

**COMPANIES ACT, 2013**

**CORPORATE  
RESTRUCTURING  
& INSOLVENCY**



**THE INSTITUTE OF  
Company Secretaries of India**  
**IN PURSUIT OF PROFESSIONAL EXCELLENCE**  
Statutory body under an Act of Parliament

# **CORPORATE RESTRUCTURING & INSOLVENCY**

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## **SECTION –I COMPROMISE ARRANGEMENT AND MERGERS**

### **INTRODUCTION**

Chapter XV (Section 230 to 240) of Companies Act, 2013(the Act) contains provisions on ‘Compromises, Arrangements and Amalgamations’, that covers compromise or arrangements, mergers and amalgamations, Corporate Debt Restructuring, demergers, fast track mergers for small companies/holding subsidiary companies, cross border mergers, takeovers, amalgamation of companies in public interest etc.,. The procedural aspects involved such as format of application to be made to National Company Law Tribunal (the Tribunal), form of notice and the procedural aspects involved with respect to the substantive law are covered under the Rules made under Chapter XV of the Act. .

The scheme of Chapter XV goes as follows.

1. Section 230-231 deals with compromise or arrangements.
2. Section 232 deals with mergers and amalgamation including demergers.
3. Section 233 deals with amalgamation of small companies (also called fast track mergers)
4. Section 234 deals with amalgamation with foreign company (also called cross border mergers)
5. Section 235 deals acquisition of shares of dissenting shareholders.
6. Section 236 deals with purchase of minority shareholding.
7. Section 237 deals with power of central government to provide for amalgamation of companies in public interest.
8. Section 238 deals with registration of offer of schemes involving transfer of shares.

9. Section 239 deals with preservation of books and papers of amalgamated companies.
10. Section 240 deals with liability of officers in respect of offences committed prior to merger, amalgamation etc.,

**COMPROMISE OR ARRANGEMENT WITH MEMBERS OR CREDITORS (SECTION 230)**

- When a compromise or arrangement is proposed—
  - (a) between a company and its creditors or any class of them; or
  - (b) between a company and its members or any class of them,
 the Tribunal may, on the application of the (i) company or (ii) of any creditor or (iii) member of the company, or (iv) in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.
- The application to the tribunal to disclose by affidavit—
  - (a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;
  - (b) reduction of share capital of the company, if any, included in the compromise or arrangement;
  - (c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including—
    - (i) a creditor's responsibility statement in the prescribed form;
    - (ii) safeguards for the protection of other secured and unsecured creditors;
    - (iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;
    - (iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and
    - (v) a valuation report in respect of the shares and the property

and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

- Notice of the meeting called in pursuant to the order of the tribunal shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by
  1. a statement disclosing the details of the compromise or arrangement,
  2. a copy of the valuation report, if any, and
  3. explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and
  4. the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and
  5. such other matters as may be prescribed:

Such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed:

When the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

### **Procedural aspects relating to notice under Rule 15.3**

Rule 15.3 states that the notice of the meeting pursuant to the order of the Tribunal to be given in Form No. 15.3, and shall be sent individually specifying therein, inter alia, including

1. details of the order of the Tribunal directing the calling, convening and conducting of the meeting;
2. details of the company;
3. if the scheme of compromise or arrangement relates to more than one company, the fact and details of any relationship

subsisting between such companies including holding, subsidiary or of associate companies;

4. the date of the board meeting at which the scheme was approved by the Board of directors including the name of the directors voted in favor of the resolution, voted against the resolution and not voted/ participated on such resolution;
5. details of the scheme of compromise or arrangement including:
  - i. parties involved in such compromise or arrangement;
  - ii. in case of amalgamation or merger, appointed date, share exchange ratio and other consideration, if any;
  - iii. valuation report including basis of valuation and fairness opinion of the registered valuer, if any;
  - iv. details of capital/debt restructuring, if any;
  - v. rationale for the compromise or arrangement;
  - vi. benefits of the compromise or arrangement as perceived by the board of directors to the company, members, creditors and others;
  - vii. amount due to other unsecured Creditors and the security available to the creditors thereon;
6. disclosure of nature and extent of interest and effect of compromise or arrangement on such interest of: (a) key managerial personnel; (b) directors; (c) promoters; (d) non-promoter members; (e) depositors; (f) creditors; (g) debenture holders; (h) deposit and debenture trustee(s); (i) promoters, directors, and key managerial personnel of holding company, subsidiary and associate companies; (j) employees of the company stating clearly that the changes, if any, in the terms and conditions of employment are not detrimental to the interest of the employees;
7. where there is no interest or there is no effect on such interest of any promoter, director or key managerial personnel, a statement to the effect that there is no interest or there is no effect of the scheme of compromise or arrangement on such interests of such persons;
8. investigation proceedings, if any, pending against the company or against any promoter, director or key managerial personnel of such company;
9. details of shareholding of directors, key managerial personnel and promoters of the company as on the date of making this statement and change in their shareholding in the last six months including the date on which and price at which change took place;

10. details of any No-objection(s), approvals or sanctions, if already received from the concerned authorities for the compromise or arrangement;
11. details of the availability of the following documents for obtaining extract from or for making copies of or for inspection by the members and creditors, namely:
  - (a) latest audited financial statements of the company including consolidated financial statements;
  - (b) copy of the order of Tribunal in pursuance of which the meeting is to be convened;
  - (c) copy of scheme of compromise or arrangement;
  - (d) contracts or agreements material to the compromise or arrangement; and
  - (e) such other information/documents as the Board/ Management believes necessary and relevant for making decision for / against the scheme;
12. declaration to the effect that the scheme is in the best interests of the employees, creditors, debenture holders, members particularly non-promoter members and minority shareholders of the company, as detailed in the scheme.;
13. Status of approval(s) of regulatory or any other authority(ies), required, if any in connection with compromise or arrangement;
14. The notice shall provide for the information required under sub section (4) of section 230 of the Act.

For the purposes of this rule, disclosure required to be made by a company shall be made in respect of all the companies which are the part of the compromise or arrangement.

The notice shall be sent by the chairman appointed for the meeting, or, if the Tribunal so directs, by the company (or its liquidator), or any other person as the Tribunal may direct, by post, e-mail or any other mode as directed by the Tribunal to their last known addresses at least four weeks before the date fixed for the meeting.

Rule 15.5 states that the notice of the meeting shall be advertised in such newspapers and in such manner as the Tribunal may direct, not less than fourteen clear days before the date fixed for the meeting. The advertisement shall be in Form No. 15.5.

- Notice to provide for voting by themselves or through proxy or through postal ballot

Subsection (4) of section 230 states that a notice under sub-section (3) shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

- Who can object to the scheme?

Any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement.

Rule 15.8 states that the consent or objections under sub-section (4) of section 230 may be conveyed in writing to the Chairperson of the meeting within a month from the date of the receipt of the notice.

- Notice to be sent to the regulators seeking their representations

Section 230(5) states that a notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

Rule 15.4 of Chapter XV states that the notice to the regulators be made in form 15.4

- Approval and sanction of the scheme

Section 230(6) states that when at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall

be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator and the contributories of the company.

15.9 states that the decisions of the meeting or meetings held in pursuance of the order of the Tribunal and the manner as prescribed in section 230 of the Act, on all resolutions shall be ascertained only by taking a poll while considering the representations of such authorities as per sub-section (5) thereof and the consents adopting the arrangement or compromise as received from the eligible persons.

15.10 states that the chairman of the meeting (or where there are separate meetings, the chairman of each meeting) shall, within the time fixed by the Tribunal, or where no time has been fixed, within seven days after the conclusion of the meeting, report the result thereof to the Tribunal. The report shall state accurately the number of creditors or class of creditors or the number of members or class of members, as the case may be, who were present and who voted at the meeting either in person or by proxy, their individual values and the way they voted. The report shall be in Form No. 15.6.

- Order of the tribunal sanctioning the scheme to provide for the Certain matters

An order made by the Tribunal shall provide for all or any of the following matters, namely:—

- (a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
- (b) the protection of any class of creditors;
- (c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;
- (d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;
- (e) such other matters including exit offer to dissenting

shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:

- Compromise or arrangement is to be in conformity with the accounting standards

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

- Order of tribunal to be filed with the Registrar

Section 230(8) states that the order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

- Tribunal may dispense with calling of meeting of creditors

Section 230(9) states that the Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

- Compromise in respect of buy back is to be in compliance with section 68

As per Section 230(10), no compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

- Compromise includes takeover

Section 230(11) states that any compromise or arrangement may include takeover offer made in such manner as may be prescribed. In case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

- Power of the tribunal to enforce compromise or arrangement

As per section 231(1) when the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it—

- (a) shall have power to supervise the implementation of the compromise or arrangement; and

- (b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper implementation of the compromise or arrangement.

Sub-section (2) states that if the Tribunal is satisfied that the compromise or arrangement sanctioned under section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company and such an order shall be deemed to be an order made under section 273.

### **MERGER AND AMALGAMATION OF COMPANIES (SECTION 232)**

- Tribunal's power to call meeting of creditors or members, with respect to merger or amalgamation of companies

Section 232(1) states that when an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—

- (a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and
- (b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies,

the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply *mutatis mutandis*.

- Circulation of documents for members/creditors meeting

Section 232(2) states that when an order has been made by the Tribunal under sub-section (1), merging companies or the companies in respect of which a division is proposed, shall also be required to

circulate the following for the meeting so ordered by the Tribunal, namely:—

- (a) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;
  - (b) confirmation that a copy of the draft scheme has been filed with the Registrar;
  - (c) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;
  - (d) the report of the expert with regard to valuation, if any;
  - (e) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.
- Sanctioning of scheme by tribunal

Section 232(3) states that the Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and (2) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—

- (a) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;
- (b) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

*No transferee company can hold shares in its own name or under any trust*

A transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of

its subsidiary or associate companies and any such shares shall be cancelled or extinguished;

- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer;
- (d) dissolution, without winding-up, of any transferor company;
- (e) the provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;
- (f) where share capital is held by any non-resident shareholder under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order;
- (g) the transfer of the employees of the transferor company to the transferee company;
- (h) when the transferor company is a listed company and the transferee company is an unlisted company,—
  - (A) the transferee company shall remain an unlisted company until it becomes a listed company;
  - (B) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal:

The amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it;
- (i) where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and
- (j) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out:

- Auditor's certificate as to conformity with accounting standard

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

- Transfer of property or liabilities

Sub-section (4) states that an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall by virtue of the compromise or arrangement, cease to have effect.

- Certified copy of the order to be filed with the registrar

Section 232(5) states that every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

- Effective date of the scheme

Section 232(6) states that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

- Annual statement certified by CA/CS/CWA to be filed with registrar every year until the completion of the scheme

Section 232 (7) states that every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

- Punishment

Section 232(8) states that if a transferor company or a transferee company contravenes the provisions of this section, the transferor company or the transferee company, as the case may be, shall be

punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of such transferor or transferee company who is in default, shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

- Compromise or arrangement includes 'demerger'

Rule 15.31 of the Rules made under Chapter XV states that For the purpose of Chapter XV of the Act, 'demerger' in relation to companies means transfer, pursuant to scheme of arrangement by a 'demerged company' of its one or more undertakings to any 'resulting company' in such a manner as provided in section 2(19AA) of the Income Tax Act, 1961, subject to fulfilling the conditions stipulated in section 2(19AA) of the Income Tax Act and shares have been allotted by the 'resulting company' to the share holders of the 'demerged company' against the transfer of assets and liabilities.

(2) For the purpose of the compromise in the nature of 'demerger' till the Accounting Standards is prescribed for the purpose of 'demerger', the Accounting Treatment shall be in accordance with the conditions stipulated in section 2(19AA) of the Income Tax Act, 1961 and

- (i) in the books of the 'demerged company':-
  - (a) Assets and liabilities shall be transferred at the same value appearing in the books, without considering any revaluation or writing off of assets carried out during the preceding two financial years; and
  - (b) The difference between the value of assets and liabilities shall be credited to capital reserve or debited to good will.
- (ii) In the books of 'resulting company':-
  - (a) Assets and liabilities of 'demerged company' transferred shall be recorded at the same value appearing in the books of the 'demerged company' without considering any revaluation or writing off of assets carried out during the preceding two financial years;
  - (b) Shares issued shall be credited to the share capital account; and
  - (c) The excess or deficit, if any, remaining after recording the aforesaid entries shall be credited to capital reserve or debited to good will as the case may be.

A certificate from a Chartered Accountant is to be submitted to the Tribunal to the effect that both 'demerged company' and 'resulting company' have complied with conditions as above and accounting treatment prescribed in this rule

### **MERGER AND AMALGAMATION OF CERTAIN COMPANIES - FAST TRACK MERGERS**

Section 233 prescribes simplified procedure for Merger or amalgamation of

- two or more small companies or
- between a holding company and its wholly-owned subsidiary company or
- such other class or classes of companies as may be prescribed;

*What is a holding company?*

As per Section 2(46) "holding company", in relation to one or more other companies, means a company of which such companies are subsidiary companies;

*What is a small company?*

As per section 2(85) "small company" means a company, other than a public company,—

- (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or
- (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to—

- (A) a holding company or a subsidiary company;
- (B) a company registered under section 8; or
- (C) a company or body corporate governed by any special Act;

*What is a subsidiary company?*

As per 2(87) "subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company—

- (i) controls the composition of the Board of Directors; or

- (ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation.—For the purposes of this clause,—

- (a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;
- (b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;
- (c) the expression "company" includes any body corporate;
- (d) "layer" in relation to a holding company means its subsidiary or subsidiaries;

### **Merger of small companies/holding and subsidiary companies**

Accordingly sub-section (1) of Section 233 states that notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely:—

- (a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company;
- (b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. of the total number of shares;

- (c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and
- (d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

*Rule 15.25 states as follows with respect to section 233(1)*

- (1) For the purposes of sub-section (1) of section 233, a company shall be deemed to be "wholly owned subsidiary" only if hundred per cent of share capital is held by the holding company except the shares held by the nominee or nominees to ensure that the number of members of subsidiary company is not reduced below the statutory limit as provided in section 187.
- (2) For the purposes of clause (c) of sub-section (1) of section 233, the declaration of solvency shall be filed by the each of the companies involved in a scheme of compromise or arrangement involving merger in Form No. 15.12 along with such fee as provided in Annexure 'B' before convening the meeting of members and creditors for approval of the scheme.
- (3) For the purposes of clause (b) and (d) of sub-section (1) of section 233, the notice of the meeting to the members and creditors shall be accompanied by
  - (a) a statement, as far as applicable, referred to in sub-section (3) of section 230;
  - (b) the declaration of solvency made in pursuance of clause (c) of sub-section (1) of section 233;
  - (c) a copy of the scheme.

### **Transferee Company to file a copy of scheme approved**

Section 233(2) states that the transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

*Rule 15.25(4) prescribes the following procedure as to section 233(2)*

- (4) (a) For the purposes of sub-section (2) of section 233, the

transferee company shall, within seven days after the conclusion of the meeting(s) of members or class of members or creditors or class of creditors, file in Form No. 15.13 a copy of the scheme as approved by the members and creditors, along with report of the result of each of the meetings with the Central Government, Registrar of Companies and the Official Liquidator, of the place where the registered office of the company is situated.

