THE LAWS AND PRACTICE OF WINDING-UP OF COMPANIES UNDER THE COMPANIES ORDINANCE 1984

Doctor of Philosophy in Law

By

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No Part of this thesis has been submitted anywhere else for any other degree. This thesis is submitted to the Faculty of Law, The Superior College, Lahore in partial fulfillment of the requirements for the degree of Doctor of Philosophy in field of Company Law in Faculty of Law at The Superior College, Lahore.

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DEDICATION

To my beloved parents and family whose love, prayers, inspiration, moral and mental support are a source of steadfast strength and which enabled me to complete this milestone and landmark of my education. May Almighty Allah shower His boundless and endless blessings on them.

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ABSTRACT

Winding up of company is a legal procedure to dissolve the company and put an end to its life. The company ceases to be a 'going concern'. The term winding up is defined as, 'the process by which the life of a company is ended and its property is administered for the benefit of its members and creditors.' During the process of winding up, the assets of the company are sold and all the debts of the company are paid off. An administrator, called the liquidator, is appointed to take control of the winding up process of the company. If any surplus is left, the liquidator would distribute it among the owners of the company in accordance to their rights. In case the assets are insufficient, the owners may have to compensate if the agreement so specifies.

From the preamble of the Company’s Ordinance, 1984, it is apparent that the purpose of the Ordinance is to consolidate and amend the law relating to the companies and certain other associations for the purpose of the healthy growth of the corporate enterprises, protection of investors and creditors, promotion of investment and development of economy and matters arising out of or connected therewith. The purpose of the Ordinance obviously is to adjudicate all matters falling under the Ordinance finally to achieve the results for which the Ordinance has been enforced.

There is a feeling that with the passage of time corporate law, will be increasingly globalize through the influences which are likely to impact on world and Pakistan economy. Perhaps one area where further efforts are required is with regard, to development of a more flexible corporate rescue in Pakistan through changes in Company Law.

When winding up of a company is made, its demise is judicially pronounced and steps are being taken or its burial culminating in what is known as dissolution of a company. In such a situation all and sundry, subject to limitations, are permitted to participate in the proceedings, lodge their claims, raises objection and put forward their grievances whatsoever and the proceedings are somewhat similar to administration of estate left by a deceased or insolvent person.

LIST OF ABBREVIATIONS

AGM	Annual General Meeting
AIR	All India Reports
AOA	Articles of Association
AR	Administrative Receiver
BCA	Banking Companies Act
BIFR	Bank of Industrial and Financial Reconstruction
BOD	Board of Directors
BOE	Bill of Exchange
CA	Companies Act
CJ	Company Judge
CLA	Corporate Law Authority
CLC	Civil Law Cases
CLD	Corporate Law Decision
CO	Companies Ordinance
COI	Committee of Inspection
CoLA	Company Liquidation Account
Cr PC	Criminal Procedure Code
CR	Court Rules
CWU	Compulsory Winding Up
DB	Division Bench
DC	Defunct Company
ECA	English Companies Act
FC	Federal Court
FC	Foreign Company
FIA	Federal Investigation Agency
GN	Gazette Notification
HC	High Court
HC	Holding Company
IA	Insurance Act
IC	Insolvent Company
ICA	Indian Companies Act
IHC	Islamabad High Court

IIA	International Insolvency Act
IP	Immovable Property
JAE	Just and Equitable
JOL	Joint Official Liquidator
JP	Judicial Proceeding
JSC	Joint Stock Company
JVA	Joint Venture Arrangement
LHC	Lahore High Court
MLD	Monthly Law Digest
MOA	Memorandum of Association
MVWU	Members Voluntary Winding Up
NAB	National Accountability Bureau
OG	Official Gazette
OL	Official Liquidator
OR	Official Receiver
PA	Partnership Act
PHC	Peshawar High Court
PICIC	Pakistan Industrial Credit and Investment Corporation
PL	Provisional Liquidator
PLD	Pakistan Legal Decisions
PLJ	Pakistan Law Journal
PM	Provisional Manager
PP	Pari Passu
PT	Preferential Treatment
QHC	Quetta High Court
RC	Respondent Company
ROC	Registrar of Companies
SBI	State Bank of India
SBP	State Bank of Pakistan
SC	Supreme Court
SCMR	Supreme Court Monthly Review
SECP	Securities Exchange Commission of Pakistan
SFC	State Financial Corporation
SHC	Sindh High Court

SO	Set Off
UC	Unregistered Companies
VL	Voluntary Liquidator
VWU	Voluntary Winding up
YLR	Yearly Law Reporter

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Wight Pilling Mackey v Eckhardt Marine (2003) CILR 211 GMBH

CHAPTER 1

INTRODUCTION

Many of corporate law models have provisions for the winding up and ultimate dissolution of companies. The winding up process is the legal and economical exit mechanism by which untenable or uncompetitive companies are taken off-line from the capitalist market economy. A capitalist market economy without a winding up regime will be extremely dysfunctional (in fact unthinkable), as market competence would be curtailed if commercially indefensible enterprises carry on to trade and resources continue to be employed in uncompetitive ventures.

The liquidation or winding up of a company is a legal process or procedure through which dissolution of the company is carried out and finally brought to an end. The company while going through winding up process stops to perform its day to day functions as a going concern or legal entity. So winding up can be regarded and defined as the procedure and process through which the legal life of a company is put to and end and its assets/ property are utilized for the benefit of its members, creditors and other stake holders. The proceedings for winding up must not be a substitute for a suit to recover the debt and the reason of submitting the same should not be to coerce the company to resolve disputed debts. Such attempts in winding up proceedings are believed to be misuse of the process of law.

Once the winding up has started, while the company is still the holder of legal title to assets/properties and these assets and properties of a company are held in trust, for the discharge of the company's liabilities. The company remained no longer practical owner. A company may be rich; however it may be commercially insolvent; the real criterion is whether it could meet its liabilities. If a company is not commercially solvent nor is there any rational chance of its doing business in the near future at a profit, then winding up of the company is just and equitable.

The date of order of dissolution of a company is the dooms day for the company. The order of dissolution, by the Court in a dissolution proceeding, is a death warrant-for a juristic person, with order of dissolution, company is declared dead, and it ceases to exist under law.

During winding up, a company cannot be treated as a dead unit; it remains alive. For the advantage of their members which will eventually be in the best interest of earlier ailing economy of this country, it would be just and proper that an attempt would be made for the revival of the company as it would be in realm of corporate and commercial understanding.

