the winding-up of a company, an advocate is entitled to preferential payment of his fees and expenses out of the funds of a litigation which he had successfully conducted for the company which are in the hands of the liquidator [Kutti Krishna Menon vs. Cochin Mercantile Ltd. (1969) 32 Comp. Case 578].

(4) **Effect of winding-up on antecedent and other transactions:** With a view to affording better protection to the creditors of a company, the principle of fraudulent preference as existent in the insolvency laws, has been extended to companies so as to render void certain categories of transactions entered into within a limited period before the commencement of winding-up. The detailed provisions in this regard are contained in Sections 531 to 537 of the Act, which are summarised below:

(i) **Fraudulent Preference:** All transfers of property, movable or immovable, made by delivery of goods or payment of money etc., if made by an insolvent person within 3 months before the presentation of insolvency petition, would be held to be a fraudulent preference of its creditors and would be invalid. Similarly, in the case of a company all such transfers, if made within 6 months before the commencement of its winding-up, would be deemed to be a fraudulent preference of its creditors, and would be invalid (Section 531). For the purpose of proving a fraudulent preference, two things need be shown, viz.:

(a) that in the case of a winding-up by or subject to the supervision of the Court, the transaction took place within 6 months before *the presentation of the petition* and in
the case of voluntary winding-up, the transaction took place within 6 months of *passing of resolution* for winding-up [Section 531(2)]; and

(b) that the main motive in the mind of the company, acting through its directors, was to prefer one creditor to the other [In Re. Jackson & Bassford (1906) 2 Ch. 467].

On the basis of the above-mentioned provisions of Section 531, let us examine the following situation: A company has been running into losses. To one of its creditors it gives a mortgage on its immovable property on 1st May, 1985. On October 15, 1985, a winding-up petition is presented to the Court, which passes an order of winding-up on 30th November, 1985. It is clear from this situation that the transaction of mortgage on the company’s immovable property took place within 6 months before the presentation of the petition for winding-up. Now, if it can further be proved that the dominant motive of the company was to prefer one creditor to other creditors, then the transaction would be deemed to be fraudulent preference and hence invalid. The real test is whether the debtor (the company in the said illustration) in making the transfer is doing what he himself felt bound or compelled to do. If so, the case does not fall within the purview of fraudulent preference [Nobin Kishori vs. Jugneshwar AIR (1983) Cal. 809; In re. MIC Trust Ltd. (1933) Ch. 542].

(ii) Avoidance of voluntary transfer: Any transfer of movable or immovable property or any delivery of goods by a company, save and except a transfer or delivery in the course of the company’s business in favour of a purchaser or encumbrancer in goods faith and for valuable consideration, shall be void against the liquidator, if such transfer or delivery is made within one year before the presentation of the winding-up petition by or subject to the supervision of the Court or the passing of a resolution for the voluntary winding-up (Section 531A).

(iii) Void transfer: Any transfer or assignments by a company of all the property to trustees for the benefit of its creditors are void (Section 532).

(iv) Liabilities of fraudulently preferred persons: If an act done by a company is invalid under Section 531 as a fraudulent preference of a person interested in property mortgaged or charged in his favour to secure the company’s debt, the person so preferred would be liable, as a surety for the debt to the extent of the mortgage (or the charge) on the property or the value of his interest, whichever is less. The value of the said person’s interest shall be determined at the date of the transaction constituting the fraudulent preference and shall be determined as if the interest were free of all encumbrances other than those to which the mortgage or charge the company’s debt was then subject (Section 533).

(v) Limitation on rights under a floating charge: There are two major statutory limitations to rights arising out of a floating charge. First, a floating charge created within 12 months of the commencement of winding-up unless it is proved that the company immediately after the creation of the charge was solvent, is invalid except up to the amount of any cash paid to the company at the time or subsequent to the creation of, and in consideration for, the charge together with interest on the amount at 5% per annum or other prescribed rate (Section 534). Secondly, preferential debts have also priority over debts secured by
a floating charge (Section 123 and 530) and they must be paid out of the assets covered by a floating charge to the extent that they cannot be met out of assets available for payments of unsecured creditors.