- (b) Copy of the scheme shall be filed with the Registrar of Companies along with the prescribed fee through the MCA e-filing system.
- (c) Copy of the scheme shall be filed with the Central Government and Official Liquidator, by sending them through hand delivery or registered or speed post or through electronic filing system as may be approved by the Central Government.

**Central Government to issue confirmation order, where there are no objections or suggestions from registrar or official liquidator**

Section 233(3) states that on the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.

*Rule 15.25(5) states as under with respect to section 233(3)*

When no objection or comment is received to the scheme from the Registrar and Official Liquidator or where even after the receipt of objections or comments of Registrar and Official Liquidator, the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors the Central Government shall issue in Form No. 15.14, a confirmation order of such scheme of compromise, or arrangement.

**Objections if any by the registrar or official liquidator to be communicated to the central government**

Section 233(4) If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days. If no such communication is made, it shall be presumed that he has no objection to the scheme.

**Application by Central Government to the Tribunal**

Section 233(5) states that if the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal within a period of sixty days of the receipt of the scheme under sub-section (2) stating its objections and requesting that the Tribunal may consider the scheme under section 232.

**Tribunal's Action to Central Government's application**

Section 233(6) states that on receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit:

If the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.

**Registrar having jurisdiction over transferee company has to be communicated**

Section 233(7) states that a copy of the order under sub-section (6) confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.

As per Rule 15.25(7) states that for the purposes of sub-section (7) of section 233, the confirmation order of the scheme issued by the Central Government or tribunal, shall be filed in Form 15.15 along with the prescribed fee, with registrars having jurisdiction over transferor and transferee companies respectively.

**Effect of registration of the scheme**

Section (8) states that the registration of the scheme under sub-section (3) or sub-section (7) shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.

Section 233 (9) states that the registration of the scheme shall have the following effects, namely:—

- (a) transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company;
- (b) the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;
- (c) legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and
- (d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.

**Transferee Company not to hold any share in its own name or trust and all such shares are to be cancelled or extinguished**

Section 233 (10) states that a transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.

**Transferee Company to file an application with Registrar along with the scheme registered**

Section 233(11) The transferee company shall file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital. The fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorised capital enhanced by the merger or amalgamation.

**CROSS BORDER MERGERS**

**Merger or amalgamation of a Company with a foreign company**

Section 234(2) Subject to the provisions of any other law for the

time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

For the purposes of sub-section (2), the expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Section 234. (1) states that the provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. The Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

### **PROVISIONS OF COMPANIES ACT 2013 RELATING TO MINORITY SHAREHOLDERS AT THE TIME OF COMPROMISE/ARRANGEMENT**

Section 235 of the Companies Act 2013 prescribes the manner of acquisition of shares of shareholders dissenting from the scheme or contract approved by the majority shareholders holding not less than nine tenth in value of the shares, whose transfer is involved. It includes notice to dissenting shareholders, application to dissenting shareholders to tribunal, deposit of consideration received by the transferor company in a separate bank account etc.,

Further Section 236 prescribes the manner of notification by the acquirer(majority) to the company, offer to minority for buying their shares, deposit an amount equal to the value of shares to be acquired, valuation of shares by registered valuer etc.,

Further section 230(7)(e) provides that the order made by the National Company Law Tribunal may provide for exit offer to dissenting shareholders, if any as are in the opinion of the tribunal necessary to effectively implement the terms of the compromise or arrangement.

Section 232(3)(h)(B) provides exit route for the shareholders of unlisted transferor company.

**POWER OF THE CENTRAL GOVERNMENT TO PROVIDE FOR AMALGAMATION OF COMPANIES IN PUBLIC INTEREST**

*Power of Central Government to provide for amalgamation of Companies*

Section 237(1) states that when the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order.

*Continuation of legal proceedings*

Section 237 (2) states that the order under sub-section (1) may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.

*Interest or rights of members, creditors, debenture holders not to be affected*

As per Section 237(3), every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.

*Appeal to tribunal*

As per Section 237 (4) Any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

*Conditions for order under Section 237*

As per Section 237 (5) No order shall be made under this section unless—

- (a) a copy of the proposed order has been sent in draft to each of the companies concerned;
- (b) the time for preferring an appeal under sub-section (4) has expired, or where any such appeal has been preferred, the appeal has been finally disposed off; and
- (c) the Central Government has considered, and made such modifications, if any, in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

*Copies of order to be laid before each house of parliament*

As per Section 237 (6) the copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

*Registration of offer of schemes involving transfer of shares*

Section 238(1) states that in relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company under section 235,—

- (a) every circular containing such offer and recommendation to the members of the transferor company by its directors to accept such offer shall be accompanied by such information and in such manner as may be prescribed;
- (b) every such offer shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that necessary cash will be available; and
- (c) every such circular shall be presented to the Registrar for registration and no such circular shall be issued until it is so registered: Provided that the Registrar may refuse, for reasons to be recorded in writing, to register any such circular which does not contain the information required to be given under clause (a) or which sets out such information in a manner

likely to give a false impression, and communicate such refusal to the parties within thirty days of the application.

Section 238(2) states that an appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub-section (1).

Section 238(3) states that the director who issues a circular which has not been presented for registration and registered under clause (c) of sub-section (1), shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.

#### *Preservation of books and papers of amalgamated company*

As per section 239, the books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter shall not be disposed of without the prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

#### *Liability of officers in respect of offences committed prior to amalgamation*

As per Section 240, notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.

### **SECTION II- REVIVAL AND REHABILITATION OF SICK COMPANIES**

Chapter XIX of Companies Act 2013 (Section 253-269) and the rules made there under provides for time bound rehabilitation or liquidation process and winding up is resorted only when the revival is not feasible.

The provisions of Chapter XIX of Companies Act 2013 inter-alia includes the following aspect to deal with the challenges in revival of Sick Companies.

- Provisions of revival and rehabilitation of sick companies to apply to all companies and not only to an "industrial company."

- Inability to pay debts is to be considered as criteria for determining a sick company. If a company fails to pay debts due to its secured creditor representing 50% or more of outstanding amount of debt within 30 days of demand, any secured creditor may file an application to National Company Law Tribunal (the tribunal) to declare such company as a "sick company". The company may also file an application to the tribunal to declare it as a sick company on above ground.
- Where the Tribunal is satisfied that a company has become sick company, it shall after considering all the relevant facts and circumstances of the case, decide, as soon as may be, by an order in writing, whether it is practicable for the company to make the repayment of its debts within a reasonable time.
- On the determination of sickness by the tribunal, the applicant shall make an application within 60 days of determination, for measures to be adopted for revival or rehabilitation.
- Where the Tribunal determines the Company as Sick and where the company has no draft scheme for its revival and rehabilitation, the Tribunal may direct the Interim administrator who shall be appointed by Tribunal from a panel maintained by the Central Govt.
- When the interim administrator submits his report about the possibility of revival, then company administrator is appointed who undertakes the approval process by creditors and submits the same to the tribunal who would sanction the scheme within 60 days of approval by creditors.
- Determination of sickness

*Application by Secured Creditors to the Tribunal (Section 253(1))*

When on a demand by the secured creditors of a company representing fifty per cent. or more of its outstanding amount of debt, the company has failed to pay the debt within a period of thirty days of the service of the notice of demand or to secure or compound it to the reasonable satisfaction of the creditors, any secured creditor may file an application to the Tribunal in the prescribed manner along with the relevant evidence for such default, non-repayment or failure to offer security or compound it, for a determination that the company be declared as a sick company.

*Application for stay of proceedings (Section 253(2) and (3))*

The secured creditors who has made application to the tribunal

for determination of sickness may make another application to the Tribunal for the stay of any proceedings for the following:

- (a) for winding up of the company, or
- (b) for execution, distress or the like against any property and assets of the company, or for appointment of a receiver in respect thereof;
- (c) for enforcement of any security against the company;

The stay order passed by the tribunal would be operative for 120 days. (section 253(3))

*Application by Central/State Government/Reserve Bank of India/Scheduled Bank/Public Financial Institution /State Level Institution may make reference to Tribunal (Section 253(5))*

Without prejudice to the provisions of sub-sections (1) to (4) of Section 253, the Central Government or the Reserve Bank of India or a State Government or a public financial institution or a State level institution or a scheduled bank may, if it has sufficient reasons to believe that any company has become, for the purposes of this Act, a sick company, make a reference in respect of such company to the Tribunal for determination of the measures which may be adopted with respect to such company:

A reference shall not be made as above in respect of any company by—

- (a) the Government of any State unless all or any of the undertakings belonging to such company are situated in such State;
- (b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to such company, an interest in such company.

*Obligation of Company on filing application to tribunal to declare the company, a sick company*

Where an application is made to the tribunal by the secured creditors or the company itself, as the case may be, —

- (a) the company shall not dispose of or otherwise enter into any obligation with regard to, its properties or assets except as required in the normal course of business;

- (b) the Board of Directors shall not take any steps likely to prejudice the interests of the creditors.

*Determination by the Tribunal*

The Tribunal shall, within a period of sixty days of the receipt of an application under sub-section (1) or sub-section (4) (i.e by the secured creditor or the company on its own), determine whether the company is a sick company or not:

It may be noted that no such determination shall be made in respect of an application made by a secured creditor under subsection (1) of Section 253, unless the company has been given notice of the application and a reasonable opportunity to reply to the notice within thirty days of the receipt thereof.

If the Tribunal is satisfied that a company has become a sick company, the Tribunal shall, after considering all the relevant facts and circumstances of the case, decide, as soon as may be, by an order in writing, whether it is practicable for the company to make the repayment of its debts referred to in sub-section (1) within a reasonable time.

If the Tribunal deems fit that it is practicable for a sick company to pay its debts referred to in that sub-section within a reasonable time, the Tribunal shall, by order in writing and subject to such restrictions or conditions as may be specified

in the order, give such time to the company as it may deem fit to make repayment of the debt.

- Application for Revival on determination of Sickness( Section 254)

On the determination of a company as a sick company by the Tribunal, any secured creditor of that company or the company may make an application to the Tribunal within sixty days of the determination of sickness, for the of the measures that may be adopted with respect to the revival and rehabilitation of such company.

*Over riding effect of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002*

1. If the financial assets of the sick company had been acquired by any securitisation company or reconstruction company under sub-section (1) of section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, no such application shall be made without the consent of securitisation company or reconstruction company which has acquired such assets.

2. that no reference shall be made under this section if the secured creditors representing three-fourths in value of the amount outstanding against financial assistance disbursed to the borrower have taken measures to recover their secured debt under sub-section (4) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002:
3. In case any reference had been made before the Tribunal and a scheme for revival and rehabilitation submitted, such reference shall abate if the secured creditors representing three-fourths in value of the amount outstanding against financial assistance disbursed to the borrower have taken measures to recover their secured debt under sub-section (4) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002:

Application to tribunal with respect to measures for revival is to be accompanied by draft scheme of revival or rehabilitation in the prescribed manner, audited financial statement for the immediately preceding financial year and such other documents as may be prescribed.

- Appointment of Interim Administrator(Section 256)

When an application for measures for revival or rehabilitation is received, the tribunal shall not later than seven days from such receipt;

- (a) fix a date for hearing not later than ninety days from date of its receipt;
- (b) appoint an interim administrator to convene a meeting of creditors of the company in accordance with the provisions of section 257 to be held not later than forty-five days from receipt of the order of the Tribunal, appointing him to consider whether on the basis of the particulars and documents furnished with the application made under section 254, the draft scheme, if any, filed along with such application or otherwise and any other material available, it is possible to revive and rehabilitate the sick company and such other matters, which the interim administrator may consider necessary for the purpose and to submit his report to the Tribunal within sixty days from the date of the order:

If no draft scheme is filed by the company and a declaration has been made to that effect by the Board of Directors, the Tribunal may direct the interim administrator to take over the management of the

company and issue such other directions to the interim administrator as the Tribunal may consider necessary to protect and preserve the assets of the sick company and for its proper management.

- Meeting of Committee of Creditors (Section 257)

The interim administrator shall appoint a committee of creditors with such number of members as he may determine, but not exceeding seven, and as far as possible a representative each of every class of creditors should be represented in that committee.

The holding of the meeting of the committee of creditors and the procedure to be followed at such meetings, including the appointment of its chairperson, shall be decided by the interim administrator.

The interim administrator may direct any promoter, director or any key managerial personnel to attend any meeting of the committee of creditors and to furnish such information as may be considered necessary by the interim administrator.

- Order of the Tribunal for revival or winding up and appointment of Company Administrator in case of revival (Section 258 & 259)

On the date of hearing fixed by the Tribunal and on consideration of the report of the interim administrator filed under sub-section (1) of section 256, if the Tribunal is satisfied that the creditors representing three-fourths in value of the amount outstanding against the sick company present and voting have resolved that—

- (a) it is not possible to revive and rehabilitate such company, the Tribunal shall record such opinion and order that the proceedings for the winding up of the company be initiated; or
- (b) by adopting certain measures the sick company may be revived and rehabilitated, the Tribunal shall appoint a company administrator for the company and cause such administrator to prepare a scheme of revival and rehabilitation of the sick company:

The Tribunal may, if it thinks fit, appoint an interim administrator as the company administrator.

The interim administrator or the company administrator, as the case may be, shall be appointed by the Tribunal from a databank maintained by the Central Government or any institute or agency authorised by the Central Government in a manner as may be prescribed consisting of the names of company secretaries, chartered accountants, cost accountants and such other professionals as may, by notification,

be specified by the Central Government. The terms and conditions of the appointment of interim and company administrators shall be such as may be ordered by the Tribunal.(Section 259(1) and (2)

- Takeover of assets or management by Company Administrator (Section 259(3))

The Tribunal may direct the company administrator to take over the assets or management of the company and for the purpose of assisting him in the management of the company, the company administrator may, with the approval of the Tribunal, engage the services of suitable expert or experts.

- Scheme of Revival and Rehabilitation(Section 261)

The company administrator shall prepare or cause to be prepared a scheme of revival and rehabilitation of the sick company after considering the draft scheme filed along with the application under section 254.

(2) A scheme prepared in relation to any sick company under subsection (1) may provide for any one or more of the following measures, namely:—

- (a) the financial reconstruction of the sick company;
- (b) the proper management of the sick company by any change in, or by taking over, the management of such company;
- (c) the amalgamation of—
  - (i) the sick company with any other company; or
  - (ii) any other company with the sick company;
- (d) takeover of the sick company by a solvent company;
- (e) the sale or lease of a part or whole of any asset or business of the sick company;
- (f) the rationalisation of managerial personnel, supervisory staff and workmen in accordance with law;
- (g) such other preventive, ameliorative and remedial measures as may be appropriate;
- (h) repayment or rescheduling or restructuring of the debts or obligations of the sick company to any of its creditors or class of creditors;
- (i) such incidental, consequential or supplemental measures as may be necessary or expedient in connection with or for the purposes of the measures specified in clauses (a) to (h).