The winding up of company has an immense impact on public view and is taken as the company being in the view of public, winding up of the company is seen as the company being fiscally and economically not practicable and viable. Therefore, the company should endeavor to evade the circumstances which have negative impression which lead to wrong ideas on the minds of the public but on the other hand it is helpful for the corporate sector that through the winding up of company the process of investment remains permanent which provides further business opportunities to corporate sector.

The fiscal, economic and financial system strength and stability depends upon an effective winding up process. It is, therefore, essential to make an effective and sound structure for restructuring and rehabilitation of such company alongwith frame work of winding up/ liquidation. The structure and frame work must look into and search for to protect estate and make best use of the value of assets/ properties, accept inter se rights of creditors and give equal treatment to similar creditors at the same time dealing with small creditors just and equitably.

1.1 BACKGROUND

This is a fact that the corporate sector has always contributed towards the development and growth of World Economy as well as Economy of Pakistan. The companies present at time of establishment of Pakistan and established after independence had played a pivotal role in grooming and strengthening of corporate sector in Pakistan. The state, companies, regulators, employees, shareholders/ members, contributories and public, directly or indirectly are involved and have significant interests in the state of affairs of the companies and especially in the process of winding up of the companies. Therefore, these matters regarding the management, organization and administration of affairs of companies are regulated/ controlled under the Companies Ordinance/ Act 1984/ 2017, in Pakistan.

The prevailing rampant trend of corruption in Pakistan has also severe impact in this area like others areas. Sometimes, due to the corruption related issues the process of winding up is mismanaged or mishandled by the concerned departments and officials involved in this area. In Pakistan, corruption has cost the nation more than Rs. 3 trillion per annum in selected areas including this area. In Pakistan, more or less corruption is carried out without any hindrance and sometimes anti-corruption institutions i.e. NAB and FIA are neither playing their role; nor pursuing the corrupt elements by collecting relevant evidence and carrying out investigations for proper prosecution of cases. Delayed processes and corruption is also affecting the due process of law involved in winding up proceedings.[1]

1.2 SIGNIFICANCE OF RESEARCH

The key purpose and objective of this research is to examine/ study the procedures/ processes, powers/ duties, court/ liquidator's role, major issues and challenges faced by state, companies, regulators, employees shareholders/ members, contributories and public and circumstances and state of affairs leading to winding up of the companies. Further at the end, on the basis of this research, some key suggestions and conclusions will be made in the light of study of decisions by Hon'able Courts of different Jurisdictions including articles, books and research papers which are collected/studied and analyzed during this research. In Pakistan, the process of winding up of companies is being regulated by Securities Commission of Pakistan (SECP) and completed/ adjudicated through Special Tribunals under the supervision of Hon'able High Courts Judges. Basically, the Special Courts and Tribunals are established in Pakistan for prompt completion of winding up process under Companies Ordinance 1984 and Companies Act 2017. However, practically, it is hardly possible to complete this process timely in true spirit without violation of the provisions of this Ordinance and the basic purpose of establishing these company's Courts in country. Further, this research is also aimed at studying the whole mechanism and process to increase the efficiency of corporate sector, the corporate entities and companies in Pakistan. The timely, efficient and accurate completion of winding up process by adopting due

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[1]Business Climate in Pakistan: Challenges and Remedies (*ICMA, Pakistan*) < www.icmap.com.pk/downloads/Business_Climate_in_Pakistan.pdf> assessed 05 December 2017.

process of law as per legal provisions of this Ordinance will ultimately save precious energy and resources of the country and will provide boost to economy. The research will also take into consideration the major areas with reference to the winding up/ liquidation corporate entities. Lastly, through this research some proposals in the legal framework for simplification/ improvement of administrative and regulatory procedures to expedite the revival and winding up of companies will be submitted.

As presently, I am performing my duties in National Accountability Bureau, Pakistan as Additional Director/Case Supervisor. In this context, this research would be very helpful and fruitful for me while performing my official duties and for my fellow colleagues. This research work would enable me to perform my official assignments in more comfortable and efficient/ confident manner and guide my colleagues in NAB in cases related to corporate sector, especially banking sector. The proposed research would also be providing a sound base for my career progression. This research work will be fruitful for my future research oriented assignments also relating to banking and other company cases investigated by NAB. I also intend to publish my research work for students, lawyers, teachers, employees of corporate sectors, company’s law officers and judicial officers, so that they may use it as a reference material in their professional dealings. This research would also enhance my knowledge about the process of winding up of companies in superior courts and other related forums and issues.

1.3 METHODS AND METHODOLOGY

The methodology used in this research is based on review/study of the legal and regulatory framework under which the corporate entities/ companies are being wound up in Pakistan and other Jurisdictions, especially our neighboring country India, having similar set of laws to wind up the companies. The study involves descriptive, empirical and normative methods which includes the primary and secondary sources of study. Available literature review is important to study the findings and recommendations of various research studies, books, articles and court cases already done/ written in order to formulate the statement of the problem and will forward suggestions and conclusions at the culmination of this research. During this research a comprehensive study of books/ articles written in this area will be done and Web based study of related material available on internet will also be conducted. Through this process of research, writing of dissertation will be completed under the able guidance/ supervision of research supervisor so that this research will be finalized. Through the present study, the relevant aspects would be explained in such a way that it would present itself as a ready reference for the topic.

1.4 STRUCTURE OF THE THESIS

This Thesis has been divided into five parts. In the first part of research, the topic has been introduced by discussing the meaning of winding up, distinction between winding up and dissolution, modes of winding up, issues pertaining to winding up, who can apply for winding up, petition for winding up, commencement of winding up and circumstances, causes, grounds and reasons of winding up. When winding up of a company is made, its end is judicially pronounced and steps are taken for its burial, culminating in that is known as dissolution of a company.

In the second part of research a detailed study has been made of voluntary winding up and compulsory winding up. The compulsory winding up is lengthier and more expensive than a voluntary winding up. In the third part examined the secured/ unsecured creditors, guarantors, contributories, creditors, liabilities of directors, priority of claims, division of the company's assets, the pari passu principle, the principle of unity/ plurality, preferential debts, set-off, realization of assets, just and equitable, defense against winding up petition/ proceedings, misfeasance proceedings, revival of company in winding up, wrongful trading and fraudulent trading.

