

## A Critical Analysis with Relevant Provisions of Companies Act, 1956 & 2013 on Petition for Winding Up

Rama Kant

Research Scholar- Faculty of Law, University of Allahabad

Prior to November 15, 2016 the term 'Winding up' was neither defined in the companies Act, 1956 and the Companies Act, 2013. It is inserted by Act 31 of 2016, Section 255 of the insolvency and Bankruptcy Code, 2016 ("the Code") which has been notified and effected from 15<sup>th</sup> November, 2016. By virtue of this Section stands amended in accordance with schedule Eleventh Para 1 (b) of the Code. Now Schedule XI defines the Term 'winding up' with introducing new Section in the Companies Act, 2013 as 2(94A) where 'winding up' means winding up under this Act or Liquidation Under the Insolvency and Bankruptcy Code, 2016, as applicable.

The provision for winding up provided in Chapter XX of the Companies Act, 2013 which are divided into four Parts:

Part I- dealing with the provisions of winding up by the Tribunal

Part II- provisions of voluntary winding up

Part III- provision applicable to every mode of winding up

Part IV- Appointment of official liquidator

After November 15, 2016 in section 271 (1)(a) of 2013 Act which dealt with the Section as If the Company is Unable to Pay its debts & 271(1)(d) as If the Tribunal has Ordered the winding up of the Company under Chapter XIX has been omitted by the Section 255 of the Code.

In 2015, the Supreme Court upheld the Constitutional Validity of the NCLT and NCLAT. Therefore, the establishment of NCLT and NCLAT might result in an efficient implementation of the winding up provisions. This will definitely reduce the multiplicity in the number of cases. Shorten the winding-up process, and avoid multiplicity and levels of litigations before high courts, the Company Law Board and the Board for Industrial and Financial reconstruction.

Petition for winding up come under part I of the Companies Act, 2013 section 272 and Section 439 and 439 A of the Companies Act 1956. 1956 Act provides that a petition for winding up can be filed by the company, a creditor, a contributory, a registrar and the central Government. Separately from this Section 439 of the 1956 Act qualifies the ability of these

persons to file petition on the various grounds which was set out in Section 433 of the 1956 Act. This act also qualifies 'Creditor' and 'Contributory' for the purpose of filing a petition for winding up. The Companies (Amendment) Act, 1960 Substituted the present Clauses (b), (c) and (e) of section 439(1) of the 1956 Act and by amendment 435(5) as power of the Registrar to file a petition for winding up of a company on the ground of its inability to repay its debts, on the basis of this report which filed by a special auditor appointed.<sup>1</sup>This amendment also empowers the Registrar to file a petition on the additional grounds in clauses (d) and (f) of section 433(1) of the 1956 Act. The companies (Second Amendment) Act,2002, introduced some amendments under clause (h) of Section 433, subsection(5) and so on but it was not brought into force.

Under companies Act,1956 in section 433, 434 and 439 provided A creditor has a right to file a winding up petition against a company registered as a limited company where the amount of debt is not less than Rs 500/-. Apart from this there is also such other criteria to be compiled as the debt should be admitted one and not disputed, the debt should be live, A 21 days

statutory notice must have been issued and the debtor failed to repay the debt, the object of the winding up petition should not be recovery and also you must have to prove the circumstances of the company is getting commercially insolvent. There is also a possibility that a management of the company in order to save the company from being wound up may come for a compromise before the court in which event, the court will grant time to the creditor to pay the debt provided the company proves it bona fides. If the creditors pay debts then petition can withdraw. The petition can be filed in the related state of high court where the registered office of the company is situated.

Section 439A of this Act was inserted by the Companies (Second Amendment) Act, 2002 which required that every company shall file a statement of its affairs along with the petition winding up filed before the tribunal.

Section 272 of the companies act 2013 provides that winding up petition is to be filled in the prescribed form whichever is applicable can be submitted in 3 sets as form number 1,2and 3. The petition for compulsory winding up can be filled by following persons: namely,

- The Company
- The Creditors

---

<sup>1</sup>Under Section 233A of the 1956 Act.

- Any Contributory or Contributories
- By the Central or State Government
- By the registrar or any person who authorized by the Central Government for this purpose

At the time of filing petition, it shall be accompanied with the statement in Affairs with the form no.4. The petition shall state the facts up to a specific date which shall not be more than 15 days prior to the date of making statement. After preparing the statement it shall be certified by practising Chartered Accountant. This petition shall not be advertised in not less than 14 days before the date of hearing in both of the newspapers English and any other local language.

After hearing petition The Tribunal has the power to dismiss it or to uphold make as interim order as think fit. Or either the tribunal can appoint the provisional fiduciary of the company till the passing of winding up of order. An order for winding up by the tribunal is given in form number 11.