(vi) **Disclaimer of onerous property:** The liquidator may, with the leave of the Court, disclaim any onerous property within twelve months of the commencement of the winding-up. If the existence of any disclaimable property does not come to the knowledge of the liquidator within one month after the commencement of the winding-up, he can disclaim at any time within 12 months after he has become are fit. The Court may, however, extend the time.

An onerous property may consist of: (a) land of any tenure, burdened with onerous covenants (b) shares or stocks in companies; (c) any other property which is unsaleable or is not readily saleable, being onerous, binding the possessor thereof either to perform any onerous act or to pay any sum of money; or (d) unprofitable contracts.

His right to disclaim is lost if, within twenty eight days or such extended period as may be, allowed by the Court of receiving a demand from any interested person to make his decision, (he does not give notice that he intends to apply for leave to disclaim).

Any person injured by disclaimer is treated as a creditor of the company to the amount of compensation or damages payable in respect of the injury, and may prove in the winding-up to the extent of the injury (Section 535).

(vii) **Avoidance of transfers etc.:** In the case of a voluntary winding-up, any transfer of shares in the company which has not been sanctioned by the liquidator, and any alteration in the status of the members of the company made after the commencement of the winding-up, is void.

In the case of a winding-up by or subject to the supervision of the Court, all disposition of properties (including actionable claims) belonging to the company as well as transfer of shares in the company or alteration in the status of its members which are made after the commencement of the winding-up are void unless otherwise ordered by the Court (Section 536).

(viii) **Avoidance of certain attachment, etc.:** In the case of any company which is being wound by or subject to the supervision of the Court, (a) any attachment, distress or execution put in force, without leave of the Court, against the estate or effects of the company, after the commencement of the winding-up or (b) any sale held, without leave of the Court, of any of the properties or effects of the company after such commencement shall be void. These provisions, however, will not apply to any proceeding for the recovery of any tax or impost or any dues payable to the Government (Section 537).

*In Rajratna Narabhai Mills Co. Ltd. (In liquidation) by its Official Liquidator vs. New Quality Bobbin Works (1973) 43 Comp. Case 131. Three issues emerged for decision. These are as follows:*

First, where an attachment of the company’s property under Court’s order takes place prior to the filing of the winding-up petition and the sale of the attachment property takes
place before the issue of the winding-up order, can the liquidator claim the sale proceeds? It was held that on account of the sale of the property having taken place after the commencement of the winding-up proceedings, Section 537 of the Act would operate and the sale of the shares would be void. Where the respondent had derived benefit under a void contract, he would be under an obligation to return it to the Official Liquidator of the company in liquidation who would be the only claimant of the benefit. Secondly, if the sale proceeds were claimable, would the liquidator being required to file a separate suit? It has been held that the summons for getting the relief under Section 537 by the official liquidator was maintainable and there was necessity for the liquidator to file a separate suit. When the official liquidator, if empowered by Section 457(1) of the Act to institute or defend legal proceedings and in performance of his duty, finds a transaction to be void against him the transaction becoming void because of the winding-up proceedings – it would be a question of fact arising in the course of winding-up and the Court would have the jurisdiction to decide the question. This is the scope and ambit of jurisdiction conferred upon the Court under Section 446(2) of the Act. Therefore, the liquidator would not have to file the suit in the Court. Thirdly, whether the application by the liquidator to the Court for the recovery of the sale proceeds was barred by limitation? Article 137 of the Limitation Act, 1963 would apply only to application not made under the Code of Procedure. The liquidator made this application not under the Code of Procedure but under the Companies Act to the Court on whom jurisdiction is conferred by Section 10 of the Companies Act. It was, therefore, held that the application was not barred by limitation.