In the fourth part of study, different areas researched like liquidator appointment, the liquidator role, liquidator powers, lliquidator duties, the distribution of the company assets by liquidator, liquidator remuneration, resignation, discharge and removal of liquidator, defunct companies, striking off of defunct companies, winding up of unregistered companies, winding up of foreign companies, winding up of insurance companies, dissolution of company, striking off from the register, revival of wound up company. In the fifth and last part of study, research has been concluded through suggestions and conclusions.

1.5 RESEARCH QUESTIONS AND SCOPE OF THE STUDY

The present research would be mainly revolving around the following basic research questions:

1. What are the Laws and Practice of winding up of a company in Pakistan?
2. How the element of delay as well as procedural implementation hampers the process of winding up of a company?
3. In what ways various modes of winding of a company can provide maximum benefits to the stake holders?

These are three basic questions which will be addressed in different parts of this thesis. The basic and main area of research is with regard to first question which would be addressed through study of available materials, books, articles and court decisions. The relevant material will be analysed and incorporated in this thesis. Keeping in view, the first question, the research would be carried out in first four parts of this thesis. Finally, the answers/ discussion on other two remaining questions will be carried out/ written and some suggestions will be made regarding these questions in the last part of this thesis, while keeping in view the overall analysis of this research.

This study is limited to research and examination of case laws by Courts which mainly ranges from 1990 to 2008 and a few cases are also studied which are decided by Courts before 1990. Similarly, large no of cases which are also made part of this research are decided by Indian Courts from 1960 to 2010. However, cases which are small in number from 1930 to 1960 are also considered being relevant to this research. In this study further focus is made on the relevant provisions of winding up under the Companies Ordinance, 1984. Most of the referred cases decisions are held by the Hon'able Courts of India and Pakistan under the Indian Companies Act, 1956 and the Companies Ordinance, 1984. The books which are mainly available in this regard, were written by different authors from Pakistan, Indian and foreign jurisdictions. These books mostly range from 1990 to 2008. The same have been perused and made part of this research.

1.6 STATEMENT OF PROBLEM AND LITERATURE REVIEW

From the study of the companies Ordinance, 1984 and decisions of Hon'able Courts in Pakistan, it is evident that the prevalent law regarding this subject meets almost all basic and essential needs/ requirements. The special tribunals are also established under the Companies Ordinance for the smooth and quick disposal of winding up cases and related matters. However, on the other side the process/ mechanism of winding up of companies to wind the matters of companies (being not as a going concern) is not so much beneficial/ helpful for the whole system as much expected/ required by the stakeholders. Therefore, the present available studies, books, articles and courts decisions are required to be researched , studied and analysed for the benefit of all the stakeholders in this field to make some suggestions/ conclusions through this research as well as by the readers of this research, as and when available to them after completion of this study/ degree. As per available literature and material collected, the topic on "The Law and Practice of Winding Up of Company Under the Companies Ordinance 1984" has not been covered in any single book, article, paper, study and publication. Therefore, in order to complete this research, the case laws mentioned in books, articles, papers, studies and available on internet are needed to be studied and referenced with relevant provisions of Company Ordinance to make the thesis/ research more informative for practical purpose, especially for practicing/ working people. During research were a few books written by the Pakistani authors relating to or partially relating to company law, none of these fully covered this subject. Further, studied books on company law written by foreign authors and also found some articles, papers which covered this subject to the great extent to complete this research. All the books, articles and court decisions/ judgments researched have been referred in bibliography of thesis and need not to be mentioned here in detail; however some of these will be mentioned and discussed briefly by me. Sincere efforts have been made to make this research more comprehensive to cover all the relevant areas of this study. However, there is possibility that some areas might not be discussed or completely covered due to limitations as mentioned above.

The books found which are written by Pakistani authors, Shaukat Mehmood and Nadeem Mehmood, on Company Law, 4^{th} Edition, published in 2001, Sh. Shaukat Mahmood, book on Company Law, published in 1982, Muhammad Aslam Hayat, book on Company Law Digest, 1947-1994 and Jawed Hussain, book on Judgments on

Company Law, 1947-2003, published by B M Publishers Karachi Pakistan. None of these books cover the topic entirely. These books are written or published before 2003 and cover the provisions of law and court decisions available before publication date of these books.

Further, to complete this research assignment, many books written by the Indian and other foreign authors have been studied. A few of them are much relevant and some have only covered one or more areas, relevant to this research. Here for reference have mentioned only a few of them, which were written a century ago and are also relevant to this research. First book on Company Liquidations (Procedure & Precedents) written by Gopi chand Rohra, 2005 Edition, second book by Robert R Pennington, on Company Law, 6th Edition, 1990, third book by Richard Smerdon, Palmers Company Law Manual, London, 2000, fourth book by Alfred F. Topham, on Principles of Company Law, Fourth Edition, 1914 and fifth book by Matthew Crawford, Cayman Islands Investment Funds: Winding up Petitions. I have made this research also by consulting other books as mentioned in bibliography. The study of all these books forms the basis of my research.

The researching of articles in this area was also important to further supplement the research already done from the books and case laws collected from different law jurisdictions. The most relevant articles/ papers and study with this subject are mentioned here. These are Fraud and the Appointment of Liquidators, written by James Hilsdon, Winding up Petitions Founded on a Bona Fide Disputed Debt; by Beng, Lee Eng. in 1998, Examining the consequences of non-compliance with the Companies Winding Up Rules, Cayman Islands, by Hector Robinson in April, 2010, Voluntary Liquidation, by Angela Wang, the Role of Official Liquidator in Winding Up, by Arathy Nair, 2008 and article written by Dr. Jürgen Fegbeutel, Procedures for the Voluntary Dissolution, 2011. Finally, it is concluded that the research is made to study winding up process and related matters and to cover all the important relevant matters by studying books, articles and court decisions, so that it will be available to research scholars for further study in this area in future.