- Sanction of scheme (Section 262)

Section 262 provides that the scheme for revival and rehabilitation prepared by the company administrator will be placed before the separately convened meetings of secured and unsecured creditors of the sick company within 60 days from the date of his appointment which shall be extended to 120 days. If the scheme is approved by the unsecured and secured creditors, the company administrator shall submit the scheme before the Tribunal for sanctioning the scheme.

If the scheme relates to amalgamation of the sick company with any other company, such scheme shall, in addition to the approval of the creditors of the sick company, be laid before the general meeting of both the companies for approval by their respective shareholders and no such scheme shall be proceeded with unless it has been approved, by a special resolution passed by the shareholders of the company.

The scheme shall be examined by the Tribunal and it may also cause the draft scheme to be published in newspapers, etc., for objections and suggestions, if any. The Tribunal may also make necessary modifications in the scheme in the light of suggestions and objections. On the receipt of the scheme, the Tribunal after satisfying that scheme had been validity approved pass an order sanctioning such scheme.

The Tribunal may review any sanctioned scheme and may make such modifications in such scheme as it may deem fit or it may also direct the company administrator to prepare a fresh scheme.

The sanction accorded by the Tribunal shall be conclusive evidence and a copy of the sanctioned scheme shall be filed with the Registrar by the sick company within a period of thirty days from the date of receipt of a copy thereof.

- Implementation of the scheme(Section 264)

The Tribunal shall, for the purpose of effective implementation of the scheme, have power to enforce, modify or terminate any contract or agreement or any obligation pursuant to such agreement or contract entered into by the company with any other person. The Tribunal may, if it deems necessary or expedient so to do, by order in writing, authorise the company administrator appointed under section 259 to implement a sanctioned scheme till its successful implementation on such terms and conditions as may be specified in the order and may for that purpose require him to file periodic reports on the implementation of the sanctioned scheme.

When it is difficult to implement the scheme for any reason or the scheme fails due to non-implementation of obligations under the scheme by the parties concerned, the company administrator authorised to implement the scheme and where there is no such administrator, the company, the secured creditors, or the transferee company in a case of amalgamation, may make an application before the Tribunal for modification of the scheme or to declare the scheme as failed and that the company may be wound up. The Tribunal shall, within thirty days of presentation of an application under, pass an order for modification of the scheme or, as the case may be, declaring the scheme as failed and pass an order for the winding up of the company if three-fourths in value of the secured creditors consent to the modification of the scheme or winding up of the company.

*Over residing effect of Securitisation Act*

Where an application has been made before the Tribunal for modification of the scheme sanctioned and such application is pending before it, such application shall abate, if the secured creditors representing not less than three-fourths in value of the amount outstanding against financial assistance disbursed to the sick company have taken any measures to recover their secured debt under sub-section (4) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

**RULES UNDER CHAPTER XIX RELATING TO REVIVAL AND REHABILITATION OF SICK COMPANIES- HIGH LIGHTS**

The rules deals with the aspects such as the prescribed format of application to the tribunal for declaring the company as sick company, for stay of proceedings under Section 254, giving notice to debtors before making application, format of application for revival, format of order appointing administrator, format of notice of meeting to creditors and other formats as required under Chapter XIX.

- Every application made to the Tribunal under sub-section (1) of section 253 by one or more secured creditors of a company, (hereinafter referred to as 'Debtor Company'), for determination whether the debtor company is a sick company, shall be made in Form A (Prescribed in the Rules). The application can be made by the secured creditors collectively, wherein they can be mentioned as 'secured creditors' or a single secured creditor on behalf of others on authorization. It may be noted that the application for stay of proceedings etc., as specified under Section 254, shall also be made in prescribed for specified in the Rules.

- The application is to be accompanied by the following
  1. prescribed fees as specified;
  2. copy of the initial demand notice issued by the applicant upon the debtor company and such notice should be dated at least ninety days prior to the date of making the application in the event of non-payment of debt;
  3. proof of service of the demand notice upon the debtor company;
  4. any acknowledgement and reply, if any, or correspondence, if any, received from the debtor company in pursuance of the demand notice;
  5. an up to-date statement of the ledger account of the respective secured creditors showing the amount receivable and the amount shown in the demand Notice;
  6. copies of the audited financial statements of last five financial years, if available, of the debtor company;
  7. the authorisation issued by the respective secured creditors in favour of the creditor acting on authorization for filing the application and the original authorization issued by the secured creditor in favour of the signatory of the application; and
  8. any other document which the applicant or applicants may consider necessary for effective determination of sickness.
- The application to tribunal for declaration as sick company or with respect to stay of proceedings as specified in Section 253 and Section 254 respectively shall not be made unless a notice thereof has been issued to the debtor company not less than fifteen days prior to the making of the application in prescribed form.
- Every application made to the Tribunal under sub-section (1) of section 254 by one or more secured creditors of a sick company, or by the sick company, for determination of measures that may be adopted with respect to the revival and rehabilitation of such company shall be made in prescribed Form F.
- For the purposes of section 256, the notice of meeting of creditors shall be issued to all creditors in prescribed Form K

and not less than twenty one clear days shall be there between the date of issue of the notice and the date of the meeting.

- The quorum for a meeting of creditors shall be the presence in person or by proxy of creditors representing not less than fifty one percent of value of debts owed by the sick company to the creditors or creditors representing such other percentage of value of debts owned by the sick company to that creditors as may be ordered by the Tribunal and even the presence of single creditor may be sufficient to form a valid quorum.
- On the date of hearing, if the Tribunal is satisfied that the creditors representing three-fourth in value of the amount outstanding against the sick company present and voting had resolved that it is not possible to revive and rehabilitate the sick company it may after giving the sick company an opportunity of being heard, by order direct the winding up of the sick company or if such requisite majority had resolved that by adopting certain measures it is possible to revive and rehabilitate the sick company, it may, by order, appoint a company administrator directing him to prepare a scheme of revival and rehabilitation for the sick company. The order of the Tribunal shall be in Prescribed Form L if the Tribunal orders the winding up of the sick company and in prescribed Form M if the Tribunal orders to appoint a company administrator.
- For the purposes of sub-section (2) of section 262, the company administrator shall issue a notice in Form O calling separate meetings of secured and unsecured creditors within sixty days of his appointment and place the scheme for their approval.
- The quorum for such meetings of creditors shall be the presence in person or by proxy of creditors representing not less than three-fourth in value of the amount outstanding against the sick company, in case of secured creditors and one-fourth in value in case of unsecured creditors or representing such other percentage of value of debts owned by the sick company to that respective class of creditors as may be ordered by the Tribunal and even the presence of single creditor of that class may be sufficient to form a valid quorum.
- The company administrator shall make an application in Form P to the Tribunal for sanctioning the scheme.

**SECTION III- WINDING UP****MODES OF WINDING UP**

Under Companies Act 2013, the Company may be wound up in any of the following modes:

1. By National Company Law Tribunal ( the Tribunal);
2. Voluntary winding up

**WINDING UP BY THE TRIBUNAL**

*Grounds on which a Company may be wound up by the Tribunal*

A company under Section 271(1) may be wound up by the tribunal if

- (a) if the company is unable to pay its debts;
- (b) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;
- (c) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
- (d) if the Tribunal has ordered the winding up of the company under Chapter XIX(I.e Revival and Rehabilitation of Sick Companies);
- (e) if on an application made by the Registrar or any other person authorized by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
- (f) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or
- (g) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

*Inability to pay debts (Section 271(2))*

A company shall be deemed to be unable to pay its debts,—

- (a) if a creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the company to pay the amount so due and the company has failed to pay the sum within twenty-one days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor;
- (b) if any execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

*Who may file Petition for the Winding up?*

An application for the winding up of a company has to be made by way of petition to the Court. A petition may be presented under Section 272 by any of the following persons:

- (a) the company; or
- (b) any creditor or creditors, including any contingent or prospective creditor or creditors;
- (c) any contributory or contributories;
- (d) all or any of the parties specified above in clauses (a), (b), (c) together
- (e) the Registrar;
- (f) any person authorised by the Central Government in that behalf;
- (g) by the Central Government or State Government in case falling under clause (c) of Section 271(1) i.e. Company acting against the interest of the sovereignty and integrity of India.

### *Petition by the Company*

The company may make a petition through its directors with the authority of a special resolution passed at a general meeting.

A petition by the Company for winding up before the tribunal will be admitted only if it is accompanied by the statement of affairs, prescribed in form 4 and shall state the facts upto the date which shall not be a date more than fifteen days prior to the date of making the statement. This statement shall be certified by a chartered accountant. (Section 272(5) read with Rule 5 made under Chapter XX of the Companies Act 2013)

Every contributory or creditor of the company shall be entitled to be furnished, by the petitioner or his authorized representative, with a copy of a petition. The contributory may seek an electronic copy from the registry of tribunal on payment of prescribed fee. (Rule 5(4) of the rules made under Chapter XX of the Companies Act 2013.

### *Petition by Creditor*

A creditor or creditors (including any contingent or prospective creditor) may make petition before the tribunal would make a winding up order on such petition if the creditor proves that the claims are undisputed debt.

### *Contingent or prospective Creditor*

Section 272(6) states that before a petition for winding up of a company presented by a contingent or prospective creditor is admitted, the leave of the Tribunal shall be obtained for the admission of the petition and such leave shall not be granted, unless in the opinion of the Tribunal there is a prima facie case for the winding up of the company and until such security for costs has been given as the Tribunal thinks reasonable.

Rule 5(3) of Chapter XX states that a contingent or prospective creditor is one who is able to prove that he has a bonafide and prima facie case to establish his claim to the satisfaction of the Tribunal and his application shall be in accordance with sub-section (6) of section 272 to seek the leave of the Tribunal for the admission of the petition in Form No. 5. along with the fees as prescribed.

### *Creditor*

The expression "creditors" includes the assignee of debt, a decree holder, a secured creditor, a debenture holder or the trustee for debenture holders. But a creditor whose debt is unliquidated cannot apply for

winding up order. A contingent or prospective creditor can present petition on giving security for costs and showing that a prima facie case has arisen. A petition by a secured creditor for winding up may not be allowed by the Court where the security is ample and the petition is not supported by the other creditors.

In the case of *State of Andhra Pradesh V Hyderabad Vegetable Products Co Ltd* (1962) 32 Comp. Cases 64(AP), the term creditor as occurring in Section 439(1) (b) of the 1956 Act (Presently section 272(1)(b)) is not limited to one to whom a debt is due at the date of the petition and who can demand immediate payment. Every person having a pecuniary claim, whether actual or contingent is a creditor.

As per Section 272(2), a secured creditor, the holder of any debentures, whether or not any trustee or trustees have been appointed in respect of such and other like debentures, and the trustee for the holders of debentures shall be deemed to be creditors.

### **Petition by Contributory**

*Who is a Contributory?*

Section 2(26) defines “contributory” means a person liable to contribute towards the assets of the company in the event of its being wound up. For the purposes of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory but shall have no liabilities of a contributory under the Act whilst retaining rights of such a contributory;

Section 273(2) states that a contributory shall be entitled to present a petition for the winding up of a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities, and shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up or have devolved on him through the death of a former holder.

### **Petition by Registrar**

The Registrar shall be entitled to present a petition for winding up under sub-section (1) on any of the grounds specified in sub-section (1) of section 271, except on the grounds specified in clause (b), clause (d) or clause (g) of that sub-section.

Accordingly the registrar can present a petition on the following grounds.

1. if the company is unable to pay its debts;
2. if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
3. if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
4. if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years;

The Registrar shall not present a petition on the ground that the company is unable to pay its debts unless it appears to him either from the financial condition of the company as disclosed in its balance sheet or from the report of an inspector appointed under section 210 that the company is unable to pay its debts:

The Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition: The Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

### **Filing a copy of petition with the registrar**

A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition.

### **Powers of Tribunal on receipt of petition**

According to Section 273, the Tribunal may, on receipt of a petition for winding up under section 272 pass any of the following orders, namely:—

- (a) dismiss it, with or without costs;

- (b) make any interim order as it thinks fit;
- (c) appoint a provisional liquidator of the company till the making of a winding up order;
- (d) make an order for the winding up of the company with or without costs; or
- (e) any other order as it thinks fit:

An order under this sub-section shall be made within ninety days from the date of presentation of the petition.

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

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

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

**Directions for statement of affairs if the petition is filed by a person other than a company**

Accordingly to Section 274(1) read with the rules made under Chapter XX, when a petition for winding up is filed before the Tribunal by any person other than the company, the Tribunal shall, if satisfied that a prima facie case for winding up of the company is made out, by an order direct the company to file its objections along with a statement of its affairs within thirty days of the order in the prescribed form. The Tribunal may allow a further period of thirty days in a situation of contingency or special circumstances:

Section 274(2) states that a company, which fails to file the statement of affairs as referred to in sub-section (1), shall forfeit the right to oppose the petition and such directors and officers of the company as found responsible for such non-compliance, shall be liable for punishment under sub-section (4). As per Section 274(4), if any

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

Section 274(3) read with Rules 7(2) of Rules made under Chapter XX, states that the directors and other officers of the company, in respect of which an order for winding up is passed by the Tribunal under clause (d) of sub-section (1) of section 273, (i.e. make an order for the winding up of the company with or without costs) shall, within a period of thirty days of such order, submit, at the cost of the company, the books of account of the company completed and audited up to the date of the order, to such liquidator and in the manner specified by the Tribunal.

Section 274(5) states that the complaint may be filed in this behalf before the Special Court by Registrar, provisional liquidator, Company Liquidator or any person authorised by the Tribunal.

### **Appointment of Company Liquidators**

Section 275(1) States that, for the purposes of winding up of a company by the Tribunal, the Tribunal at the time of the passing of the order of winding up, shall appoint an Official Liquidator or a liquidator from the panel maintained under sub-section (2) as the Company Liquidator.

Section 275(2) states that the provisional liquidator or the Company Liquidator, as the case may be, shall be appointed from a panel maintained by the Central Government consisting of the names of chartered accountants, advocates, company secretaries, cost accountants or firms or bodies corporate having such chartered accountants, advocates, company secretaries, cost accountants and such other professionals as may be notified by the Central Government or from a firm or a body corporate of persons having a combination of such professionals as may be prescribed and having at least ten years' experience in company matters.

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

Section 275 (4) enables the Central Government may remove the

name of any person or firm or body corporate from the panel maintained under sub-section (2) on the grounds of misconduct, fraud, misfeasance, breach of duties or professional incompetence. However, the Central Government before removing him or it from the panel shall give him or it a reasonable opportunity of being heard.

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

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

As per Section 275 (7) while passing a winding up order, the Tribunal may appoint a provisional liquidator, if any, appointed under clause (c) of sub-section (1) of section 273, as the Company Liquidator for the conduct of the proceedings for the winding up of the company.

Rule 6(2) of Rules under Chapter XX states that the rules relating to company liquidators shall apply to provisional liquidators, so far as applicable, subject to such variations as the tribunal may direct in each case.