(5) Offences by officers of companies in liquidation: The Act provides certain punishments to be inflicted on past or present officers of a company which is in the course of winding-up (i) who do not disclose to the liquidator all the property of the company and consideration for which the same has been disposed of, (ii) who conceal or fraudulently remove any part of the property of the company of value of ₹ 100 or more within twelve months next before the commencement of the winding-up, (iii) who make any material omission in their statements about the affairs of the company, (iv) who are guilty of any false representation or fraud obtaining consent of the creditor to the agreement relating to the affairs of the company or to a winding-up.

Note: The above is illustrative of offences for which an officer may be punished. For a complete list of such offences read Section 538(1)(a) to (p).

The officers may be punished on any one of the aforementioned grounds with imprisonment or with fine or with both.

Offences against the Act: No Court shall take cognizance of any offence against the Act other than an offence with respect to which proceedings are instituted under section 545, which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing made by the Registrar, or a shareholder or a person authorised by the Central Government in this regard [Section 621(1)]. In spite of anything contained in the Code of Criminal Procedure if the complainant is either the Registrar or the Central Government’s deputationist, his personal attendance before the Court trying
the offence shall not be necessary, unless the Court for reasons to be recorded in writing
requires his personal attendance at the trial [Section 621(IA)].

Notwithstanding anything contained in the Code of Criminal Procedure 1973 any offence
punishable under this Act (whether committed by a company or any officer thereof, not
being an offence punishable with imprisonment only or with imprisonment and also with
fine, may, either before or after the institution of any prosecution be compounded by
(a) the Company Law Board, or
(b) where the maximum amount of fine which may be imposed for such offence does
not exceed fifty thousand rupees by the Regional Director on payment or credit by
the company or the officer, as the case may be, to the Central Government of such
sum as that Board or the regional director as the case may be, may specify:

But in no case the sum so specified shall exceed the maximum amount of fine imposed
for the offences so compounded. This provision is not applicable in case of an offence
committed by a company or its officer within a period of three years from the date on
which a similar offence committed by it or him was compounded. [Section 621A, as
added by the Companies (Amendment) Act, 1988].

The amount of fine, imposed under the Act by the Court may be applied, under the
direction of the Court in or towards the payment of the costs of proceedings, or rewarding
the person on whose information the fine is recovered (Section 626).

For false statements made in, as well as omissions intentionally made of, any material
fact knowing it to be material, any return, report, certificate, balance sheet, prospectus,
statement or other document, Section 628 renders the offence punishable with
imprisonment extending-up to 2 years as well as with fine.

Similarly, under Section 629 an offender is punishable for intentionally giving false
evidence in any examination on oath.

Falsification of books: If with intent to defraud or deceive, any person, any officer or
contributory of a company destroys, mutilates, alters, falsifies, secrets, etc. any books,
papers or securities, or is a party to any of these acts, he will be punishable with
imprisonment for a period extending up to 7 years and fine. He will also be equally
punishable, if he makes or is privy to the making of, any false or fraudulent entry in any
register, books of account, etc. belonging to the company (Section 539).

An auditor, being an officer of the company, if culpable in the circumstance would be
liable to be punished as prescribed. The provisions of this Section can be invoked only
when the company is being wound-up.

Liabilities where proper accounts not kept: If in a winding-up it is found that proper books
of account have not been kept throughout the period of two years preceding the
commencement of winding-up (or the period between the incorporation of the company
and the commencement of the winding-up whichever is shorter) the officers of the
company would be liable to imprisonment for a term extending to one year. They may
however, escape liability, if they can show that they had acted honestly, and that in view of the circumstances in which the business was carried on, the default was excusable.

Proper books of account will be deemed to have been kept if there have been kept (a), such books or accounts as are necessary to exhibit and explain the transactions and financial position of the business of the company, including books containing entries made from day-to-day in sufficient detail of all cash received and all cash paid, and (b) statement of annual stock taking with all necessary particulars, where the business of the company has involved dealings in goods (Section 541).