PART I

CHAPTER 2

WINDING UP OF A COMPANY AND JURISDICTION OF THE COURT

2.1 DEFINING THE WINDING UP

"Winding up" is' a term which may be defined as the proceedings and process by which a company is dissolved (i.e. the life of a company is put to an end); therefore, putting an end to the legal and commercial life of the company by the winding up process. The process of winding up starts when a resolution is passed for voluntary winding up by the members of the company or after the Court passes the order for winding up.[2]

The term winding up is used for the process by which a company is dissolved. This procedure is also known as liquidation proceedings. The assets of the company in these proceedings are disposed of, debt is realized and the liability of the company towards its creditors is paid off, out of realized assets. The excess if any is dispersed among the members and contributories proportionately as per their shares. In brief, winding up is a legal process, through which an incorporated company is brought to an end.[3]

The life and survival of a company is brought to an end in consequence of winding up and, lastly dissolution of the company. The company's legal entity and personality comes to an end through dissolution. The insolvency of a company, that is, unable to pay its debts is the one of the important reasons of winding up. However, a company can also be wound up even if it is quite solvent.[4]

Liquidation or winding up is the process and course through which the properties and assets of the respective company are amassed, realized, its debts and dues are paid and

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[2]Guide on Winding up: Dissolution of Companies (*SECP Guide*) < https://www.secp.gov.pk/document/winding-up-dissolution-of-companies-guide/?wpdmdl=13879&ind=DQoNCg0KDQoNCg0KDQoNCg0KDQoNCiAgICAgICAgICAgICBXaW5kaW5nIHVwIERpc3NvbHV0aW9uIG9mIENvbXBhbmllcyBHdWlkZS5wZGY > assessed 17 December 2017.

[3]*Pakistan Industrial Leasing Corporation v Sunrise Textile Mills* (2009) C L D 1662 (Lah).

[4]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 389.

any surplus is obtained back by members. This process is to direct and escort to the company's demise.[5]

Hence, in view of above, winding up is the procedure by which the day to day activities of the association of persons is ultimately finished/ stopped and the assets and liabilities of the company is assessed and dispersed among the shareholders as per the existing agreement. On winding up, the company is necessarily to be closed to be a going entity. The owners are also legally competent to get the share of residual assets and may ask for to pay off in the event the assets are insufficient and the existent agreement so necessitates.[6]

2.2 LIQUIDATION

Liquidation is a process by which a company is wound up and dissolution is the last stage of liquidation. Liquidation can be voluntary as well as compulsory. Voluntary and compulsory liquidations are controlled by creditors and shareholders.[7]

The end consequence of the liquidation of a company is that the company ends to exist. The reason of a liquidation process is to make sure that all its affairs and dealings are done with the purpose which takes away the company from all its legal relationships. As a result of liquidation all contracts made by or on behalf of a company must be ended, reassigned or otherwise carried to an end; it must stop conducting business, it financial and economic liabilities must be paid, as far as possible, all the legal matters and actions to which it is a party must be resolved and determined.[8]

2.3 WINDING-UP AND LIQUIDATION

Winding up process is completed at the dissolution of a solvent company with no legal descendant. During the winding up of the company first of all, the claims of the creditors must be paid back/ satisfied and the remaining assets of the company should

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[5]Jennifer James, *Company Law* (4th edn, 2003-4) 265.
[6]Winding up Procedure under Companies Act, 1956 <www.caclubindia.com/articles/winding-up-of-companies-3971.asp> assessed 09 December 2017.
[7]*Winding Up* <www.investopedia.com/terms/w/windingup.asp > assessed on 11 November 2017.
[8]Mayson S W, French D & Ryan C. L, *Company Law* 14th edn Blackstone Press 1997) 659.

then be dispersed to the members of the dissolved company. However, on the other side the liquidation of a company aims at the dissolution of an insolvent company with no legal descendant. It is important that during the process of liquidation, all creditors' claims are to be paid back to the extent as possible and in the light of the order by the court as required by the relevant laws. If it is found during a winding up procedure that the assets of the company being wound up do not meet its debts and the same is not therefore, sufficient to pay back the loans of all its creditors, at that time the winding up has to be turned into liquidation. Whereas, the winding up process is properly managed by a final accounting manager and by the competent court of jurisdiction, on the other hand liquidation is administered/ controlled by a liquidator of the company and the competent ordinary court.[9]

2.4 DISSOLUTION

Dissolution as a legal term has varied meanings. It is the last stage of winding up. It is a process through which assets of the company are divided among deserving shareholders, creditors and other related persons. The liquidator calls the meeting of the members in case of voluntary winding up and of creditors if it is a compulsory winding up. The liquidator also provides accounts of the company to the registrar and the company is finally dissolved. The court in such cases has discretionary powers. It can declare dissolution of the company as null and void.[10]

2.5 ADMINISTRATION

Administration as a legal idea is a modus operandi in the insolvency laws of a number of common law jurisdictions. The procedure substitute to liquidation is frequently known as going into administration. A company in administration is run by the Administrator on behalf of the creditors as a going concern whereas choices are wanted short of liquidation. These choices embrace re-establishing the business,

[9]Kovács ZB, 'Liquidation Proceedings in Hungary' (SZECSKAY, 8 July 2008) <www.mondaq.com/article.asp?articleid=63136> assessed 10 December 2017.
[10]Strike off, Dissolution and Restoration (*Companies House*, 7 February 2018 < www.gov.uk/government/publications/company-strike-off-dissolution-and-restoration/strike-off-dissolution-and-restoration > assessed 13 December 2017.

selling and handing over the business to new owners, or demerging it into basics that can be sold and closing the rest. The administrator is a manger/ officer of the court established for winding up as well as an agent of the company. He is not personally responsible for any contracts she or he makes on behalf of the company. He has the authority to do anything important or beneficial for the business, assets of the company and management of the matters relevant to administration.[11]

2.6 DISTINCTION BETWEEN WINDING UP AND STRIKING OFF

The terms "Winding up" and "Striking off" are occasionally mistakenly used to mean the same thing. However, they are rather different in their meanings. Winding up is a course and procedure through which all properties/ assets of the company are amassed realized and utilized to pay off the liabilities to members. Striking off of the company happens after entire procedure of winding up is completed and finished. Striking off virtually ends the corporate life of the company.[12]

2.7 DISTINCTION BETWEEN WINDING UP AND BANKRUPTCY

The administration of the assets of companies being wound up has been arranged more similar to the administration of assets in bankruptcy. Winding up, either voluntary or by the Court, does not consequence a *cession bonorum*, as does a bankruptcy, but the company's assets remains attached with it as earlier. The liquidators of a limited company are not attached with the property to the staying out of the company. The property keeps attached with the company itself, and the liquidators are only administrators of it for the reasons given by the statute, and that is for equivalent division among creditors. It is important that the winding up of a company does not cause and affect a *cession bonorum*, and the properties/ assets of