### **Removal and replacement of liquidator**

As per Section 276 (1) The Tribunal may, on a reasonable cause being shown and for reasons to be recorded in writing, remove the provisional liquidator or the Company Liquidator, as the case may be, as liquidator of the company on any of the following grounds, namely:—

- misconduct;
- fraud or misfeasance;
- professional incompetence or failure to exercise due care and diligence in
- performance of the powers and functions;
- inability to act as provisional liquidator or as the case may be, Company

- Liquidator;
- conflict of interest or lack of independence during the term of his appointment that would justify removal.

As per Section 276 (2) in the event of death, resignation or removal of the provisional liquidator or as the case may be, Company Liquidator, the Tribunal may transfer the work assigned to him or it to another Company Liquidator for reasons to be recorded in writing.

As per Section 276 (3) if the Tribunal is of the opinion that any liquidator is responsible for causing any loss or damage to the company due to fraud or misfeasance or failure to exercise due care and diligence in the performance of his or its powers and functions, the Tribunal may recover or cause to be recovered such loss or damage from the liquidator and pass such other orders as it may think fit.

As per Section 276 (4) The Tribunal shall, before passing any order under this section, provide a reasonable opportunity of being heard to the provisional liquidator or, as the case may be, Company Liquidator.

### **Order of winding up/order of appointment of liquidator to be communicated to the company liquidator and the registrar**

Section 277 (1) states that Where the Tribunal makes an order for appointment of provisional liquidator or for the winding up of a company, it shall, within a period not exceeding seven days from the date of passing of the order, cause intimation thereof to be sent to the Company Liquidator or provisional liquidator, as the case may be, and the Registrar.

### **Advertisement of Winding up order**

As per Rule 7(3) of winding up rules 2013,

- (i) At the time of making the winding-up order, or at any time thereafter, the Tribunal shall give directions as to the advertisement of the order and the persons, if any, on whom the order shall be served and the persons, if any, to whom notice shall be given of the further proceedings in the liquidation, and such further directions as may be necessary.
- (ii) Save as otherwise ordered by the Tribunal, every order for the winding-up of a company by the Tribunal, shall within fourteen days of the date of making the order, be advertised by the petitioner in English and Vernacular language in one issue of a newspaper in the English language and a newspaper in the

principal regional language respectively circulating in the State or the Union Territory concerned and shall be served by the petitioner upon such person, if any, and in such manner as the Tribunal may direct including publication on the website of the Tribunal if any or MCA 21 portal.

### **Registrar's action on receipt of order of winding up or order appointing company liquidator**

Section 277 (2) states that On receipt of the copy of order of appointment of provisional liquidator or winding up order, the Registrar shall make an endorsement to that effect in his records relating to the company and notify in the Official Gazette that such an order has been made and in the case of a listed company, the Registrar shall intimate about such appointment or order, as the case may be, to the stock exchange or exchanges where the securities of the company are listed.

### **Winding up order shall be deemed to be a notice**

Section 277 (3) states that the winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the company, except when the business of the company is continued.

### **Constitution of winding up committee**

Section 277 (4) states that within three weeks from the date of passing of winding up order, the Company Liquidator shall make an application to the Tribunal for constitution of a winding up committee to assist and monitor the progress of liquidation proceedings by the Company Liquidator in carrying out the function as provided in sub-section (5) and such winding up committee shall comprise of the following persons, namely:—

- (i) Official Liquidator attached to the Tribunal;
- (ii) nominee of secured creditors; and
- (iii) a professional nominated by the Tribunal.

### **Functions of winding up committee**

Section 277(5) states that the Company Liquidator shall be the convener of the meetings of the winding up committee which shall assist and monitor the liquidation proceedings in following areas of liquidation functions, namely:—

- (a) taking over assets;
- (b) examination of the statement of affairs;

- (c) recovery of property, cash or any other assets of the company including
- (d) benefits derived therefrom;
- (e) review of audit reports and accounts of the company;
- (f) sale of assets;
- (g) finalisation of list of creditors and contributories;
- (h) compromise, abandonment and settlement of claims;
- (i) payment of dividends, if any; and
- (j) any other function, as the Tribunal may direct from time to time.

### **Report and minutes of the meeting of the winding up committee**

As per section 277(6) the Company Liquidator shall place before the Tribunal a report along with minutes of the meetings of the committee on monthly basis duly signed by the members present in the meeting for consideration till the final report for dissolution of the company is submitted before the Tribunal.

As per 277 (7), the Company Liquidator shall prepare the draft final report for consideration and approval of the winding up committee. As per 277 (8), the final report so approved by the winding up committee shall be submitted by the Company Liquidator before the Tribunal for passing of a dissolution order in respect of the company.

### **Effect of Winding up order**

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

### **Stay of suits, etc., on winding up order.**

As per section 279. (1) When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose. Any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days. Section

279 (2) states that nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

### **Jurisdiction of Tribunal**

As per Section 280, The Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of,—

- (a) any suit or proceeding by or against the company;
- (b) any claim made by or against the company, including claims by or against any of its branches in India;
- (c) any application made under section 233;
- (d) any scheme submitted under section 262;
- (e) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made.

### **Report by Company liquidator**

Section 281(1) states that when the Tribunal has made a winding up order or appointed a Company Liquidator, such liquidator shall, within sixty days from the order, submit to the Tribunal, a report containing the following particulars, namely:—

- (a) the nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company. The valuation of the assets shall be obtained from registered valuers for this purpose;
- (b) amount of capital issued, subscribed and paid-up;
- (c) the existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given,

whether by the company or an officer thereof, their value and the dates on which they were given;

- (d) the debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof;
- (e) guarantees, if any, extended by the company;
- (f) list of contributories and dues, if any, payable by them and details of any unpaid call;
- (g) details of trade marks and intellectual properties, if any, owned by the company;
- (h) details of subsisting contracts, joint ventures and collaborations, if any;
- (i) details of holding and subsidiary companies, if any;
- (j) details of legal cases filed by or against the company; and
- (k) any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include.

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

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

As per Section 281 (4), the Company Liquidator may also, if he thinks fit, make any further report or reports.

As per Section 281 (5), any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this section and take copies thereof or extracts there from on payment of the prescribed fees.

### **Directions by the Tribunal on receipt of winding up order**

Section 282. (1) states that the Tribunal shall, on consideration of the report of the Company Liquidator, fix a time limit within which the entire proceedings shall be completed and the company be dissolved.

The Tribunal may, if it is of the opinion, at any stage of the proceedings, or on examination of the reports submitted to it by the Company Liquidator and after hearing the Company Liquidator, creditors or contributories or any other interested person, that it will not be advantageous or economical to continue the proceedings, revise the time limit within which the entire proceedings shall be completed and the company be dissolved.

Section 282(2) states that the Tribunal may, on examination of the reports submitted to it by the Company Liquidator and after hearing the Company Liquidator, creditors or contributories or any other interested person, order sale of the company as a going concern or its assets or part thereof. The Tribunal may, where it considers fit, appoint a sale committee comprising such creditors, promoters and officers of the company as the Tribunal may decide to assist the Company Liquidator in sale under this sub-section.

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

Section 283(4) states that the Tribunal may order for taking such steps and measures, as may be necessary, to protect, preserve or enhance the value of the assets of the company.

### **Custody of Company's properties**

According to Section 283. (1) when a winding up order has been made or where a provisional liquidator has been appointed, the Company Liquidator or the provisional liquidator, as the case may be, shall, on the order of the Tribunal, forthwith take into his or its custody or control all the property, effects and actionable claims to which the company is or appears to be entitled to and take such steps and measures, as may be necessary, to protect and preserve the properties of the company.

According Section 283(2, ), all the property and effects of the company shall be deemed to be in the custody of the Tribunal from the date of the order for the winding up of the company, notwithstanding to anything contained in sub-section (1).

According to Section 283(3) on an application by the Company Liquidator or otherwise, the Tribunal may, at any time after the making of a winding up order, require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent, officer or other employee of the company, to pay, deliver, surrender or transfer forthwith, or within such time as the Tribunal directs, to the Company Liquidator, any money, property or books and papers in his custody or under his control to which the company is or appears to be entitled.

### **Settlement of list of contributories**

Section 285 (1) states that as soon as, may be after the passing of a winding up order by the Tribunal, the Tribunal shall settle a list of contributories, cause rectification of register of members in all cases where rectification is required in pursuance of this Act and shall cause the assets of the company to be applied for the discharge of its liability. If it appears to the Tribunal that it would not be necessary to make calls on or adjust the rights of contributories, the Tribunal may dispense with the settlement of a list of contributories. Sub-section(2) of section 285, states that in settling the list of contributories, the Tribunal shall distinguish between those who are contributories in their own right and those who are contributories as being representatives of, or liable for the debts of, others.

Rule 10 of Companies (Winding up Rules) 2013 states that

- For the purposes of sub-section (1) of section 285, unless the Tribunal dispenses with the settlement of a list of contributories, the Company Liquidator shall prepare and file in the Tribunal not later than twenty one days after the date of the winding up order a provisional list of contributories in Form No. 18.
- The Company Liquidator shall obtain date from the Tribunal for settlement of the list of contributories and shall give notice of the date appointed to every person included in such list. Such notice shall be in Form No. 19, and shall be sent by Registered AD or other recognized modes of service as per section 20 of the Act for acknowledgment to every person included in the list so as to reach him in the ordinary course of post not less than fourteen days before the date fixed for the settlement.
- An affidavit in Form No. 20 relating to the dispatch of notice, shall be filed in the Tribunal not later than two days before the date fixed for the settlement of the list.
- On the date appointed for the settlement of the list, the Tribunal

shall hear any person who objects to being settled as a contributory or as a contributory in such character or for such number of shares as is mentioned in the list, and after such hearing, shall finally settle the list in accordance with subsection (1) of section 285. The list when settled shall be certified by the Tribunal under its seal and shall be in Form No. 21.

- Upon the settlement of the list of contributories, the Company Liquidator shall forthwith give notice to every person placed on the list of contributories as finally settled, stating in what character and for what number of shares he has been placed on the list, what amount has been called up and what amount paid up in respect of such shares and in the notice he shall inform such person that any application for the removal of his name from the list or for a variation of the list, must be made to the Tribunal within fifteen days from the date of service on the contributory of such notice. Such notice shall be in Form No. 22, and shall be sent to each person settled on the list by Registered AD or other recognized modes of service as per section 20 of the Act for acknowledgment at the address mentioned in the list as settled.
- An affidavit of service relating to the despatch of the notices to the contributories under this Rule shall be filed in the Tribunal within seven days of the settlement of the list of contributories by the Tribunal. Such affidavit shall be in Form No. 23.

Section 285 (2) states that in settling the list of contributories, the Tribunal shall distinguish between those who are contributories in their own right and those who are contributories as being representatives of, or liable for the debts of, others.

Section 285 (3) states that while settling the list of contributories, the Tribunal shall include every person, who is or has been a member, who shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, subject to the following conditions, namely:—

- (a) a person who has been a member shall not be liable to contribute if he has ceased to be a member for the preceding one year or more before the commencement of the winding up;
- (b) a person who has been a member shall not be liable to contribute

in respect of any debt or liability of the company contracted after he ceased to be a member;

- (c) no person who has been a member shall be liable to contribute unless it appears to the Tribunal that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act;
- (d) in the case of a company limited by shares, no contribution shall be required from any person, who is or has been a member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member;
- (e) in the case of a company limited by guarantee, no contribution shall be required from any person, who is or has been a member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up but if the company has a share capital, such member shall be liable 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.

### **Constitution of Advisory Committee**

*Tribunal may direct constitution of advisory committee while passing winding up order*

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

*Members of Advisory committee*

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

*Meeting of creditors and contributories to identify the members of advisory committee*

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

*Advisory Committee may inspect the books of account and other documents*

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

*Procedure for convening the meeting*

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

Rule 11(6) of Companies (Winding up) Rules 2013 states the following procedure to be followed in this regard.

- (i) The advisory committee shall meet at such times as it may from time to time appoint and the Company liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.
- (ii) The quorum for a meeting of the advisory committee shall be one third of the total number of the members, or two, whichever is higher.
- (iii) The advisory committee may act by a majority of its members present at a meeting, but shall not act unless a quorum is present.
- (iv) A member of the advisory committee may resign by notice in writing signed by him and delivered to the Company Liquidator.
- (v) If a member of the advisory committee is adjudged an insolvent, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who, together with himself, represent the creditors or contributories, as the case may be, his office shall become vacant.
- (vi) A member of the advisory committee except the Official Liquidator or his nominee appointed as committee member may be removed at a meeting of creditors if he represents creditors, or at a meeting of contributories if he represents contributories, by an ordinary resolution of which seven days' notice has been given, stating the object of the meeting.

*Company Liquidator to chair the meeting of advisory committee*

Section 287 (6) states that the meeting of advisory committee shall be chaired by the Company Liquidator.

**Submission of periodic reports to the tribunal**

Section 288. (1) requires the Company Liquidator to make make periodical reports to the Tribunal and in any case make a report at the end of each quarter with respect to the progress of the winding up of the company in such form and manner as may be prescribed. Subsection (2) states that the Tribunal may, on an application by the Company Liquidator, review the orders made by it and make such modifications as it thinks fit.

**Application for stay of winding up –powers of Tribunal**

As per 289. (1) The Tribunal may, at any time after making a winding up order, on an application of promoter, shareholders or creditors or any other interested person, if satisfied, make an order that it is just and fair that an opportunity to revive and rehabilitate the company be provided staying the proceedings for such time but not exceeding one hundred and eighty days and on such terms and conditions as it thinks fit. An order under this sub-section shall be made by the Tribunal only when the application is accompanied with a scheme for rehabilitation.

As per sub-section (2) The Tribunal may, while passing the order under sub-section (1), require the applicant to furnish such security as to costs as it considers fit.

As per sub-section (3) if an order under sub-section (1) is passed by the Tribunal, the provisions of Chapter XIX shall be followed in respect of the consideration and sanction of the scheme of revival of the company.

As per sub-section (4) Without prejudice to the provisions of sub-section (1), the Tribunal may at any time after making a winding up order, on an application of the Company Liquidator, make an order staying the winding up proceedings or any part thereof, for such time and on such terms and conditions as it thinks fit.

As per sub-section (5) The Tribunal may, before making an order, under this section, require the Company Liquidator to furnish to it a report with respect to any facts or matters which are in his opinion relevant to the application.

As per sub-section (6) A copy of every order made under this section shall forthwith be forwarded by the Company Liquidator to the Registrar who shall make an endorsement of the order in his books and records relating to the company.

Rule 16 of Companies (Winding up) Rules 2013 states that the order by the tribunal staying winding up proceedings shall be filed with the Registrar of Companies within 15 days of passing such order.