Section 272 of the companies Act, 2013 consolidated the provisions of 439 and 439 A of the 1956 Act. A Contributory persons who can filed a petition defined section 2(26) of the companies Act 2013 as this *means a person liable to contribute towards the assets of the company in the*

*event of its being wound up.* Section 2(20) defined *company means a company incorporated under this act or under any previous company law.* Section 2(75) *registrar means a registrar, an additional registrar, a joint registrar, a deputy registrar or an assistant registrar, having the duty of registering companies and discharging various functions under this act.* Here in this phenomenon creditor includes contingent and prospective creditors, and further includes secured creditors, debenture holders and trustees of debenture holders. Under this act ability to file a petition qualification of persons is following.

Registrar of companies cannot able to file a petition under clause (b), (d), or (g) under the section 271 of the companies act before the 2016 amendment act. Now (d) substituted and (b), (g) became clause (a) and (e)

- Previous sanction of the central government is require to registrar for filing a petition
- Registrar cannot file petition under clause (a) of section 271(1) of the 2013 Act which is omitted now.
- Petition must be accompanied by a statement of affairs.
- Petition can be filed by a contributory only.

According to above fulfilment or conditions Central Government grants sanction to the Registrar of companies for filing petition for winding up. Section 272(4) of the 2013 act which is after omission and substitution conferred to section 272 (3) require reasonable opportunity to be provided to the company to make its representation against such sanction before the Central Government accords Sanction. A new requirement introduced in section 272 (7) {Now 272 (5)} of the 2013 Act is the requirement to give copy of the petition to the registrar of companies, who is required to give his views of the tribunal within 60 days. In the 2013 Act confined few Modifications of the 1956 Act. Where Central and State Government included as a parties who can file a petition under this Act for winding up.

Section 272 (3) now 272 (2) of the 2013 Act is the details of entitlement. The provision commences with the Statement that “*notwithstanding*” certain factors, the contributory is entitled to file a petition for winding up of a company, it in proceeds to list out qualifications which are to be met by such contributory. All the provision of filing of petitions is related to three essential grounds, these are following:

- The number of member below the minimum prescribed

- Company is not able to commence business in a year
- Not holding a statutory meeting or filing the statutory report.

In the Companies (Amendment) Act, 1960 which is based on the Recommendations of the Company Law Committee, on the 1956 Act where the enhancement of powers given to the registrar and the power given to the central government under the 439 (1) (f). It also be noted that the Registrar’s powers were considerably increased. But in all cases he would have to obtain the previous sanction of the central government. After that this act was amended by the 2002 amendment Act.

As per 439(1) (a) of the 1956 Act which corresponds to 272(1) (a) of the 2013 Act, Company has right to file a petition. Along this Special resolution for the purpose of company proceedings under section 433(a) and 271(a) {before amendment 271(1) (b)} is necessary.it is not the directors’ resolutions or directors decision. It was held by the Court that without special Resolution Winding up order on the basis of majority is rejected. Companies’ rights exercised by the directors and directors have no rights to ask for winding up.<sup>2</sup>

In *Re Instrumentation Electrical Services Ltd.* Where petition filed by the two out of

---

<sup>2</sup>Patiala Banaspati and Allied products Co. Ltd.  
Re,AIR 1953 PEPSU 195

three directors on the ground of insolvency which was dismissed under section 124 (1) of the English insolvency Act, 1986. Specifies the parties who have locus Standi for bringing an application for winding up. This section stated that a petition may be presented either by the company, its directors, any creditors (whether contingent or prospective) or by any contributories, i.e. members or certain former members, 'or by all or any of those parties, together or separately. Court held that The Court is not bound to order winding up merely because the company has so resolved; the power of the court is discretionary and may not be exercised where winding up would be opposed to the public or the company's interests and the petition must be brought by one or more of the directors acting in accordance with a unanimous or majority resolution of their colleagues. When there is no proof of a board of meeting authorising the secretary to seek winding up. in this situation the petition was incompetent.<sup>3</sup>

In Situation of 272(1) (b) and (2) {now omitted of the 2013 Act} which corresponded to section 439(1) (b) of the 1956 Companies Act. All the decision

under this clause is not relevant in now days.

Now in comparison of section 272(1)(c) and (3) of the 2013 Act corresponded Section 439(1)(c) and (3) of the 1956 Act where after the substitution by Act 31 of 2016, 2013 Act related to the filing petition become 272(1)(b) and (2). thus the precedents of the 1956 Act will apply to this section also. This section is based on the Contributory's Petition. Its clarified that who is contributory for this purpose, understanding to purchase shares not enough, availability of alternative remedy, right of legal representative to maintain petition for winding up, when a person not yet registered as member, Locus Standi of erstwhile directors and of company emerging from amalgamation. Also described that the right of a contributory to a petition for winding up cannot be taken away on the ground that his membership has been challenged by the opponents in the petition or that it is alleged by them that he is holding the shares as their nominee. This will not persuade the Court to dismiss the petition or to suspend the hearing until the petitioner title to membership has been established in separate proceedings.<sup>4</sup>

<sup>3</sup>Ahmedabad Electricity Co.Ltd. v. Sanghi Spinners (India) Ltd. ;(2007) 140 Com Cases 161:(2007) 74 SCL 95 (AP)

<sup>4</sup>Garage Door Associates Ltd., Re,(1984)1 All ER 434: (1983) BCLC 164 (ChD)

*In Thankam Paul city court* (now Tribunal) held that the legal representative of a deceased member cannot file a petition for winding up by virtue of the succession certificate without getting the inherited shares registered in his name. In this case the respondent company is a Hospital and registered under the Indian Companies Act, 1956, claiming that the petitioner is a contributory entitled for the rights of the shareholder of the company as provided under section 439(4)(b) which is now not in the provision.