[11]Administration <www.merriam-webster.com/thesaurus/administration> assessed 15 December 2011.
[12]Bilal Al Sabbah, 'Summary Winding up of Jebel Ali Free Zone Offshore Companies Avoiding Delay' (*Al Tamimi*, 2011) <www.tamimi.com/law-update-articles/summary-winding-up-of-jebel-ali-free-zone-offshore-companies-avoiding-delay/> assessed 05 December 2017.

the company attached with the company as earlier than; at the same time as in a bankruptcy, the assets of the bankrupt are vested in the Trustee or Receiver.[13]

Indisputably there are a number of very clear differences between bankruptcy and a winding up, either compulsory or voluntary. The major difference is as follows: in bankruptcy the assets of the debtor are distanced from him and vested in a trustee for his creditors, even as in a winding up the assets of the company are not separated from it.[14]

2.8 ISSUES PERTAINING TO WINDING UP

The issues pertaining to winding up are needed to be discussed so that these could be considered by the relevant departments for further improvements in system and processes of winding up. During the winding up proceedings, the liquidator steps into the shoes of company with aim of disposing of assets of company, the ultimate aim could not be attained in the presence of cumbersome procedures. Sometimes such a situation arises, when the management of the company equally divided between two opposite camps and the winding up of the company remained the only way to resolve the deadlock. The company is put into liquidation process when the substratum of company has gone, however on the other side the company can still perform economically well. Initiation of winding process on just and equitable grounds merely due to statutory non-compliance is not sometimes justified and whether this process should be initiated or otherwise on this ground is debatable.[15]

There are large no of winding up of cases which are pending in Company Tribunals/ High Courts, despite of the fact that these special Tribunals were established under the Companies Ordinance, for speedy disposal of such matters/ cases. Presently, the petitions for winding up, under companies Act, take around about two years for admittance in courts.[16] In order to make the law compatible with current situation/

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[13]Kaikhosru J. Rustomji, *Company Law* (1st edn, Empire Publication 1926) 206.
[14]Kaikhosru J. Rustomji, *Company Law* (1st edn, Empire Publication, 1926) 206.
[15]Sinead Kelly, 'Winding-up on Just and Equitable Grounds*' (A&LG,* 11 February 2014) <www.lexology.com/library/detail.aspx?g=74b2c364-e2d7-4033-ac52-645c77fa4e1f> assessed 17 December 2017.
[16]Rajeswari Sengupta and Anjali Sharma, 'Challenges in the Transition to the New Insolvency and Bankruptcy Code' (*IBC, 15 December 2016)* <https://thewire.in/86871/insolvency-and-bankruptcy-code/> assessed 17 December 2017.

dynamics, the amendments are introduced in Company Ordinance, however, the cases under previous law, how could be dealt inconsonance with new law. [17]

During the winding up proceedings, especially the winding up of foreign companies, the business interests, assets, and creditors are located/ placed in two or more than two jurisdictions. Further, some dealings/ transactions are governed by the laws of different countries. The relevant laws of each and every country have different aspects which create jurisdictional issues and delayed the process of winding up. The costs incurred during winding process and the illegal activities carried out, misappropriation of assets by the mangers, liquidators and company management create problems and devoid the process of winding up.[18]

In case of nonpayment of loans by the company, the control shifts from the shareholders to a committee of creditors which ultimately decide for winding up of the company. In India liquidation of sick company completes in more than four years which is twice in time as in case of China and only get recovery around 25% on average case through winding up process.[19] The companies which are situated in multinational jurisdictions are required to be dealt with consistent and unified set of laws. The resources are to be used more efficiently, especially when the company is being wound up with insufficient or no assets. [20]

When the company is being wound up and liquidator is appointed to complete this process, however, some times the costs of the winding up may increase and the process could result into loss instead of benefit for the company. [21] There are certain various alternatives to winding up of companies. These are reconstruction, administration, and arrangement with creditors, management buyout, mergers, acquisition and receivership. The general trend which is being followed by the

[17]Lee shih, 'Ten Common Issues Arising from Companies Act 2016' (*ML*, 11 April 2017) < https://themalaysianlawyer.com/2017/04/11/10-key-issues-the-companies-act-2016/> assessed 17 December 2017.

[18]Cross Border Insolvency and Insolvency of Financial Institutions (*IPAS*, 11 November 2009) < http://ipas.org.sg/resources.php> assessed 17 December 2017.

[19]David A Skeel, 'Is India's New Bankruptcy Law a Game Changer' (K*W*, 23 May 2016) < http://knowledge.wharton.upenn.edu/article/indias-new-bankruptcy-law-game-changer/> assessed 17 December 2017.

[20]Corporate Insolvency (cpnLaw, 2014) <www.cnplaw.com/en/cnpupdatev2/Media/Content/Articles/2014/01/Corporate_Insolvency.pdf > assessed 17 December 2017.

[21]*Leonard C Opara*, 'The Legal Regime of Bankruptcy and Winding up Proceedings as a Tool for Debt Recovery in Nigeria: An Appraisal*'* (CSCanada, 2014) < www.cscanada.net/index.php/css/article/viewFile/4151/pdf_106> assessed 17 December 2017.

creditors is to go into liquidation without exploring the alternative options as mentioned above to recover bad debts from the company which can be achieved/ received from the debtors through business recovery. [22]

This year in 2017, some amendments regarding the provisions of winding up companies are introduce in Companies Ordinance, 1984 through enactment of Companies Act, 2017. However, as per views of expert of SECP these amendments are not enough to meet out the needed requirements in Company Law in Pakistan. [23]

2.9 WHO MAY PETITION

The process for submitting the application and petition for winding up of the company has been described in common law and other jurisdictions. The law explains/ envisages that only members or creditors encompassing interests in the assets and paid-up capital of the company are allowed to file an application at the time of required different eventualities one of which being imperative and important is dealings, interactions and affairs of the company are performed through an oppressive and unfair approach and manner to the creditors or the members as the matter may be apart from a person is a creditor or member of accompany and that the dealings and affairs of the company are done and conducted in an unfair way to the creditors or members as the matter may be apart from a person is a creditor or member of a company, he cannot approach the Court. Moreover, on the date of submitting the winding up application, the members are required to be, as per the record of company as the members of the company.[24]