**Powers and duties of liquidator**

290. (1) states that Subject to directions by the Tribunal, if any, in this regard, the Company Liquidator, in a winding up of a company by the Tribunal, shall have the power—

- (a) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company;
- (b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use, when necessary, the company's seal;
- (c) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels;
- (d) to sell the whole of the undertaking of the company as a going concern;
- (e) to raise any money required on the security of the assets of the company;
- (f) to institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;
- (g) to invite and settle claim of creditors, employees or any other claimant and distribute sale proceeds in accordance with priorities established under this Act;
- (h) to inspect the records and returns of the company on the files of the Registrar or any other authority;
- (i) to prove rank and claim in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;
- (j) to draw, accept, make and endorse any negotiable instruments including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such

instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

- (k) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company Liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company Liquidator himself;
- (l) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company Liquidator is unable to do himself;
- (m) to take all such actions, steps, or to sign, execute and verify any paper, deed, document, application, petition, affidavit, bond or instrument as may be necessary,—
  - for winding up of the company;
  - for distribution of assets;
  - in discharge of his duties and obligations and functions as Company Liquidator; and
- (n) to apply to the Tribunal for such orders or directions as may be necessary for the winding up of the company.

Sub-section (2) states that the exercise of powers by the Company Liquidator under sub-section (1) shall be subject to the overall control of the Tribunal.

Sub-section (3) states that notwithstanding the provisions of sub-section (1), the Company Liquidator shall perform such other duties as the Tribunal may specify in this behalf.

### **Provision for professional assistance to Company Liquidator**

As per 291 (1) The Company Liquidator may, with the sanction of the Tribunal, appoint one or more chartered accountants or company secretaries or cost accountants or legal practitioners or such other professionals on such terms and conditions, as may be necessary, to

assist him in the performance of his duties and functions under this Act. Sub-section (2) states that any person appointed under this section shall disclose forthwith to the Tribunal in the prescribed form any conflict of interest or lack of independence in respect of his appointment.

### **Exercise and control of company liquidators' powers**

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

As per sub-section (2) any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the advisory committee.

As per sub-section (3) The Company Liquidator—

- (a) may summon meetings of the creditors or contributories, whenever he thinks fit, for the purpose of ascertaining their wishes; and
- (b) shall summon such meetings at such times, as the creditors or contributories, as the case may be, may, by resolution, direct, or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories, as the case may be.

(4) Any person aggrieved by any act or decision of the Company Liquidator may apply to the Tribunal, and the Tribunal may confirm, reverse or modify the act or decision complained of and make such further order as it thinks just and proper in the circumstances.

### **Register of Books to be maintained by the Company Liquidator.**

For the purpose of sub-section (1) of Section 293 and sub-section (1) of section 294, the company liquidator shall maintain the following books, so far as may be applicable, in respect of the company under winding up. This is prescribed under rule 20 of Companies (Winding up Rules) 2013.

- Register of Liquidations in Form No. 41-A.
- Central Cash Book in Form No.41-B
- Company's Cash Book in Form No. 41-C.

- General Ledger in Form No. 41-D.
- Cashier's Cash Book in Form No. 41-E
- Bank Ledger in Form No. 41-F.
- Register of Assets in Form No. 41-G
- Securities and Investment Register in Form No. 41-H.
- Register of Book Debts and Outstandings in Form No. 41-I.
- Tenants Ledger in Form No. 41-J.
- Suits Register in Form No. 41-K.
- Decree Register in Form No. 41-L.
- Sales Register in Form No. 41-M.
- Register of Claims and Dividends in Form No. 41-N.
- Contributories Ledger in Form No. 41-O.
- Dividends Paid Register in Form No. 41-P.
- Commission Register in Form No. 41-Q.
- Suspense Register in Form No. 41-R.
- Documents Register in Form No. 41-S.
- Books Register in Form No. 41-T.
- Register of unpaid dividends and undistributed assets, deposited into the Company Liquidation Dividend and Undistributed Assets Account in a scheduled bank, in Form No. 41-U and
- A Record Book for each company in which shall be entered all minutes of proceedings and the resolutions passed at any meeting of the creditors or contributories or of the Advisory Committee, the substance of all orders passed by the Court in the liquidation proceedings, and all such matters other than matters of account as may be necessary to furnish a correct view of the administration of the company's affairs.

### **Filing of Half-yearly accounts with the Tribunal**

Section 294(2) states that the Company Liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Tribunal an account of the receipts and payments as such liquidator in the prescribed form in duplicate,

which shall be verified by a declaration in such form and manner as may be prescribed.

Rule 21 of the Companies (winding up ) Rules, 2013 states that for the purpose of sub-section (2) of section 294, unless otherwise ordered by the Tribunal, the Company Liquidator shall file his accounts in the Tribunal twice a year. Such accounts shall be made up to the 31st of March and 30th of September every year, the account for the period ending 31st March being filed not later than the 30th of June following, and account for the period ending 30th September, not later than the 31st of December following. The account shall be a statement of receipts and payments in Form No. 42 and shall be prepared in accordance with the instructions contained therein. Three copies thereof shall be filed, and the account shall be verified by an affidavit of the Company Liquidator in Form No.43. The final account shall be in Form No. 44. If the Company Liquidator has not during the period of account received or paid any sum of money on account of the assets of the company, he shall file an affidavit of no receipts or payments on the date on which he shall have to file his accounts for the period. As soon as the accounts are filed, the Registrar of Tribunal shall forward to the auditor one copy thereof within 15 days for purposes of audit with a requisition in Form No. 45 requesting that the accounts may be audited and a certificate of audit submitted to the Tribunal not later than one month from the date of receipt of the copy of the account as required under subsection (4) of section 294. However, the accounts need not be got audited where the transaction during the period is for rupees five thousand or less.

### **Audit of company liquidator's accounts**

Section 294(3) states that the Tribunal shall cause the accounts to be audited in such manner as it thinks fit, and for the purpose of the audit, the Company Liquidator shall furnish to the Tribunal with such vouchers and information as the Tribunal may require, and the Tribunal may, at any time, require the production of, and inspect, any books of account kept by the Company Liquidator.

Section 294(4) states that when the accounts of the company have been audited, one copy thereof shall be filed by the Company Liquidator with the Tribunal, and the other copy shall be delivered to the Registrar which shall be open to inspection by any creditor, contributory or person interested.

Rule 21(5) of Companies (Winding up Rules) 2013 states that the accounts shall be audited by one or more Chartered Accountants appointed by the Tribunal. The audit shall be a complete check of the

accounts of the Company Liquidator. The Company Liquidator shall produce before the auditor all his books and vouchers for the purposes of the audit, and shall give the auditor all such explanations, information and assistance as may be required of him in respect of the accounts.

Rule 21(6) states that after the audit of the accounts of the Company Liquidator filed in Tribunal, the auditor shall forward to the Registrar a certificate of audit relating to the account with his observations and comments, if any, on the account, together with a copy thereof and shall forward another copy to the Company Liquidator in accordance with sub-section (4) of section 294. The Registrar shall file the original certificate with the records and forward the copy to the Registrar of Companies together with a copy of the account to which it relates.

Rules 21(8) states that for the purposes of sub-section (4) of section 294, any creditor or contributory or person interested shall be entitled to inspect the accounts and the auditor's certificate in the office of the Registrar of Companies on payment of such fee and to obtain a copy thereof on payment of prescribed fees.

Section 294(6) states that (6) the Company Liquidator shall cause the accounts when audited, or a summary thereof, to be printed, and shall send a printed copy of the accounts or summary thereof by post to every creditor and every contributory.

Section 294(5) states that where an account referred to in sub-section (4) relates to a Government company, the Company Liquidator shall forward a copy thereof—

- (a) to the Central Government, if that Government is a member of the Government company; or
- (b) to any State Government, if that Government is a member of the Government company; or
- (c) to the Central Government and any State Government, if both the Governments are members of the Government company.

Rule 21(9) states that, upon the audit of the account, the Registrar of Tribunal shall place the statement of account and the auditor's certificate before the Bench for its consideration and orders.

### **Payment of debt by the Contributory and the extent of set off**

As per Section 295. (1) the Tribunal may, at any time after passing

of a winding up order, pass an order requiring any contributory for the time being on the list of contributories to pay, in the manner directed by the order, any money due to the company, from him or from the estate of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

According to sub-section (2) the Tribunal, in making an order, under sub-section (1), may,—

- (a) in the case of an unlimited company, allow to the contributory, by way of setoff, any money due to him or to the estate which he represents, from the company, on any independent dealing or contract with the company, but not any money due to him as a member of the company in respect of any dividend or profit; and
- (b) in the case of a limited company, allow to any director or manager whose liability is unlimited, or to his estate, such set-off.

As per subsection(3) in the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

### **Power of the Tribunal to make calls/Distribution of surplus**

As per Section 296, the Tribunal may, at any time after the passing of a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company,—

- (a) make calls on all or any of the contributories for the time being on the list of the contributories, to the extent of their liability, for payment of any money which the Tribunal considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves; and
- (b) make an order for payment of any calls so made.

As per section 297 the Tribunal shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.

**Power to summon persons suspected of having property of company, etc.**

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

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

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

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

As per 299 (5) If the Tribunal finds that—

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

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

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

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

### **Draft Rules under Winding up Chapter of Companies Act, 2013**

An application for the examination of a person under section 299 may be made ex-parte, provided that where the application is made by any person other than the Company Liquidator, notice of the application shall be given to the Company Liquidator. The application shall be in Form No. 46 and, where the application is by the Company Liquidator, it shall be accompanied by a statement signed by him setting forth the facts on which the application is based. Where the application is made by a person other than the Company Liquidator, the application shall be supported by an affidavit of the applicant setting forth the matters in respect of which the examination is sought and the grounds, relied on in support of the application.

The summons issued in pursuance of the order shall be in Form No. 47 and shall be served by Registered AD or other recognized modes of service as per section 20 of the Act on the person to be examined not less than seven days before the date fixed for the examination. The Tribunal at its discretion may give a reasonable sum towards expenses to such person for appearing before the Tribunal, if it deems to be justifiable.

The Company Liquidator shall have the conduct of an examination under section 299, provided that the Tribunal may, if for any reasons it thinks fit to do so, entrust the conduct of the examination to any contributory or creditors. Where the conduct of the examination is entrusted to any person other than the Company Liquidator, the Company Liquidator shall nevertheless be entitled to be present at the examination in person or by authorised representative, and may take notes of the examination for his own use and put such questions to the person examined as the Tribunal may allow.

Save as aforesaid, no person shall be entitled to take part in an examination under section 299 except the Company Liquidator and his authorised representative, but any person examined shall be entitled to have the assistance of his authorised representative, who may re-

examine the witness. The Tribunal may permit, if it thinks fit, any creditor or contributory to attend the examination subject to such conditions as it may impose. Notes of the examination may be permitted to be taken by the witness or any person on his behalf on his giving an undertaking to the Tribunal that such notes shall be used only for the purpose of the re-examination of the witness. On the conclusion of the examination, the notes shall, unless otherwise directed, be handed over to the Tribunal for destruction.

The notes of the deposition of a person examined under section 299 shall be signed by such person and shall be lodged in the office of the Registrar. But the notes shall not be open for the inspection of any creditor, contributory or other person, except the Company Liquidator, nor shall a copy thereof or extract therefrom be supplied to any person other than the Company Liquidator, save upon orders of Tribunal. The Tribunal may from time to time give such general or special directions as it shall think expedient as to the custody and inspection of such notes and the furnishing of copies thereof or extracts therefrom.

*Power to order examination*

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

As per Section 300 (2) the Company Liquidator shall take part in the examination, and for that purpose he or it may, if specially authorised by the Tribunal in that behalf, employ such legal assistance as may be sanctioned by the Tribunal.

As per Section 300 (3) the person shall be examined on oath and shall answer all such questions as the Tribunal may put, or allow to be put, to him.

As per Section 300 (4) A person ordered to be examined under this section—

- (a) shall, before his examination, be furnished at his own cost with a copy of the report of the Company Liquidator; and

- (b) may at his own cost employ chartered accountants or company secretaries or cost accountants or legal practitioners entitled to appear before the Tribunal under section 432, who shall be at liberty to put to him such questions as the Tribunal may consider just for the purpose of enabling him to explain or qualify any answers given by him.

As per Section 300 (5) If any such person applies to the Tribunal to be exculpated from any charges made or suggested against him, it shall be the duty of the Company Liquidator to appear on the hearing of such application and call the attention of the Tribunal to any matters which appear to the Company Liquidator to be relevant.

As per Section 300 (6) If the Tribunal, after considering any evidence given or hearing witnesses called by the Company Liquidator, allows the application made under sub-section (5), the Tribunal may order payment to the applicant of such costs as it may think fit.

As per Section 300 (7) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, a copy be supplied to him and may thereafter be used in evidence against him, and shall be open to inspection by any creditor or contributory at all reasonable times.

*Rule 22 of Companies (Winding up) Rules 2013*

Where an order is made for the examination of any person or persons under section 300, the examination shall be held before the Bench. The Bench may direct that the whole or any part of the examination of any such person or persons be held before any of the officers mentioned in sub-section (9) of the said section as may be mentioned in the order. If the date of the examination has not been fixed by the order, the Company Liquidator shall take an appointment from the Bench, or officer before whom the examination is to be held as to the date of the examination. The order directing a public examination shall be in Form No. 48. The Bench may, if it thinks fit, either in the order for examination or by any subsequent order, give directions as to the specific matters on which such person is to be examined.

Not less than seven clear days before the date fixed for the examination, the Company Liquidator shall give notice thereof to the creditors and contributories of the company of advertisement in Form No. 49 in such newspapers as the Bench shall direct, and shall within the same period, serve, either personally or by Registered AD or other recognized modes of service as per section 20 of the Act, on the person

or persons to be examined, a notice in Form No. 50 of the date and hour fixed for the examination and the officer before whom it is to be held, together with a copy of the order directing the examination. Where a public examination is adjourned, it shall not be necessary to advertise the adjournment or serve notice thereof unless otherwise ordered.

The copy of the notes of every public examination shall, after being signed as required by sub-section (7) of section 300, form part of the records of winding-up. The Company Liquidator, the person examined and any creditor or contributory of the company shall be entitled to obtain a copy thereof from the Tribunal on payment of charges prescribed. If any person who has been directed by the Tribunal to attend for examination under section 299 or section 300 fails to attend at the time and place appointed for holding or proceeding with the same and no reasonable cause is shown by him for such failure, suitable costs may be imposed on him.

### **Dissolution**

As per 302 (1) When the affairs of a company have been completely wound up, the Company Liquidator shall make an application to the Tribunal for dissolution of such company.

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

As per 302 (3) A copy of the order shall, within thirty days from the date thereof, be forwarded by the Company Liquidator to the Registrar who shall record in the register relating to the company a minute of the dissolution of the company.

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

### **VOLUNTARY WINDING UP**

*Circumstances in which a company may be wound up voluntarily*

As per Section 304(1), a company may be wound up voluntarily,—

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

*Declaration of Solvency*

The declaration to be made by the director or directors or in case the company has more than two directors, by the majority of directors of a company under sub-section (1) of section 305 read with rule 24 of Companies (Winding up) Rules 2013 shall be in Form No. 51 and such a declaration has to be made at a meeting of the Board, make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company and they have formed an opinion that the company has no debt or whether it will be able to pay its debts in full from the proceeds of assets sold in voluntary winding up.