Liabilities for fraudulent trading: If, in the course of a winding-up, it appears that the business has been carried on with the intent to defraud creditors or others, the Court may, on the application of the Official Liquidator, or the liquidator or any creditor or contributory, declare that any person who was knowingly a party to such a carrying on of the business shall be personally liable to an unlimited extent for all or any of the company's debts or liabilities, he may also be called upon to pay fine up to ₹ 50,000 or sentenced to imprisonment up to two years or with both (Section 542).

Misfeasance: If, in the course of winding-up of a company, it appears that any person who had taken part in the formation or promotion of the company, or any past or present director, manager, liquidator or other officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or has been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Liquidator, or any creditor or contributory, examine into the conduct of such person, and compel him to repay or restore the money or property or make compensation to the company for misfeasance or breach of trust/misapplication etc. (Section 543).

Now suppose, the Official Liquidator of a company in liquidation institutes misfeasance proceedings against the director thereof and during the pendency of the proceeding itself the director passes away. Can the legal representatives of the deceased director be impleaded and the proceedings continued against them? This question came up for judicial decision in Official liquidator vs. Pasthasarathi Sinha (1983) 53 Comp. Cases 163 (SC).

Held: The misfeasance proceedings initiated under Section 543 against a director of a company in winding-up can be continued on his death against his heirs and legal representatives for the purpose of determining and declaring the loss or damage caused to the company though no compulsive order may be made in those proceedings under Section 543 against the heirs and legal representatives. On conclusion of the proceedings under Section 543 a declaration of liability may be made. Such declaration partakes the character of a decree in a suit and can be enforced under Section 634 and 635. The provisions of Section 50 of CPC have to be applied when the person who is made liable dies and the liability of the legal representatives should be determined accordingly.

Misfeasance is an act or omission, in relation to the company, which causes loss or injury to the company. Although loss to the company has not been expressly stated in Section...
543, nevertheless such ‘loss’ has to be implied in case of misapplication or retainer. Only such an act of misfeasance as results in the loss to the company will fall within the ambit of Section 543. It is essential for the liquidator to establish that the respondents are accountable for some goods or money belonging to the company or that they are guilty of misapplication, retainer or breach of trust (In re. Vijay Laxmi Sugar Mills Ltd. AIR 1963 All 55). For the creation of liability under Section 543, it must be shown that there has been dishonesty or fraud or at least gross and culpable negligence Pilai Central Bank vs. Augusti AIR 196, Ker. 121). An honest mistake, not amounting to culpable negligence or breach of duty, would not be misfeasance (Ayyangar vs. Official Assignee of Madras, 55 Mad. 153).

Where the person guilty of the offence is a firm or body corporate, the Court may make the aforesaid order against the individual who was at the relevant time a partner of the firm or a director of the body corporate (Section 544).

**Notes:**

(i) For the purpose of Section 543 an auditor is an officer [Section 2(30)];

(ii) Section 543 provides for a summary remedy for bringing erring officers of the company to book and the long-winded remedy by way of suit is always available in addition;

(iii) Illustrations of misfeasance are: improper payment of dividends; ultra vires investment; selling his own property to company without disclosure; allotting shares in contravention of Section 69, etc.; and

(iv) Misfeasance summons would also lie against directors when they have paid dividend out of capital knowingly allotted shares to infants, etc. Misfeasance lies against the liquidator when he has negligently admitted a claim.

**Misfeasance proceedings can be taken against the auditors under Section 543 of the Companies Act.** If they are found to have been guilty of any misfeasance or breach of trust in relation to the company. Such a liability may arise due to non-performance or unsatisfactory performance of duties by an auditor in relation to the account of the company, as a result of which the company has suffered losses. The liability is a liability and the Court may call upon the auditor to make good the damages suffered by the company. But the action against the auditor under the aforementioned provision of law can be taken only if the business of the company is in the course of being wound up. The directors of a company while it is functioning can also take an action against the auditor for negligence in the circumstances similar to those aforementioned.

The application must be made within 5 years from the date of the order of winding-up or the first appointment of liquidator or of the misapplication, retainer, misfeasance or breach of trust as the case may be, whichever is longer.