In order to streamline the affairs of the companies, the relevant laws have provided a role to the regulators. The courts had also delivered judgments from time to time which provide a procedure for filing of petitions. The Hon'able Sindh High Court held that permission of the Commission is not necessary for submitting application for winding up and 'a very long period of about six years after the service of show cause

[22]Streamsowers & Köhn, 'Nigeria: Restructuring & Insolvency Review' (*WWL*, 2017) < http://whoswholegal.com/news/analysis/article/34040/project-finance> assessed 09 December 2017.
[23]Yousuf Adil, 'Comparative Index of Sections under the Companies Act, 2017 and the Companies Ordinance, 1984'(*Deloitte*, 2017) <www2.deloitte.com/content/dam/Deloitte/pk/Documents/public-sector/Comparative%20Index%20of%20Companies%20Act,%202017%20vs.%20Companies%20Ordinance1984-deloittepk-noexp.pdf > assessed 11 December 2017 and an Interview with Mr. Hassan Zaidi Dy. Registrar SECP Lahore (Lahore Pakistan, 12 December 2017) .
[24]*Hassan Al-Adawi v Hama International (Pvt.) Ltd* (2009) C L D 1043 (Kar).

notice was accessible, which the company did not benefit to improve the worst dealings. Further provisions of the Modaraba Ordinance shall have consequence despite anything have contained and for the time being in force through the Companies Act, 1913, or any other law. Moreover, the Hon'able court has further laid down that the Companies Ordinance, 1984, is the successor statute of the Companies Act and, therefore, in light of section eight (8) of the General Clauses Act, 1897, Companies Ordinance, 1984, which is a rescinding and re-enacted statute, will encompass to be read in position of the Companies Act, 1913.[25]

The Hon'able court was pleased to hold that the Company was fiscally insolvent and also not a going entity and has been infringing related Rules as well as proviso of sections the companies Ordinance, 1984, and, therefore, is exposing and coercing the benefits of the members of the Company. Consequently, the process is being commenced for liquidation or winding up of the Company as per provisions of company law. Therefore, in exercise of the relevant powers under section 309 of the Companies Ordinance, 1984, the Hon'able Court allowed Joint Registrar, Company Registration Office Karachi to file an application for winding up.[26]

While deciding, Innovative Investment Bank Ltd case, the Hon'able Court in order to start the process of winding up ordered that the winding up of company is imperative to ensure the just and equitable allocation/ distribution of accessible and available properties/ assets of company among its creditors, members and depositors at the earliest as the deficit between the realizable value of assets and liabilities is increasing with every passing day. Therefore, without prejudice to anything contained in section 305 and clause (c) of section 309 of the Ordinance, 1984, necessary action is being required for winding up of company.[27]

In law, legally competent person is required to file winding up petition to avoid future complications and the petition filed by incompetent person is required to be dismissed by the court. The burden to show that the petition was filed by the authorized person is upon the petitioner. So the petitioner is required to discharge this burden. The Hon'able Court has also referred judgments in this respect. In case there is any

[25] *Unity Modaraba Management Pvt Ltd v Registrar Modaraba Companies Karachi* (2009) CLD 85 (Kar).
[26] *Re Investec Mutual Fund Ltd Securities & Exchange Commission of Pakistan* (2011) CLD 4 (Kar).
[27] *Re Innovative Investment Bank Ltd & Security Exchange Commission of Pakistan* (2010) CLD 1866 (Kar).

deficiency in start of the proceeding i.e. it has been set up unauthorized and ineptly the said deficiency is not curable. In the present case neither any resolution passed by the Board of Directors has been produced nor have articles of association been filed to scrutinize whether the power of attorneys was properly executed and conferred the powers as claimed in the application. The Hon'able court concluded that the petition has been filed by incompetent persons which is not maintainable and is likely to be dismissed.[28]

Simon Goulding in his book on Company Law has also discussed process of filing of winding up of petition and mentioned that the petition for winding up to the court or special tribunal may be filed by the company in case of issuing/ passing a special resolution for winding up. If a company is incapable of returning of its debts then it has to file petition for winding up. A contributory or contributories, are also allowed to submit petition for winding up in case of decreasing of members under the statutory lowest, in case of a stoppage to hold a statutory meeting or to submit a statutory report. Therefore, an application for a winding up order is by petition and can be filed/ preferred by the directors, the company, contributories, any creditors, or even by the clerk of a magistrates' court.[29]

The creditors have important and vital role in the commercial and business matters of the company. A creditor, in its primary sense, imports one to whom a debt is due, in a secondary connotation one to whom money is due. Whether a bondholder is allowed to file petition depends on the conditions of his security. If a direct debt from the company to the holder is formed in the bonds and there is no contract with the trustees of the covering trust deed the bondholder may file the petition.[30]

The directors can initiate process of winding up of company and also file the petition of winding up. For the purposes of s 124(1) Insolvency Act 1986 (UK) 'directors' means the board of directors and a formal board resolution in support of liquidation/ winding up is also required, in case if it has been approved / sanctioned by a majority, in this case all the directors are thus legally bound by it and the application will be in all of their resources.[31]

[28] *PICIC Commercial Bank Limited v Spectrum Fisheries Ltd Karachi* (2006) C L D 440 (Kar).
[29] Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 390.
[30] C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 713-5, 720.
[31] Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish, 1999) 390.

The process of filing of petition for winding up is explained/ discussed in detail by the Hon'able Justice C. A. Hasten and William Kaspar Fraser in their book on Company Law in the light of judicial precedents and statutes. They narrated that in England the parties which are legally allowed/ permitted to be heard on the petition for winding up, are the company, its creditors and contributories, yet other people may be heard as amid curiae, but no appeal is permitted to them. Whether a bondholder is permitted to petition depends on the terms of his security. Holders of debenture stock protected by trust deed in which the contract to pay principal and concern is between the company and the trustee, even though the contract is to give the debenture stockholders, are not creditors allowed to file a winding up petition. These are *cestuis que* trust merely. An executor of a creditor, an assignee legal or just or bona fide carrier of a debt and an assignee to whom the company has prepared an assignment for the benefit of its creditors may file petition. The persons, who are parties to a deed of assignment prepared by the company for the benefit of its creditors and whereby an extension of period for payment of the company's debts is settled to, are estopped from presenting a winding up petition until the period of extension has ended. Petitioning without rational and possible cause is a ground for action by company and a shareholder may appear to support or object.[32]