A declaration made under Section 305(1) shall have no effect for the purposes of this Act, unless—

- (a) it is made within five weeks immediately preceding the date of the passing of the resolution for winding up the company and it is delivered to the Registrar for registration before that date;
- (b) it contains a declaration that the company is not being wound up to defraud any person or persons;
- (c) it is accompanied by a copy of the report of the auditors of the company prepared in accordance with the provisions of this Act, on the profit and loss account of the company for the period commencing from the date up to which the 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 that date which would also contain a statement of the assets and liabilities of the company on that date; and
- (d) where there are any assets of the company, it is accompanied by a report of the valuation of the assets of the company prepared by a registered valuer

Section 305(4) states that when the company is wound up in

pursuance of a resolution passed within a period of five weeks after the making of the declaration, but its debts are not paid or provided for in full, it shall be presumed, until the contrary is shown, that the director or directors did not have reasonable grounds for his or their opinion under sub-section (1).

Section 305(5) states that any director of a company making a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full from the proceeds of assets sold in voluntary winding up shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.

#### *Meeting of Creditors*

As per Section 306. (1) the company shall along with the calling of meeting of the company at which the resolution for the voluntary winding up is to be proposed, cause a meeting of its creditors either on the same day or on the next day and shall cause a notice of such meeting to be sent by registered post to the creditors with the notice of the meeting of the company under section 304.

Sub-section (2) requires the Board of Directors of the company to—

- (a) cause to be presented a full statement of the position of the affairs of the company together with a list of creditors of the company, if any, copy of declaration under section 305 and the estimated amount of the claims before such meeting; and
- (b) appoint one of the directors to preside at the meeting.

Sub-section(3) states that when two-thirds in value of creditors of the company are of the opinion that—

- (a) it is in the interest of all parties that the company be wound up voluntarily, the company shall be wound up voluntarily; or
- (b) the company may not be able to pay for its debts in full from the proceeds of assets sold in voluntary winding up and pass a resolution that it shall be in the interest of all parties if the company is wound up by the Tribunal, the company shall within fourteen days thereafter file an application before the Tribunal.

As per sub-section (4) the notice of any resolution passed at a meeting of creditors in pursuance of this section shall be given by the company to the Registrar within ten days of the passing thereof.

As per sub-section (5) if a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees and the director of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than fifty thousand rupees but which may extend to two lakh rupees, or with both.

### **Publication of resolution of creditors**

As per Section 307. (1) when a company has passed a resolution for voluntary winding up and a resolution under sub-section (3) of section 306 is passed, it shall within fourteen days of the passing of the resolution give notice of the resolution by advertisement in the Official Gazette and also in a newspaper which is in circulation in the district where the registered office or the principal office of the company is situate. Sub-section (2) states that if a company contravenes the provisions of sub-section (1), the company and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees for every day during which such default continues.

*When does voluntary winding up commence?*

As per Section 308 voluntary winding up shall be deemed to commence on the date of passing of the resolution for voluntary winding up under section 304. ie special resolution or resolution on the expiry of period fixed by its articles or on occurrence of any event in respect of which the articles provide that the company should be dissolved.

*What is the effect of commencement of voluntary winding up?*

As per Section 309 In the case of a voluntary winding up, the company shall from the commencement of the winding up cease to carry on its business except as far as required for the beneficial winding up of its business. However, the Corporate state and corporate powers of the company shall continue until it is dissolved.

### **Appointment of Company Liquidator**

As per 310. (1) the company in its general meeting, where a resolution of voluntary winding up is passed, shall appoint a Company

Liquidator from the panel prepared by the Central Government for the purpose of winding up its affairs and distributing the assets of the company and recommend the fee to be paid to the Company Liquidator.

As per sub-section (2) when the creditors have passed a resolution for winding up the company under sub-section (3) of section 306, the appointment of the Company Liquidator under this section shall be effective only after it is approved by the majority of creditors in value of the company: When such creditors do not approve the appointment of such Company Liquidator, creditors shall appoint another Company Liquidator.

As per sub-section (3) The creditors while approving the appointment of Company Liquidator appointed by the company or appointing the Company Liquidator of their own choice, as the case may be, pass suitable resolution with regard to the fee of the Company Liquidator.

As per Sub-section (4) On appointment as Company Liquidator, such liquidator shall file a declaration in the prescribed form within seven days of the date of appointment disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the company and the creditors and such obligation shall continue throughout the term of his or its appointment.

### **Power to remove and fill the vacancy of company liquidator**

According to Section 311(1) a Company Liquidator appointed under section 310 may be removed by the company where his appointment has been made by the company and, by the creditors, where the appointment is approved or made by such creditors.

Sub-section (2) states that when a Company Liquidator is sought to be removed under this section, he shall be given a notice in writing stating the grounds of removal from his office by the company or the creditors, as the case may be.

Sub-section (3) states that when three-fourth members of the company or three-fourth of creditors in value, as the case may be, after consideration of the reply, if any, filed by the Company Liquidator, in their meeting decide to remove the Company Liquidator, he shall vacate his office.

Sub-section(4) states that if a vacancy occurs by death, resignation, removal or otherwise in the office of any Company Liquidator

appointed under section 310, the company or the creditors, as the case may be, fill the vacancy in the manner specified in that section.

**Rule 25 states the following regarding vacation of office of company liquidator**

Rule 25(4) states that a Company Liquidator against whom an order of insolvency is made shall there by vacate his office, and for the purposes of the Act and the Rules, shall be deemed to have been removed. Further, a Company Liquidator who is found guilty of professional or other misconduct under the respective laws governing the profession to which he belongs, shall vacate his office, and for the purposes of the application of the Act and the Rules, he shall be deemed to have been removed.

Rule 25(5) states that a Company Liquidator appointed by the members or creditors who desires to resign from his office, shall summon a meeting of the members or creditors, as the case may be, to submit his resignation and shall submit an account of his acts and dealings as liquidator and a statement as to the position of the liquidation during his tenure and all the relevant documents including books of accounts. The expenses of summoning the meeting shall be part of the expenses of the liquidation. The company shall give the notice of intimation of resignation to the Registrar of Companies in Form No. 57 within ten days of such meeting with filing fees as prescribed.

**Notice of Appointment of Company Liquidator to be given to the Registrar**

According to Section 312(1) of the Company shall give notice to the Registrar of the appointment of a Company Liquidator along with the name and particulars of the Company Liquidator, of every vacancy occurring in the office of Company Liquidator, and of the name of the Company Liquidator appointed to fill every such vacancy within ten days of such appointment or the occurrence of such vacancy.

Rule 25(2) of Companies Winding up Rules 2013 states that for the purposes of sub- section (1) of section 312, the notice of appointment of the Company Liquidator, of every vacancy occurring in the office of the Company Liquidator and of the name of the Company Liquidator appointed to fill every such vacancy shall be given to the Registrar of Companies within ten days thereof in Form No. 56. with filing fees as prescribed.

Sub-section (2) states that if a company contravenes the provisions

of sub-section (1), the company and every officer of the company who is in default shall be punishable with fine which may extend to five hundred rupees for every day during which such default continues.

### **Powers of the Board shall cease on the appointment of Company Liquidator**

According to Section 313, on the appointment of a Company Liquidator, all the powers of the Board of Directors and of the managing or whole-time directors and manager, if any, shall cease, except for the purpose of giving notice of such appointment of the Company Liquidator to the Registrar.

### **Powers and duties of liquidator in voluntary winding up**

Section 314 deals with the powers and duties of liquidator in voluntary winding up. Accordingly, the powers and duties are as follows.

- (1) The Company Liquidator shall perform such functions and discharge such duties as may be determined from time to time by the company or the creditors, as the case may be.
- (2) The Company Liquidator shall settle the list of contributories, which shall be prima facie evidence of the liability of the persons named therein to be contributories.
- (3) The Company Liquidator shall call general meetings of the company for the purpose of obtaining the sanction of the company by ordinary or special resolution, as the case may require, or for any other purpose he may consider necessary.
- (4) The Company Liquidator shall maintain regular and proper books of account in such form and in such manner as may be prescribed and the members and creditors and any officer authorised by the Central Government may inspect such books of account.
- (5) The Company Liquidator shall prepare quarterly statement of accounts in such form and manner as may be prescribed and file such statement of accounts duly audited within thirty days from the close of each quarter with the Registrar, failing which the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the failure continues.
- (6) The Company Liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.

(7) The Company Liquidator shall observe due care and diligence in the discharge of his duties.

If the Company Liquidator fails to comply with the provisions of this section except sub-section (5) he shall be punishable with fine which may extend to ten lakh rupees.

Rule 25(3) of Companies (Winding up) Rules 2013 states that the Company Liquidator not to accept any gift, commission, remuneration or pecuniary or other benefit and restriction on purchase of goods. A Company Liquidator shall not, under any circumstances whatsoever, make any arrangement for, or accept from any authorised representative, auctioneer or any other person connected with company of which he is the liquidator, or employed in or in connection with the winding-up of the company, any gift, commission, remuneration, or pecuniary or other benefit whatsoever beyond the remuneration to which he is entitled as liquidator under the Act and the Rules, nor shall he make any arrangement for giving up, or give up any part of such remuneration to any such person. Where the Company Liquidator carries on the business of the company, he shall not, purchase goods for carrying on of such business from any person which would result in any direct or indirect benefit out of the transaction.

Rule 25(6) states that for the purpose of sub-section (4) of section 314, the Company Liquidator shall keep proper books of account as provided in rule 20 so far as may be applicable. In addition to the books of account, the Company Liquidator shall keep a record book in which he shall enter minutes of all the proceedings and resolutions passed at any meeting of the creditors or members or of the Committees, particulars of all his transactions and negotiations in relation to the winding-up and all such matters other than matters of account as may be necessary to furnish a correct view of the administration of the company's affairs. He shall also keep a book showing the dates at which all notices to creditors and shareholders were sent out and posted. The person who despatched the notices shall initial the entries in the book relating thereto.

Rule 25(7) states that for the purposes of sub-section (5) of section 314, the quarterly statement of accounts to be filed with the Registrar of Companies shall be made in Form No. 58. Such statement of accounts shall be audited by an auditor appointed by the company in general meeting if the Company Liquidator is appointed in general meeting or by the creditors if the Company Liquidator is appointed by the creditors and the fee of the auditor so appointed, shall be determined by the members or creditors as the case may be.

**Appointment of Committees**

Section 315 states that when there are no creditors of a company, such company in its general meeting and, where a meeting of creditors is held under section 306, such creditors, as the case may be, may appoint such committees as considered appropriate to supervise the voluntary liquidation and assist the Company Liquidator in discharging his or its functions.

**Company liquidator to send the progress on winding up**

Section 316 (1) states that the Company Liquidator shall report quarterly on the progress of winding up of the company in such form and in such manner as may be prescribed to the members and creditors and shall also call a meeting of the members and the creditors as and when necessary but at least one meeting each of creditors and members in every quarter and apprise them of the progress of the winding up of the company in such form and in such manner as may be prescribed. (2) If the Company Liquidator fails to comply with the provisions of sub-section (1), he shall be punishable, in respect of each such failure, with fine which may extend to ten lakh rupees.

**Report of Company Liquidator to Tribunal for examination of persons**

Section 317(1) states that when the Company Liquidator is of the opinion that a fraud has been committed by any person in respect of the company, he shall immediately make a report to the Tribunal and the Tribunal shall, without prejudice to the process of winding up, order for investigation under section 210 and on consideration of the report of such investigation, the Tribunal may pass such order and give such directions under this Chapter as it may consider necessary including the direction that such person shall attend before the Tribunal on a day appointed by it for that purpose and be examined as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as officer thereof or otherwise.

Sub-section (2) the provisions of section 300(ie power to order examination of promoters, directors etc.,) shall mutatis mutandis apply in relation to any examination directed under sub-section (1).

**Final Meeting and dissolution**

Section 318. (1) states that as soon as the affairs of a company are fully wound up, the Company Liquidator shall prepare a report of the winding up showing that the property and assets of the company have been disposed of and its debt fully discharged or discharged to the

satisfaction of the creditors and thereafter call a general meeting of the company for the purpose of laying the final winding up accounts before it and giving any explanation there for.

Sub-section (2) states that the meeting referred to in sub-section (1) shall be called by the Company Liquidator in such form and manner as may be prescribed.

Sub-section(3) states that if the majority of the members of the company after considering the report of the Company Liquidator are satisfied that the company shall be wound up, they may pass a resolution for its dissolution.

As required under sub-section(4) Within two weeks after the meeting, the Company Liquidator shall—

- (a) send to the Registrar— (i) a copy of the final winding up accounts of the company and shall make a return in respect of each meeting and of the date thereof; and (ii) copies of the resolutions passed in the meetings; and
- (b) file an application along with his report under sub-section (1) in such manner as may be prescribed along with the books and papers of the company relating to the winding up, before the Tribunal for passing an order of dissolution of the company.

As per sub-section(5) If the Tribunal is satisfied, after considering the report of the Company Liquidator that the process of winding up has been just and fair, the Tribunal shall pass an order dissolving the company within sixty days of the receipt of the application under sub-section (4).

As per sub-section(6) the Company Liquidator shall file a copy of the order under sub-section (5) with the Registrar within thirty days.

As per sub-section (7) the Registrar, on receiving the copy of the order passed by the Tribunal under sub- section (5), shall forthwith publish a notice in the Official Gazette that the company is dissolved.

As per sub-section (8) if the Company Liquidator fails to comply with the provisions of this section, he shall be punishable with fine which may extend to one lakh rupees.

As per rule 25(12) of Company(Winding up) Rules 2013, the Company Liquidator/ Voluntary Liquidator shall lay report before a general meeting of the company under sub-section (1) of section 318 of the Act. Rule 25(13) states that for the purposes of sub-section (2) of section 318, the notice convening the final meeting of the company

in a voluntary winding-up, shall be in Form No. 60. The Account of the winding-up to be laid by the liquidator before the said meeting shall be in Form 61. Rule 25(14) states that for the purposes of clause (b) of sub-section (4) of section 318, the Company Liquidator/Voluntary Liquidator shall apply to the Tribunal and the Registrar, if on preliminary scrutiny finds the application to be in order, shall fix a date for the consideration thereof by the Bench, and notify the date on the notice board of the Tribunal and to the Company Liquidator. The Company Liquidator shall attend such consideration of the application or report or final account, as the case may be, and shall give the Bench such further explanation or information with reference to the matters contained therein as the Bench may require. Rule 25 (15) states that any creditor or contributory of a company which is being wound-up shall be entitled to inspect any of the reports, statements made under sections 316 and 318 on payment of such fee, and to obtain a copy thereof or extract therefrom on payment of the charges at such rate as may be prescribed

**Power of Company liquidator to accept shares ec as consideration if the transferor company is in the course of being wound up**

According to section 319. (1) when a company (the transferor company) is proposed to be, or is in the course of being, wound up voluntarily and the whole or any part of its business or property is proposed to be transferred or sold to another company (the transferee company), the Company Liquidator of the transferor company may, with the sanction of a special resolution of the company conferring on him either a general authority or an authority in respect of any particular arrangement,—

- (a) receive, by way of compensation wholly or in part for the transfer or sale of shares, policies, or other like interest in the transferee company, for distribution among the members of the transferor company; or
- (b) enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies or other like interest or in addition thereto, participate in the profits of, or receive any other benefit from, the transferee company: Provided that no such arrangement shall be entered into without the consent of the secured creditors.