(6) **Power of Court to grant relief to officers against the liability for misfeasance, breach of duty, etc.:** If in any proceedings for misfeasance against an officer of a company, it appears to the Court hearing the case that he is or may be liable in respect...
of the misfeasance, negligence, breach of duty, etc. but that he has acted honestly and reasonably and that having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused the Court may relief him either wholly or partly, from his liability on such terms as it may think fit. But in a criminal proceeding under this Sub-section, the Court shall have no power to grant relief from any liability, which may attach to an officer in respect of such misfeasance [Section 633(i)].

Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any misfeasance, etc. he may apply to the Court for relief and the Court on such application has the same power to relieve him as it would have had if it had been a Court before which proceedings against that officer for misfeasance, etc. had been brought under Sub-section 633 [Section 633(2)].

But the relief under Sub-section (1) or Sub-section (2) can be granted to an officer, only if the relevant Court has, by notice served in the manner specified by it, required the Registrar or any other person to show cause why such relief should not be granted [Section 633(1)].

It should be noted that only an officer of the company and not company itself could apply for relief. But it is for the Court before which the proceeding is pending and not for Court to grant relief. The Court can grant relief only under Sub-section (2) against apprehended prosecution.

(7) Prosecution of delinquent officers and members of the company (Section 545): If it appears to the Court in a winding-up by or subject to the supervision of the Court that any past or present officer or any member of the company has been guilty of any offence in relation to the company, the Court may, either on the application of any person interested in the winding-up or of its own motion direct the liquidator either himself to prosecute that offender or to refer the matter to the Registrar. In the latter case, if the Registrar considers it to be a fit case for prosecution he shall report the matter to the Central Government, which may, after taking such advice as it thinks fit, direct the Registrar to institute such proceedings for the purpose. No report shall, however, be made by the Registrar unless an opportunity is given to an accused person to make a statement to him in writing and of being heard thereon.

Similarly, if in the course of the voluntary winding-up it appears to the liquidator that any such person as stated above has been guilty of criminal offence in relation to the company, then he shall forthwith report to the Registrar. The Registrar may, in this case, do any of the three viz. (i) he may refer the matter to the Central Government for further enquiry whereupon they shall investigate the matter and if thought expedient, may apply to the Court for an order conferring on any person designated by them, all the case of compulsory winding-up or (ii) if he is of the opinion that the case is not a fit one for the prosecution, he shall inform the liquidator according and (iii) the liquidator in the last case if he holds a different opinion may himself take proceedings against the offender after securing the sanction of the Court. In case, however, the liquidator does not make a report to the Registrar as he should, the Court may, on an application of any person interested in the winding-up or of its own, motion, direct the liquidator to make such
report which, on being made shall dealt with by the Registrar in any one of the three ways mentioned above.

In connection with any prosecution in pursuance of these provisions, it shall be the duty of the liquidator and of every officer and an agent of the company, past and present (other than the defendant in the proceeding) to give to the Registrar all assistance he is reasonably able to give. ‘Agent’ here includes any banker, legal advisor or an auditor of the company. In case of default, the Court may, on the application of the Registrar, direct performance of this duty. Where the liquidator is in default, the Court may order him to pay the cost of the application personally unless it appears that the default was due to the liquidator not having in the hands the sufficient assets of the company.

(8) Disposal of books and papers of the company: In a winding-up by the Court or subject to the supervision of the Court, the Court will direct how the books and papers of the company and of the liquidator are to be disposed of.

In the case of members’ voluntary winding-up they are disposed of in such manner as the company by a special resolution directs and in the case of creditors’ voluntary winding-up in such a way as the Committee of Inspection and if there is no such Committee as the creditors of the company may direct.

After the expiry of five years from the dissolution of the company, no responsibility will rest on the company the liquidator or any person to whom the custody of the books and papers has been committed, by reason of any books or papers not being forthcoming for any person claiming to be interested therein (Section 55).