There are illegal acts against the Act in which the liquidator has to start the prosecution process. In suitable cases, the High Court may exercise authority in considering or transmitting the given proceedings to exercise absolute justice between the parties, in particular when the company has been announced to be wound up. In such cases, the winding up court may be the simply proper court which could decide the issues more properly.[33]

During the course of winding up proceedings, the liquidators can pursue for recovery of debts due from company. The Hon'able Sindh High Court, Karachi Bench held that Subsection (a) of section 306 of the Companies Ordinance, 1984, provides that a company is believed to be incapable of performing of its business and it has failed to pay its debts if a demand has been served requiring the company to pay sum owing and ultimately the company has for thirty days as per legal requirement ignored to pay the sum. The Hon'able Court further held that the Court before passing the winding

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[32]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 714, 715, 720.
[33]*Official Liquidator Khosla Fans v Ramesh Khosla* (1983) 53 CompCas 858 (PH).

up order has to convince itself and to make a view in terms of subsection (h) of section 305 of the Companies Ordinance, 1984, that it is just and equitable that the company should be wound up. The purpose of the proceedings seems to be, to get out solvency or insolvency of the company and not to resolve the claims/ issues of creditors. The purpose is not to compel the company to pay dues to unpaid to the creditor but to safe discontinuation of tasks of such company, which had finished to be commercially solvent and feasible.[34]

In Sabir Ahamad and others case, the Hon'able Lahore High Court Lahore was pleased to hold that even though the written statement and the other documents furnished by the respondent side were perused and as the respondent was also ensued ex parte and as no one has come out even today or yesterday on behalf of the respondent and whereas keeping in mind the orders of this Court, this Court permits this petition under section 305 of the Companies Ordinance 1984.[35]

The Hon'able Sindh High Court, Karachi Bench, discussed the role of registrar for filing of winding up petition and held that section 309 of the Companies Ordinance, 1984 provides that application for winding up of the company whose affairs are not dealt in a prudent manner and are unsatisfactory, as per the evidence available on record, approval has been accorded without providing an opportunity to the respondents to file a representation of being heard. While discussing the role of the state Bank of Pakistan the Court further held that there was no probe in the matters of the company but it was simply on a scrutiny by the State Bank of Pakistan, which was not allowed by the SECP to probe the company being Commissioner. In this state of affairs, the inspection cannot be taken as inspection by the commissioner; thus, the approval forwarded for submitting/ filing of the petition against the company for winding up is against the law and departed from the provisions of the Ordinance. Therefore, such petition against the respondent company for winding up is not permissible and allowable in view of non-providing the chance to the company of being heard by the SECP, so on basis of reasons mentioned above the petition was not allowed.[36]

The Hon'able Sindh High Court, was also pleased to hold that Section 306 of the Companies Ordinance, 1984, provides that a company shall be considered incapable

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[34] *Faysal Bank Ltd v Southern Networks Ltd* (2008) CLD 1336 (Kar).
[35] *Sabir Ahamad v Najma Sugar Mills* (2005) CLD 151 (Lah).
[36] *Additional Registrar of Companies SECP v Speedways Founmetall (Pakistan) Ltd* (2009) CLD 1106 (Kar).

of paying its debts if order necessitating the company to give the total so due and the respondent company has actually thirty days subsequently failed or ignored to compound or pay the sum or to secure for it to the logical and rational satisfaction of the creditor.[37]

In Pakistan Industrial Credit and Investment Corporation Limited case, the Hon'able Lahore High Court Lahore held that if the respondents are incapable of paying the huge liabilities, the Mills for four years are stopped incurring persistent losses, all the creditors collectively ask the winding of the company at this point. Hence, the Hon'able Court allowed the winding up petition.[38]

It must be kept in view that an application for winding up is not for money. The petition filed under the provisions of Companies Act would be to the effect that the company has become commercially insolvent and, consequently, must be wound up. The power of a company court to order winding up of a company is, consequently, completely different from the power of the civil court to pass a decree for a definite sum of money.[39]

2.10 PETITION FOR WINDING UP

In the following paragraphs further details is being discussed which describe the procedure and method regarding winding up petition in the light of judicial precedents and the relevant provisions of the law. The Hon'able Lahore High Court Lahore held that a creditors' winding up is a method of implementation which the Court provides a creditor against a company incapable of giving its debts "Unable to pay its debts" means incapability of paying ' debts totally as they happen to be due that is debts which the creditor may require to be paid immediately. The reality that the company has not paid the debt, has permitted itself to be sued, judgment to be received and implementation came back *nulla bona*, is not recognition of insolvency. A winding up

[37]*Islamic Republic of Pakistan v Sabah Shipyard (Pakistan) Ltd* (2009) CLD 999 (Kar).
[38]*Pakistan Industrial Credit & Investment Corporation Limited v Mansoor Textile Mills Ltd* (1989). MLD 945 (Lah).
[39]*Haryana Telecom Ltd v Sterlite Industries India Ltd* (1999) 97 CompCas 683 (SC), (1999) 5 SCC 688 (SC).

petition, which contends fraud, e.g. by promoters and directors, has to utter the details which comprise the fraud although not the proof.[40]

In Messrs Krim Silk Mills Limited case, the Hon'able Court was pleased to hold that section 305 of the Ordinance, 1984, provides that if the company fails to begin its business for a whole year from its inception and incorporation, or defers its business for a whole year and if the company is controlled/ governed by persons who are unsuccessful to keep correct and accurate accounts, or involve in malfeasance, fraud, or misfeasance with respect to affairs and dealings of the company, the Hon'able Court decided that under section 309 of the Companies Ordinance, 1984, the Additional Registrar, CRO Karachi is entitled to file a winding up petition in the Hon'able Sindh High Court for winding up of the company.[41]

The receipt and service of a winding up petition on a party allowed by the directors to acknowledge service may be considered as valid, e.g., the service of winding up petition through a solicitor of a company, will also serve the purpose although such service is not done at the proper registered office of the company. The petition itself has to contend facts sufficient to petition, justify a winding up order. It is not sufficient that a suitable case can be revealed on the proof. One petition to wind up two companies is incorrect.[42]