Sub-section (2) states that any transfer, sale or other arrangement in pursuance of this section shall be binding on the members of the transferor company.

As per sub-section (3) any member of the transferor company who did not vote in favour of the special resolution and expresses his dissent therefrom in writing addressed to the Company Liquidator, and left at the registered office of the company within seven days after the passing of the resolution, may require the liquidator either—

- (a) to abstain from carrying the resolution into effect; or
- (b) to purchase his interest at a price to be determined by agreement or the registered valuer.

Sub-section (4) states that if the Company Liquidator elects to purchase the member's interest, the purchase money, raised by him in such manner as may be determined by a special resolution, shall be paid before the company is dissolved.

### **Distribution of the property of the company**

As per section 320, subject to the provisions of this Act as to overriding preferential payments under section 326, the assets of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

### **Arrangement when binding on Company and Creditors**

As per section 321(1) any arrangement other than the arrangement referred to in section 319 entered into between the company which is about to be, or is in the course of being wound up and its creditors shall be binding on the company and on the creditors if it is sanctioned by a special resolution of the company and acceded to by the creditors who hold three-fourths in value of the total amount due to all the creditors of the company. As per sub-section (2) Any creditor or contributory may, within three weeks from the completion of the arrangement, apply to the Tribunal and the Tribunal may thereupon amend, vary, confirm or set aside the arrangement.

### **Apply to tribunal to determine questions arising in the course of winding up**

As per section 322. (1) The Company Liquidator or any contributory or creditor may apply to the Tribunal—

- (a) to determine any question arising in the course of the winding up of a company; or
- (b) to exercise as respects the enforcing of calls, the staying of

proceedings or any other matter, all or any of the powers which the Tribunal might exercise if the company were being wound up by the Tribunal.

Sub-section (2) states that the Company Liquidator or any creditor or contributory may apply to the Tribunal for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up.

As per sub-section (3) the Tribunal, if satisfied on an application under sub-section (1) or sub-section (2) that the determination of the question or the required exercise of power or the order applied for will be just and fair, may allow the application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks fit.

Sub-section (4) requires a copy of an order staying the proceedings in the winding up, made under this section, to be forthwith forwarded by the company, or otherwise as may be prescribed, to the Registrar, who shall make a minute of the order in his books relating to the company.

### **Cost of Voluntary winding up**

323. All costs, charges and expenses properly incurred in the winding up, including the fee of the Company Liquidator, shall, subject to the rights of secured creditors, if any, be payable out of the assets of the company in priority to all other claims.

### **PROVISIONS APPLICABLE TO EVERY MODE OF WINDING UP**

The provisions applicable to every mode of winding up are comprehensively stated in Sections 324 to 365 of the Act and these apply to every mode of winding up whether it be a voluntary winding up and winding up by tribunal.

These sections broadly cover the following aspects.

- Application of insolvency rules in case of winding up of insolvent companies
- Overriding preferential payments
- Preferential payments
- Fraudulent preference and rights & liabilities of persons fraudulently preferred
- Effect of floating charge

- Disclaimer of onerous property
- Offences, penalties and liabilities of different persons including officers, directors of the company
- Appointment of official liquidator
- Summary procedure for liquidation
- Order for dissolution etc.,

### **Application of Insolvency Rules in Winding Up of Insolvent Companies**

As per Section 325,(1)in the winding up of an insolvent company, the same rules shall prevail and be observed with regard to—

- (a) debts provable;
- (b) the valuation of annuities and future and contingent liabilities; and
- (c) the respective rights of secured and unsecured creditors, as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

The security of every secured creditor shall be deemed to be subject to a pari passu charge 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 debts, opts to realise his security,—

- (i) the liquidator shall be entitled to represent the workmen and enforce such charge;
- (ii) 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
- (iii) so much of the debts due to such secured creditor as could not be realised by him 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 326.

### **Overriding preferential payments**

Section 326 (1) Notwithstanding anything contained in this Act or any other law for the time being in force, in the winding up of a company,— (a) workmen's dues; and (b) debts due to secured creditors to the extent such debts rank under clause (iii) of the proviso to sub-

section (1) of section 325 pari passu with such dues, shall be paid in priority to all other debts:

In case of the winding up of a company, the sums towards wages or salary referred to in sub-clause (i) of clause (b) of sub-section (3) of section 325, which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in priority to all other debts (including debts due to secured creditors), within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

Sub-section (2) states that the debts payable under the proviso to sub-section (1) shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that sub-section shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions

### **Preferential payments**

As per Section 327(1) in a winding up, subject to the provisions of section 326(i.e overriding preferential payments), the following shall be paid in priority to all other debts,—

- (a) all revenues, taxes, cesses and rates due from the company to the Central Government or a State Government or to a local authority at the relevant date, and having become due and payable within the twelve months immediately before that date;
- (b) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any employee in respect of services rendered to the company and due for a period not exceeding four months within the twelve months immediately before the relevant date, subject to the condition that the amount payable under this clause to any workman shall not exceed such amount as may be notified;
- (c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death, to any other person claiming under him, on the termination of his employment before, or by the winding up order, or, as the case may be, the dissolution of the company;
- (d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another

company, all amount due in respect of contributions payable during the period of twelve months immediately before the relevant date by the company as the employer of persons under the Employees' State Insurance Act, 1948 or any other law for the time being in force;

- (e) unless the company has, at the commencement of winding up, under such a contract with any insurer as is mentioned in section 14 of the Workmen's Compensation Act, 1923, rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company: when any compensation under the said Act is a weekly payment, the amount payable under this clause shall be taken to be the amount of the lump sum for which such weekly payment could, if redeemable, be redeemed, if the employer has made an application under that Act;
- (f) all sums due to any employee from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the employees, maintained by the company; and
- (g) the expenses of any investigation held in pursuance of sections 213 and 216, in so far as they are payable by the company.

Sun-section(2) states that when any payment has been made to any employee of a company on account of wages or salary or accrued holiday remuneration, himself or, in the case of his death, to any other person claiming through him, out of money advanced by some person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid-up to the amount by which the sum in respect of which the employee or other person in his right would have been entitled to priority in the winding up has been reduced by reason of the payment having been made.

As per sub-section (3) the debts enumerated in this section shall—

- (a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and
- (b) so far as the assets of the company available for payment to general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating

charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

Sub-section (4) states that subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the debts under this section shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given under clause (d) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

Sub-section (5) states that in the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months immediately before the date of a winding up order, the debts to which priority is given under this section shall be a first charge on the goods or effects so distrained on or the proceeds of the sale thereof: Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(6) Any remuneration in respect of a period of holiday or of absence from work on medical grounds through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period.

For the purpose of Section 327

“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 thereunder, 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;

“Employee” does not include a workman; and

“Relevant date” means—

- in the case of a company being wound up by the Tribunal, the date of appointment or first appointment of a provisional liquidator, or 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; and
- in any other case, the date of the passing of the resolution for the voluntary winding up of the company.

**Fraudulent Preference**

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

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

**Liabilities and rights of certain persons fraudulently preferred**

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

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

Sub-section (3) states that on an application made to the Tribunal with respect to any payment on the ground that the payment was a fraudulent preference of a surety or guarantor, the Tribunal shall have jurisdiction to determine any questions with respect to the payment arising between the person to whom the payment was made and the surety or guarantor and to grant relief in respect thereof,

notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose, may give leave to bring in the surety or guarantor as a third party as in the case of a suit for the recovery of the sum paid.

Sub-section(4)states that the provisions of sub-section (3) shall apply mutatis mutandis in relation to transactions other than payment of money.

### **Effect of floating charge**

As per section 332, when a company is being wound up, a floating charge on the undertaking or property of the company created within the twelve months immediately preceding the commencement of the winding up, shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except for the amount of any cash paid to the company at the time of, or subsequent to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum or such other rate as may be notified by the Central Government in this behalf.

### **Offences by officers of companies in liquidation**

For the purposes of Section 336, the expression “officer” includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

Section 336(1) states that if any person, who is or has been an officer of a company which, at the time of the commission of the alleged offence, is being wound up, whether by the Tribunal or voluntarily, or which is subsequently ordered to be wound up by the Tribunal or which subsequently passes a resolution for voluntary winding up,—

- (a) does not, to the best of his knowledge and belief, fully and truly disclose to the Company Liquidator all the property, movable and immovable, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary course of the business of the company;
- (b) does not deliver up to the Company Liquidator, or as he directs, all such part of the movable and immovable property of the company as is in his custody or under his control and which he is required by law to deliver up;

- (c) does not deliver up to the Company Liquidator, or as he directs, all such books and papers of the company as are in his custody or under his control and which he is required by law to deliver up;
- (d) within the twelve months immediately before the commencement of the winding up or at any time thereafter,—
  - (i) conceals any part of the property of the company to the value of one thousand rupees or more, or conceals any debt due to or from the company;
  - (ii) fraudulently removes any part of the property of the company to the value of one thousand rupees or more;
  - (iii) conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of, any book or paper affecting or relating to, the property or affairs of the company;
  - (iv) makes, or is privy to the making of, any false entry in any book or paper affecting or relating to, the property or affairs of the company;
  - (v) fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent parting with, altering or making of any omission in, any book or paper affecting or relating to the property or affairs of the company;
  - (vi) by any false representation or other fraud, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for;
  - (vii) under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for; or
  - (viii) pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing of the property is in the ordinary course of business of the company;
- (e) makes any material omission in any statement relating to the affairs of the company;
- (f) knowing or believing that a false debt has been proved by any person under the winding up, fails for a period of one month to inform the Company Liquidator thereof;

- (g) after the commencement of the winding up, prevents the production of any book or paper affecting or relating to the property or affairs of the company;
- (h) after the commencement of the winding up or at any meeting of the creditors of the company within the twelve months next before the commencement of the winding up, attempts to account for any part of the property of the company by fictitious losses or expenses; or
- (i) is guilty of any false representation or fraud for the purpose of obtaining the consent of the creditors of the company or any of them, to an agreement with reference to the affairs of the company or to the winding up,

he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees: Provided that it shall be a good defence if the accused proves that he had no intent to defraud or to conceal the true state of affairs of the company or to defeat the law.

Sub-section(2) states that when any person pawns, pledges or disposes of any property in circumstances which amount to an offence under sub-clause (viii) of clause (d) of sub-section (1), every person who takes in pawn or pledge or otherwise receives the property, knowing it to be pawned, pledged, or disposed of in such circumstances as aforesaid, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than three lakh rupees but which may extend to five lakh rupees.

### **Power of tribunal to assess damages against delinquent directors etc**

Section 340.(1) states that if in the course of winding up of a company, it appears that any person who has taken part in the promotion or formation of the company, or any person, who is or has been a director, manager, Company Liquidator or officer of the company—

- (a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or
- (b) has been guilty of any misfeasance or breach of trust in relation to the company, the Tribunal may, on the application of the Official Liquidator, or the Company Liquidator, or of any

creditor or contributory, made within the period specified in that behalf in sub-section (2), inquire into the conduct of the person, director, manager, Company Liquidator or officer aforesaid, and order him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Tribunal considers just and proper, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Tribunal considers just and proper.

Sub-(2) states that an application under sub-section (1) shall be made within five years from the date of the winding up order, or of the first appointment of the Company Liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer. (3) This section shall apply, notwithstanding that the matter is one for which the person concerned may be criminally liable.

### **Prosecution of delinquent officers and members of company**

Section 342 (1) states that if it appears to the Tribunal in the course of a winding up by the Tribunal, that any person, who is or has been an officer, or any member, of the company has been guilty of any offence in relation to the company, the Tribunal may, either on the application of any person interested in the winding up or suo motu, direct the liquidator to prosecute the offender or to refer the matter to the Registrar

Sub-section(2) further states that if it appears to the Company Liquidator in the course of a voluntary winding up that any person, who is or has been an officer, or any member, of the company has been guilty of any offence in relation to the company under this Act, he shall forthwith report the matter to the Registrar and shall furnish to him such information and give to him such access to and facilities for inspecting and taking copies of any books and papers, being information or books and papers in the possession or under the control of the Company Liquidator and relating to the matter in question, as the Registrar may require.

Sub-section(3) states that when any report is made under sub-section (2) to the Registrar,—

- (a) if he thinks fit, he may apply to the Central Government for an order to make further inquiry into the affairs of the

company by any person designated by him and for conferring on such person all the powers of investigation as are provided under this Act;

- (b) if he considers that the case is one in which a prosecution ought to be instituted, he shall report the matter to the Central Government, and that Government may, after taking such legal advice as it thinks fit, direct the Registrar to institute prosecution: Provided that no report shall be made by the Registrar under this clause without first giving the accused person a reasonable opportunity of making a statement in writing to the Registrar and of being heard thereon.

Sub-section(4) states that if it appears to the Tribunal in the course of a voluntary winding up that any person, who is or has been an officer, or any member, of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the Company Liquidator to the Registrar under sub-section (2), the Tribunal may, on the application of any person interested in the winding up or suo motu, direct the Company Liquidator to make such a report, and on a report being made, the provisions of this section shall have effect as though the report had been made in pursuance of the provisions of sub-section (2).

Sub-section(5) states that when any prosecution is instituted under this section, it shall be the duty of the liquidator and of every person, who is or has been an officer and agent of the company to give all assistance in connection with the prosecution which he is reasonably able to give. Explanation.—For the purposes of this sub-section, the expression “agent”, in relation to a company, shall include any banker or legal adviser of the company and any person employed by the company as auditor.

Sub-section(6) states that if a person fails or neglects to give assistance required by sub-section (5), he shall be liable to pay fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

### **Disposal of books and papers of the company**

Section 347(1) states that when the affairs of a company have been completely wound up and it is about to be dissolved, its books and papers and those of the Company Liquidator may be disposed of as follows:—

- (a) in the case of winding up by the Tribunal, in such manner as the Tribunal directs; and

- (b) in the case of voluntary winding up, in such manner as the company by special resolution with the prior approval of the creditors direct.

Sub-section (2) states that after the expiry of five years from the dissolution of the company, no responsibility shall devolve on the company, the Company Liquidator, or any person to whom the custody of the books and papers has been entrusted, by reason of any book or paper not being forthcoming to any person claiming to be interested therein.

As per sub-section(3) The Central Government may, by rules,—

- (a) prevent for such period as it thinks proper the destruction of the books and papers of a company which has been wound up and of its Company Liquidator; and
- (b) enable any creditor or contributory of the company to make representations to the Central Government in respect of the matters specified in clause (a) and to appeal to the Tribunal from any order which may be made by the Central Government in the matter.

As per sub-section (4) if any person acts in contravention of any rule framed or an order made under sub-section (3), he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees, or with both.