The Central Government may, by rules, prevent for such period (not exceeding 5 years from the dissolution of the company) as the Central Government thinks proper, the destruction of the books and papers of a company, which has been wound-up, and of its liquidator. Also it can similarly enable any creditor or contributory of the company to make representation to the Central Government in respect of the matters aforementioned and to appeal to the Court from any direction, which may be given by the Central Government in the matter [Section 540(3)]. If any person acts in contravention of any such rules or of any direction of the Central Government thereunder, he shall be punishable with an imprisonment for a term extending to 6 months or with fine extending to ₹ 50,000 or with both [Section 550(4)].

(9) Information as to pending liquidation (Section 551): You may come across a situation where the winding-up of a company has commenced but it has not been possible to conclude it within one year since its commencement. In such a case, the liquidator is required to file in the Court (in case of a winding-up/by or subject to supervision of the Court or with the Registrar in case of a voluntary winding-up) a statement in the prescribed form. The statement is to contain the prescribed particulars and is to be duly audited by a qualified auditor with respect to the proceedings in and the position of the liquidation. This statement is to be filed within two months of expiry of such a year. This statement is to be filed at intervals of not more than one year or such shorter intervals as may be prescribed. The liquidator has to comply with these requirements unless he is exempted from so doing wholly or partly by the Central Government [Sub-section (1)].
A copy of the statement filed in the Court as aforesaid has to be simultaneously filed with the Registrar who shall keep it along with the other records of the company [Sub-section (2)].

In the case of Government Company in liquidation, copy of the statement shall be forwarded to the Central Government if it is a member of the Government Company or to the state Government if that Government is a member or to the Central and the State Government both, if both are the members of the Government Company [55(2A) as added by the Companies (Amendment) Act, 1988].

The said statement is open to an inspection by any person stating himself in writing to be a creditor or contributory or his agent at all reasonable times on payment of the prescribed fee. He may also have a copy of or an extract from, the statement if he so wants [Sub-section (3)].

The Section provides for the following penalties namely:

(a) fine up to ₹ 5,000 for every day of the liquidator’s failure in complying with the requirement of the Section.

(b) imprisonment up to six months or fine up to ₹ 10,000 or both for the liquidators wilful default in causing the statement to be audited by a qualified auditor and

(c) sentence provided in Section 182 of the Indian Penal Code for the person untruthfully stating himself to be a creditor or contributory of the company for inspecting the aforementioned statement or receiving copy or an extract thereof [Sub-section (4) & (5)].

(10) Liquidators’ duty as to the payment into a bank: In terms of Section 552, every Official Liquidator is bound to pay all moneys which he receives as the liquidator of the company into the public account of India in the Reserve Bank in such a manner and as at such times as may be prescribed.

Under Section 553, every other liquidator than the Official Liquidator shall pay such money into a scheduled bank to the credit of a special bank account. This account is to be described as “the Liquidation Account of Company ‘Company Limited’/Company Private Limited”. He has to make this payment into the bank unless the Court for reasons of an advantage to the creditors or contributories otherwise orders him. However, he cannot retain with himself any sum in excess of ₹ 500 or such other amount as the Court may authorise for more than 10 days. If he fails to give any satisfactory explanation he is obliged to pay interest at 12% per annum and such other penalty as may be prescribed by the Registrar. He shall be further liable to disallowance of all or such of his remuneration as the Court may think fit. For the said stipulated amount and period, he shall also be liable to be out as well as to pay expenses occasioned by reason of his default.

According to Section 554, neither, the Official Liquidator nor any other liquidator can pay any money received by him in his capacity as such into any private banking account.

(11) Unpaid dividend, and undistributed assets to be paid into Company’s Liquidation Account (Section 555): Where a company is being wound-up, the liquidator shall
forthwith may into the public account of India in the Reserve Bank in a separate account described as the “Company’s Liquidation Account” all the money which he has either in his hands or under his control and which represents (a) dividends payable to any creditor which had remained unpaid for 6 months after the declaration thereof; or (b) assets refundable to any contributory, which have remained undistributed thereof; or (b) assets refundable to any contributory, which have remained undistributed for 6 months after the date on which they became refundable. Similarly, on the dissolution of a company the liquidator must pay any unpaid dividends or undistributed assets in his hands at the date of the dissolution, into the account aforementioned [Sub-section (2) & (3)].