In contributory petition a registered company having its registered office at Cochin and having three rubber estates and one tea estates apart from extended form of unit offices. The company holding a fully paid shareholders around 30%. Petitioner holds only 50 shares in the respondent company which is less than 0.02% of the total shareholders. The company was not able to shown to be commercially insolvent. He did not move to other forums. Then the appeals was allow and petition was dismissed with cost of Rs. 25,000. deposit made by the applicant in company application be refunded on their requests. This case fell under 433(e) (f) and 439 also.<sup>5</sup>

<sup>5</sup>Cochin Malabar Estates & Industries Ltd. V. P.V. Abdul Khader, (2003) 114 Com Cases 777 (Ker)

Section 439(1) (e) and (5) of the 1956 Act Confer to Section 272 (1) (e) and (4) {now 272(1) (d) and (3)} of the 2013 Act. Precedents of the 1956 Act also will apply on 2013 Act regarding this section. Where the Registrar has obtained the permission of the Central Government on a certain Grounds, he should file the petition on the same ground and not on some other ground.<sup>6</sup> Even reference of the sanction of the central government, in case of *Registrar of Companies. U.P v. Saving and General Finance (P). Ltd* where sanction obtain by the registrar for a presenting a petition under 1956 act of above clause which also relevant to 2013 act i.e. the company was unable to pay its debts, the power of the court to direct winding up of the company are not restricted to that ground alone. The court can always go into the question whether it was just and equitable to wind up the company.

Then analysis of section 439(1) (f) and (g) of the 1956 Act which corresponds to section 272(1) (f) and (g) {now 272(1) (e) and (f)} of the 2013 Act. A petition for winding up of a company based on the report of inspector in terms of section 243 of the 1956 Act where company is also liable under insolvency and bankruptcy code 2016 which is inserted by act 31 of

<sup>6</sup>M.H Varekar ROC v. All India Groundnut Syndicate Ltd. ;(1953) 23 Com Cases 25 (Bom)

2016, can be filed by any person authorised by the Central Government.

Here 439(5) of the 1956 Act corresponds to the section 272(4){now 272(3)} of the 2013 companies act express the Delegation of powers to Regional Directors. It may be noted that the departmental circulars, clarifications and notifications continue to be relevant since section 272 of the 2013 Act is notified. They will continue to be relevant until Fresh Departmental Circulars, clarifications and notifications are issued in their place. Section 439(6) of the 1956 Act corresponds to the third proviso of section 272(4) {now second proviso of 272(3)} of the 2013 Companies Act. Here it cleared that the Government must be satisfied that ground for winding up do exist.<sup>7</sup>

Section 439(8) of the Companies Act,1956 Corresponds to Section 272(6)of the companies act omitted and the decision on the basis of this clause are not relevant in now days.

Section 439A of the Companies Act 1956 correspond to Section 272(5) {after Substitution converted into 272(4)} of the companies Act, 2013. Where 439A was inserted as a new provision by the companies (Amendment) Act, 2002 and provided that every company shall file a

statements of its affairs along with the petition for winding up before the tribunal. Such Statement of affair was to include details, such as the last known addresses of all the directors and name and addresses of the Company Secretary; the details of location of assets of the company and their value; and the details of debtor and creditors with their addresses and such other details as the tribunal may direct. Statement of affairs is the requirement of this clause.

Section 272 (7) {now 272(5)} of the 2013 Act inserted as new requirement and had no provision in the 1956 Act. This section talks about the copy of filed petition shall also be filed with the registrar and gave time limit to submit his views to the tribunal on the basis of receipt of such petitions.

### **Conclusion**

In analysis of this Section on the 2013 act with the Companies Act 1956 we see that the act was continuous change and found many modifications and amendments in related sections. Some sections inserted and some omitted by the insolvency act 2016. As we know that winding up is the last procedure of the company where company cannot commence business due to any situations or circumstances. On the behalf of this situation section 272 of the Companies Act, 2013 contained this

---

<sup>7</sup>Registrar of Companies v. U.P Saving & General Finance (P.) Ltd., (1986) Tax LR 1708 (All)

section to file a petition and also listed who is qualified for filing the petition. Here Central Government and State Government get the power to authorise any person for filed a petition to the tribunal as well. After the amendments section 272 of the 2013 Act summarize with five

subsections and six sub clauses. Those sections are relevant section 271of the 2013 Act as well existed and which is not in the provision of section271 of this act also omitted from this section 272. The new modification after the substitutions is effected from December 01, 2016.