### **Information as to pending liquidations**

Section 348(1) states that if the winding up of a company is not concluded within one year after its commencement, the Company Liquidator shall, unless he is exempted from so doing either wholly or in part by the Central Government, 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 intervals, if any, as may be prescribed, file a statement in such form containing such particulars as may be prescribed, duly audited, by a person qualified to act as auditor of the company, with respect to the proceedings in, and position of, the liquidation,—

- (a) in the case of a winding up by the Tribunal, with the Tribunal; and
- (b) in the case of a voluntary winding up, with the Registrar:

However, (Audit of company liquidators' account under winding

up by tribunal) no such audit as is referred to in this sub-section shall be necessary where the provisions of section 294 apply.

Rule 31 of companies (winding up) Rules 2013 states that the winding-up of a company shall, for the purposes of section 348, be deemed to be concluded-

- (i) in the case of a company wound-up by order of the Tribunal, at the date on which the order dissolving the company has been reported by the Company Liquidator to the Registrar of Companies;
- (ii) in the case of a company wound-up voluntarily, at the date of the dissolution of the company, unless any fund or assets of the company remaining unclaimed or undistributed in the hands or under the control of the Company Liquidator, shall be distributed or paid into the Company Liquidation Dividend and Undistributed Assets Account as provided in section 352 of the Act.

## **OFFICIAL LIQUIDATORS**

### **Appointment of official liquidator**

Section 359(1) the Central Government may appoint as many Official Liquidators, Joint, Deputy or Assistant Official Liquidators as it may consider necessary to discharge the functions of the Official Liquidator. Sub-section (2) states that the liquidators appointed under sub-section (1) shall be whole-time officers of the Central Government.

### **Powers and functions of official liquidators**

Section 360(1) states that the Official Liquidator shall exercise such powers and perform such duties as the Central Government may prescribe.

Sub-section(2) states that without prejudice to the provisions of sub-section (1), the Official Liquidator may—

- (a) exercise all or any of the powers as may be exercised by a Company Liquidator under the provisions of this Act; and
- (b) conduct inquiries or investigations, if directed by the Tribunal or the Central Government, in respect of matters arising out of winding up proceedings.

Rule 35(2) of Companies (Winding up) Rules 2013 (2) states that for the purpose of sub section (1) of section 360, the Official Liquidator shall exercise following powers and perform following duties:

- For winding up of the company by the Tribunal, the Tribunal

at the time of passing an order of winding up, may appoint Official Liquidator as Company Liquidator, who shall exercise all powers as may be exercised by the Liquidator in the winding up proceedings.

- The Tribunal may also by an order appoint official liquidator as Provisional Liquidator for the purpose of winding up.
- Official Liquidator shall continue as the Company Liquidator or provisional liquidator for all such cases of winding up of companies, pending before District Court or High Court immediately before the date of transfer to the Tribunal as per clause (c) of sub-section (1) of Section 434 of the Act.
- To supervise the functions of any Company Liquidator or Provisional Liquidator appointed from the panel, if directed by Tribunal or Central Government.
- To advice or guide the Company Liquidator or Provisional Liquidator appointed from the panel on any reference made to him by such Liquidator.
- Official Liquidator shall conduct enquires or investigations, if directed by the Tribunal or Central Government in respect of matters arising out of winding up proceedings including all such cases where the company liquidator is appointed from the panel.
- To submit report to the Tribunal on any such matter including on the report for dissolution of the company filed by Company Liquidator appointed from the panel, on winding up by the Tribunal or Voluntary Winding up.
- The Official Liquidator shall maintain a panel of Security Agency with the approval of Tribunal and of professionals including Valuers, Chartered Accountants, Company Secretaries, Cost Accountants and Advocates to represent and assist the Official Liquidator in the winding up process and proceeding related to winding up petitions and applications before the Tribunal and the Central Government.
- Any such powers and duties as may be directed by the Tribunal or Central Government from time to time.

### **Summary procedure for liquidation**

Section 361(1) states that when the company to be wound up under this Chapter, —

- (i) has assets of book value not exceeding one crore rupees; and

(ii) belongs to such class or classes of companies as may be prescribed, the Central Government may order it to be wound up by summary procedure provided under this Part.

Sub section (2) states that when an order under sub-section (1) is made, the Central Government shall appoint the Official Liquidator as the liquidator of the company.

Sub-section (3) states that the Official Liquidator shall forthwith take into his custody or control all assets, effects and actionable claims to which the company is or appears to be entitled.

As per sub-section(4) the Official Liquidator shall, within thirty days of his appointment, submit a report to the Central Government in such manner and form, as may be prescribed, including a report whether in his opinion, any fraud has been committed in promotion, formation or management of the affairs of the company or not.

Sub-section (5) states that on receipt of the report under sub-section (4), if the Central Government is satisfied that any fraud has been committed by the promoters, directors or any other officer of the company, it may direct further investigation into the affairs of the company and that a report shall be submitted within such time as may be specified.

Sub-section (6) states that after considering the investigation report under sub-section (5), the Central Government may order that winding up may be proceeded under Part I of this Chapter or under the provision of this Part.

*Rule 39 of Companies Winding up Rules 2013 states the following aspects as to the summary procedure for winding up.*

- (1) Application under Section 361 for Summary Procedure of Winding-Up- For the purpose of clause (ii) of sub section (1) of section 361 of the Act, the classes of company shall be as follows: (a) One Person Company, or (b) Small Company.
- (2) Application for winding up (i) Application for winding up by the Company shall be in Form- A with such variations as may be necessary and in any other case it shall be in Form-B with such variations as may be necessary.
  - (ii) The applicant shall, not less than one month before filing any application in Form A or B as the case may be publish a

general notice, at least once, in a daily newspaper published in English and in the principal language of the State or the Union Territory in which the registered office of the company is situated, clearly indicating the substance of the application and stating that any person whose interest is likely to be affected by the proposed application and may intimate to the Central Government (Regional Director) within twenty-one days of the date of publication of that notice, the nature of interest and grounds of opposition, if any.

- (3) Application by the Company. Subject to section 271 and 272 of the Act, in case the application is made by the company: (i) The company shall not less than one month before filing application, serve on each debenture-holder and creditor of the company by registered post or speed post, individual notice indicating the substance of the application and stating that if his interest is likely to be affected by the proposed application and may intimate to the Central Government (Regional Director) within twenty-one days of the date of publication of that notice, the nature of interest and grounds of opposition, if any.

(ii) The application shall contain: (a) a list stating the name and address of the creditors and debenture holders and the amount due to each of them up to the latest practicable date preceding the date of filing of the application which shall not precede the date of filing the application by more than thirty days indicating whether the secured or unsecured creditors and details of the property mortgaged or hypothecated to such secured creditors, if any. (b) A director of the company shall file an affidavit to the effect that they have made the full enquiry into the affairs of the company and, having done so, have formed the opinion that the list referred above is correct, and the estimated values as given in the list of debt or claims payable on a contingency or not ascertained are proper estimates of the values of such debt and claims included in the list and the same are borne out by the books and records of the company and that there are no other debts, or claims against, the company to their knowledge. (c) The company shall prove the publication of the notice and service of notice to each of the debenture holder or creditor by an affidavit. (d) Copy of the audited financial statements for the preceding financial year; (e) Statement of Affairs in Form 4 made up to the latest practicable date preceding the date of filing of the application which shall not precede the date of filing the application by

more than 30 days; and (f) Copy of the resolution of the Board of Directors authorizing Board to submit the application; and

(g) copy of the special resolution of the company in terms of clause (b) of sub-section (1) of section 271 of the Act

- (4) Subject to section 271 and 272 of the Act in any other case, the application shall be accompanied by an affidavit to prove the publication of the notice, copy of the latest audited financial statements available in the MCA 21 portal, copy of the charge documents available in the MCA 21 portal and an affidavit to prove the service of notice to the secured creditors whose names are available in the charge documents in the manner provided in clause (i) of sub-rule (3).
- (5) Objections to the application. (i) Any person intending to oppose the application shall within twenty-one days from the date of service of publication of the notice, as the case may be, deliver, or cause to be delivered, or send by registered post or speed post, the objections supported by an affidavit, in original, to the Central Government and shall also serve a copy of the objections on the applicant and the company at its registered office if the objector is not the company.  
(ii) Where an application for winding up is filed by a person other than the company : - (a) the objection, if any, by the company shall be accompanied with the statement of affairs in Form 4 (b) The Central Government if satisfied that a prima facie case for winding up of the company is made out, direct the company to file its objections along with a statement of its affairs in Form 4 within thirty days of the direction. (c) A company which fails to file statement of affairs, shall forfeit the right to oppose the application and such directors and officers of the company as found responsible for such non compliance, shall be liable for punishment under sub section (4) of section 274 of the Act.
- (6) Affidavit in support. Every application shall be accompanied by an affidavit verifying the same and shall be drawn up in the first person and shall state the full name, age, occupation and complete residential address of the deponent and shall be signed by the deponent and sworn before an oath commissioner.
- (7) Documents may be attested by the party or the authorized representative or the advocate. Where the application is filed by the authorized representative, Memorandum of Appearance shall be appended to the application as in Form C.

- (8) Admission of application and directions - Upon the filing of the application, it shall be listed before the Central Government for admission and consideration of objections received, if any.
- (9) Consideration and disposal- The Central Government may upon considering the application, in case where there are no objections, wherever applicable, statement of affairs have been received, and found that the company can be wound up through summary procedures, may allow the application and pass a winding up order; in any other case may either dismiss the application or may issue notice to the company or the objector to file a reply or issue any other direction deemed fit and proper.
- (10) Reply of the notice: The objector or the company as the case may be within a period of thirty days from the receipt of notice file a reply to the application for winding up.
- (11) Order: Upon considering the application and the reply, if the central government is of the view that;
  - A. the grounds for winding up are made out and no further evidence is required it shall pass an order winding up the company;
  - B. the grounds for winding up are not made out it shall dismiss the application;
  - C. the adjudication of the application involves complex issues of facts and law or the Central Government is of the opinion that summary procedures under the Part IV of Chapter XX is not possible, the Central Government shall return the application, where after, the applicant shall be at liberty to approach the Tribunal.

### **Sale of assets and recovery of debts due to company**

Section 362 (1) states that the Official Liquidator shall expeditiously dispose of all the assets whether movable or immovable within sixty days of his appointment.

Sub-section (2) states that the Official Liquidator shall serve a notice within thirty days of his appointment calling upon the debtors of the company or the contributories, as the case may be, to deposit within thirty days with him the amount payable to the company.

As per sub-section(3) when any debtor does not deposit the amount under sub-section (2), the Central Government may, on an application made to it by the Official Liquidator, pass such orders as it thinks fit.

Sub-section (4) requires the amount recovered under this section by the Official Liquidator to be deposited in accordance with the provisions of section 349.

### **Settlement of claims of creditors by official liquidator**

As per section 363(1), the Official Liquidator within thirty days of his appointment shall call upon the creditors of the company to prove their claims in such manner as may be prescribed, within thirty days of the receipt of such call. As per sub-section (2) The Official Liquidator shall prepare a list of claims of creditors in such manner as may be prescribed and each creditor shall be communicated of the claims accepted or rejected along with reasons to be recorded in writing.

#### *Appeal by creditor*

As per 364 (1), any creditor aggrieved by the decision of the Official Liquidator under section 363 may file an appeal before the Central Government within thirty days of such decision.

Sub-section (2) states that the Central Government may after calling the report from the Official Liquidator either dismiss the appeal or modify the decision of the Official Liquidator.

Sub-section (3) states that the Official Liquidator shall make payment to the creditors whose claims have been accepted. (4) The Central Government may, at any stage during settlement of claims, if considers necessary, refer the matter to the Tribunal for necessary orders.

#### *Order of dissolution of company*

Section 365 (1) states that the Official Liquidator shall, if he is satisfied that the company is finally wound up, submit a final report to— (i) the Central Government, in case no reference was made to the Tribunal under sub-section (4) of section 364; and (ii) in any other case, the Central Government and the Tribunal.

As per sub-section (2) the Central Government, or as the case may be, the Tribunal on receipt of such report shall order that the company be dissolved. (3) Where an order is made under sub-section (2), the Registrar shall strike off the name of the company from the register of companies and publish a notification to this effect.

**SECTION IV – ROLE OF INSOLVENCY PROFESSIONALS**

The Companies Act 2013 provides for regulation of insolvency, including rehabilitation, winding up and liquidation of companies in time bound manner. It incorporates international best practices based on models suggested by the United Nations Commission on International Trade Law (UNCITRAL). The powers and jurisdiction of Company Law Board, Board of Industrial and Financial Reconstruction and High Court in this regard, is being exercised by National Company Law Tribunal and appellate tribunal. The purpose of creation of the Tribunal is to avoid multiplicity of litigation before various courts or quasi-judicial bodies or forums regarding revival or rehabilitation or merger and amalgamation, and winding up of companies. NCLT will have-

- The power to consider revival and rehabilitation of companies—a mandate presently entrusted to BIFR under SICA.
- The jurisdiction and power relating to winding up of companies presently vested in the High Court. The winding up proceeding pending in High Courts shall stand transferred to the Tribunal.
- The jurisdiction and power exercised by the Company Law Board under the 1956 Act. The Company Law Board will stand abolished.

The Act also provides for larger role for professionals like Company Secretaries to act as interim administrator/Company administrator and Company liquidators in the process of revival and rehabilitation of Sick Companies (Chapter XIX); Winding up of Companies (Chapter XX)

**Specific provisions of Companies act, dealing with the role of Insolvency practitioners.**

- Appointment of interim administrator/Company Administrator in the process of revival/restructuring

The interim administrator or the company administrator, as the case may be, shall be appointed by the Tribunal from a databank maintained by the Central Government or any institute or agency authorised by the Central Government in a manner as may be prescribed consisting of the names of company secretaries, chartered accountants, cost accountants and such other professionals as may, by notification, be specified by the Central Government. The terms and conditions of the appointment of interim and company administrators shall be such as may be ordered by the Tribunal.(Section 259(1) and (2))

- Appointment of provisional liquidator or company liquidator

Section 275(2) states that the provisional liquidator or the Company Liquidator, as the case may be, shall be appointed from a panel maintained by the Central Government consisting of the names of chartered accountants, advocates, company secretaries, cost accountants or firms or bodies corporate having such chartered accountants, advocates, company secretaries, cost accountants and such other professionals as may be notified by the Central Government or from a firm or a body corporate of persons having a combination of such professionals as may be prescribed and having at least ten years' experience in company matters.

- Company liquidator may appoint professionals to assist him

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

- To appear before the Tribunal

As per Section 300 (4) A person ordered to be examined under this section—

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

- Professionals to assist official liquidators

Rule 35(2) of Companies (Winding up ) Rules 2013, states that the Official Liquidator shall maintain a panel of Security Agency with the approval of Tribunal and of professionals including Valuers, Chartered Accountants, Company Secretaries, Cost Accountants and Advocates to represent and assist the Official Liquidator in the winding up process and proceeding related to winding up petitions and applications before the Tribunal and the Central Government.

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