While making the aforesaid payment, the liquidator shall furnish to such officer as appointed by the Central Government with a statement in the prescribed form. Such a statement must set forth the nature of the sums, the names and the last known addresses of thin persons entitled to participate therein, the amount to which each is entitled thereto and nature of the claim thereto, and other prescribed particulars.

For the money paid into the Reserve Bank the liquidator is entitled to a receipt from the former a receipt is an effectual discharge of the liquidator’s obligation in this regard [Sub-section (4)].

Where the company is being wound-up by the Court the liquidator shall make the payment mentioned above by transfer from the account referred to in Section 552 [Sub-section (5)].

Visualise situation where the company is being wound-up voluntarily or subject to the supervision of the Court. In such a case, the liquidator shall, when filing a statement pursuant to Section 51(1) indicate the sum of money which is payable to the Reserve Bank under Section 551(1) & (2) as unclaimed dividends or undistributed assets and which he has not in his hands for 6 months preceding the date to which the statement is brought down, and pay that sum into the company’s Liquidation Account within 14 days from the date of filing the statement [Sub-section (6)].

Any person entitled to moneys which had been paid into the company’s Liquidation Account, may apply to the Court for an order for payment thereof. The Court may order payments, if it is satisfied that the money is due to the applicant. Prior to this order being made; the Court shall, however, serve a notice on an officer who might have been appointed by the Central Government in this connection, asking him to show cause why the order should not be made [Sub-section (7)]. This provision clearly shows that the person entitled to participate in the sums so paid up into the Company’s Liquidation Account do not lose their right forever.

It should, however, be noted that the person may also apply to the Central Government, instead of the Court as referred to above, for an order for payment of the money. If no application for such a payment has already been made to the Court, the Central Government may make the order for payment to that person or the sum due after taking such security from him as it may think fit) provided it is satisfied with a certificate to be given in this regard by the liquidator or the Official Liquidator or otherwise [Sub-section (7)].
It is necessary that if the moneys paid into the company’s liquidation account have remained unclaimed for fifteen years, those will have to be transferred to the general revenue account of the Central Government. Even thereafter any person entitled thereto may apply to the Central Government [Sub-section (8)].

Should the liquidator, instead of putting the money into the company’s Liquidation Account, retain it, he must: (i) pay interest @ 12% per annum on the sum retained, subject, however to the Central Government’s power to remit wholly or partly the amount of interest; (ii) pay any expenses incurred as a result of his default; and (iii) where the winding-up is by or under the ‘supervision of the Court, be deprived of his remuneration partly or wholly and be removed from his office [Sub-section (9)].

(12) Dissolution declared void: Within two years of the dissolution of a company, the Court may, on an application being made by the liquidator or any other person interested, make an order declaring the dissolution to have been void. A certified copy of the order must be filed with the Registrar by the person on whose application order was made, within 30 days (Section 559).

(13) By removal of the company’s name from the register by the Registrar (without winding-up order) (Section 560): A defunct company is a company which has not been legally dissolved, and the name of which continues on the Register of Companies maintained in the Registrar’s office.

Where the Registrar has a reasonable ground to believe that a company is not carrying on business or is not in operation he must send to the company a letter through post enquiring if it is carrying on business or is in operation. If no reply is received by him within one month, the Registrar, within 14 days after the expiry of the period of one month, must send to the company a registered letter referring to the first letter and state that no answer thereto has been received and further stating that if no answer is received to the second letter within one month of the date thereof, a notice will be published in the Official Gazette with a view to striking the companies name off the register. If the Registrar either gets a reply to the effect that it is not carrying on business or is not in operation, or does not within one month, after the second letter, receive any reply, he may publish in the Official Gazette and send to the company by registered post a notice that at the expiry of a period of three months from the date of the notice, the name of the company will, unless cause is shown to the contrary, be struck off the Register and the company will be dissolved.

If the Registrar has reason to believe either that no liquidator is acting or that the affairs of the company have been completely wound up, and any returns required to be made by the liquidator have not been made for consecutive six months, the Registrar must publish in the Official Gazette and send to the company a similar notice. When the time stipulated in such notice expires, the Registrar may, unless cause to the contrary is previously shown, strike its name off the Register and publish notice thereof in the Official Gazette, whereupon the company shall stand dissolved.

But the liability (if any) of every director, manager or other officer who was exercising and power of management and of every member of the company, shall continue. This liability may be enforced as if the company had not been dissolved. Also, the aforesaid
provisions will not affect the power of the Court to wind up a company the name of which has been struck off the register.

As per present practice, a company desirous of getting its name struck off, has to apply to Registrar of Companies in e-form 61. All pending statutory returns are required to be filed along with e-form 61.

In order to give an opportunity for fast track exit by a defunct company, for getting its name struck off from the Register of Companies, the Ministry of Corporate Affairs vide General Circular No. 36/2011 dated 7th June, 2011 has decided to modify the existing route through e-form – 61 and has prescribed the new Guidelines for “Fast Track Exit mode”.

(14) Winding-up unregistered companies: An “unregistered company” includes any partnership, association or company consisting of more than seven members at the time when the petition for winding-up the partnership, etc. is presented before the Court. It does not include, however, a railway company incorporated by an Act of Parliament or other Indian Law or any Act of Parliament of the United Kingdom, or a company registered under the Companies Act, 1956 or under any previous Companies Law (Section 582).

An unregistered company may be wound-up under the Act and all the provisions of the Act with respect to winding-up apply to an unregistered company with the following exceptions and additions:

(a) To determine a Court’s jurisdiction in the matter of its winding-up, the principal place of business is, for all the purposes of the winding-up deemed to be the Registered Office of the company.

[N.B. The Registered Office of a company is the determining factor for the Court’s jurisdiction in this regard].

(b) An unregistered company is not to be wound-up under Act voluntarily or subject to supervision. It is to be wound-up by the Court.

(c) The circumstances in which an unregistered company may be wound-up are as follows:

(i) if the company has been dissolved, or has ceased to carry on business, or is carrying on business for the purpose of winding-up its affairs;

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

(iii) if the Court is of the opinion that it is just and equitable that the company should be wound-up.

An unregistered company is deemed to be unable to pay its debts in the following circumstances:

(i) if a creditors (as assignee or otherwise), to whom a sum exceeding ₹ 500 is due, has submitted a demand in writing to the company asking it to pay him the sum due and the company has neglected to pay it or to secure or to compound for it for 3 weeks after the service of the demand;
(ii) if any suit or legal proceedings has been instituted against any member for any debt or demand due from the company and a notice thereof has been communicated to the company and the company has not, within 10 days of the service of the notice, paid, secured or compounded for the debt;

(iii) if the execution or the process against the company has been returned unsatisfied in whose or in part;

(iv) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

Every person, in the event of an unregistered company being wound-up, who is liable to pay or to contribute to the payment of (a) any debt or liability of the company, (b) any sum for the adjustment of the rights of the members among themselves or (c) the costs, charges and expenses of the winding-up, shall be deemed to be a contributory. He will be liable to contribute to the assets of the company all sums due from him in respect of any liability to pay or contribute. If a contributory dies or becomes insolvent, the provision of the Act as regards legal representatives or assignees shall be applicable (Section 585).

The provisions of the Act with regard to staying and restraining suits and legal proceeding against a company at any time after the presentation of the petition for winding-up but before a winding up order is made, in the case of an unregistered company where the application to stay or restrain is made by a creditor, extent to suits and legal proceedings against any contributory (Section 586). If, however, a winding-up order has been made, no suit or legal proceedings can be commenced or proceeded with against a contributory for the debt of the company with leave of the Court (Section 587).

Note: In this chapter, wherever the word ‘Act’ is used, it refers to the Companies Act, 1956.