The petition itself must contend facts enough to petition; rationalize a winding up order. The petition should explain the conditions with sufficient detail to assist the Court to observe from the petition itself that a winding up order has to be passed. A petition may be modified with permission of the Court. So where sufficient material was revealed to make it appear prudent that it is just and equitable that the company must be wound up, the Court accordingly, permits to amend tender supplementary proof and again file the petition. The affidavit should be provided by the petitioner, but an affidavit made by the petitioner's agent or solicitor may be enough/ sufficient. A shareholder's petition on the ground of misappropriation of capital must be along with evidence therefore apart from his affidavit. The petition agitated by a majority of

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[41]*Re Krim Silk Mills Ltd* (2007) CLD 1009 (Kar).
[42]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 685-704.

creditors, and it was ordered to stand over for six months on terms, this being considered more helpful to the other creditors than dismissing it.[43]

A petition for a winding up order is taken to be a proper mode of enforcing payment of a debt owing from a company provided always that there is a realistic ground for launching a petition.[44] The Hon'able Court of Calcutta held that prima facie, it appears that the nature of the company is somewhat doubtful and strange and the Registrar deems to have been mechanically proceeding under the Companies Act, on the one hand getting sanction to file/ present under Sub-section (5) of Section 433 of the Companies Act, 1956, a winding up petition and, on the other hand, acting against the company and its directors for non-filing of the profit and loss accounts and balance sheets and profit for the following years.[45]

In Gramercy Emerging Market Fund case, the Hon'able Indian Gujrat High Court, decided that the court does not hold that the petition is likely to be thrown out in case the petitioners lack having 20 per cent shares. If the trustee of the company does not provide support to the petitioning creditors, but the petitioners have share of 20 per cent, the court would continue to listen to the petitioners, the company and the trustee on merits for giving a decision whether to admit the petitions.[46]

The Hon'able Indian Delhi High Court was pleased to hold that the Official Liquidator furnished the petition under Section 446(2) of the Companies Act, 1956, to the Court of Additional District Judge straightly. The District Judge transferred the winding up case to the Additional District Judge. All subsequent proceedings cropping up in that case can be considered directly by the Additional District Judge. It is not the requirement of law that each and every application which is made in the case given to the Additional District Judge must be furnished to or routed through the District Judge.[47]

In Smt. M. Parvathavardhana case, the Hon'able Indian Kerala High Court held that the reason of the present appeal seems to be only to divest the petitioner of his due

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[43]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 703,704, 707, 708, 710, 713-4.
[44]W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 359.
[45]*Re Standard Brands Ltd v Unknown* (1980) 50 CompCas 75 (Cal).
[46]*Gramercy Emerging Market Fund v Essar Steel Ltd* (2002) 111 CompCas 1 (Guj).
[47]*Mysore Chemicals & Fertilizers v Official Receiver* (1975) 45 CompCas 419 (Delh), ILR (1975) 394 (Delh).

share in the assets. If the offer of the appellants is just, fair and *bona fide*, there is no reason for opposing the application for winding up of the company which has been unreasonably dragged for about a period of nine years. Without mentioning upon the adversary contentions of the parties regarding each other' *bona fide*, winding up of the company is the only choice present for the benefit of parties and company in such circumstances and facts of the matter. The filing of an objection concerning non-maintainability of the company petition and the present appeal cannot be considered to be a step in the right direction for the resolution of the disputes as has been proclaimed and anticipated on behalf of the appellants.[48]

The court while deciding the petition has to observe and consider that a creditor of the company, or a shareholder or company itself is entitled to submit a petition for winding up. Where it is furnished by a person other than the company, the Court has to observe whether he is a person aggrieved or otherwise. A fully paid up shareholder is a contributory, he is allowed to file a petition for winding up. Therefore, court has to follow a legal course and not voluntarily enthused to implement the desire of person who is not really aggrieved.[49]

2.11 THE JURISDICTION OF THE COURT TO ENTERTAIN WINDING UP PETITION

The law has provided certain powers to courts to entertain winding up petition in order to safe guard the interests of all stake holders. The Hon'able Lahore High Court held that the provisions of section 7(1) of the Companies Ordinance, 1984, are utterly clear that where the registered office of the company is situated, the relevant High court has legal jurisdiction to consider any matter under the Companies Ordinance, 1984. The ratio established in the above said judgments also supports the point taken by the respondent against the power of this Court. Therefore, in fact legally the Court can bi-furcate any matter and transmit a part of it to another Court of the same jurisdiction.[50]

In Muslim Commercial Bank Ltd case, the Hon'able High Court of Islamabad held that section 305 of the Companies Ordinance, 1984, deals with in total different

[48]*Smt. Parvathavardhana v Ganesh Prasad (1999) 4 KarLJ 322 (Kar).*
[49]Sh. Shaukat Mahmood, *Company Law*, (Galaxy Press 1982) 385.
[50]*Iftikhar Hussain v Dadex Enternit Lahore* (2002) CLD 575 (Lah).

situation. If a company is solvent and is capable of paying its debts, the winding up order cannot be passed against it, even the debts of the company has not been paid to a particular creditor. The winding up order can only be approved if it is brought on record before the Court that the debts which are required to be paid by the company has not been settled/ paid so far. If a creditor whether it is a financial institution or not is to file a suit for recovery of its debts, it will invoke the jurisdiction of the Banking Court or Ordinary Civil Court as the case may be. However, if the creditor can prove before a Company Judge that the Company is not in a position to back its due debts then it may approach the Company Judge under section 305 of the Companies Ordinance, 1984, for winding up of the company.[51]

The Hon'able Lahore High Court was pleased to hold that main business was being performed by the Company within the jurisdiction of Province of Punjab, as such this Court has concurrent/ parallel jurisdiction to advance with the winding up process of the respondent-company. It was also proposed that this Court under sections 307 and 308 of the Companies Ordinance, 1984, can capably seek transfer of the winding up proceedings of the company under winding up; pertaining to its assets situated within the Province of Punjab with a view to protect the interest of the creditors. It was pursed that the respondents are actively engaged in these days to misappropriate the assets of the respondent company located within the Province of Punjab.[52]

2.12 POWER OF COURT ON PRESENTATION OF WINDING UP PETITION

The presentation of winding up petition is the legal right and discretion of the parties. The courts have inherited powers to deal with these applications. The Hon'able Lahore High Court was pleased to observe that sections 290 to 294 in the Companies Ordinance, 1984, occur in the statute under the title: Prevention of Oppression and Mismanagement and award vast and undefined powers on the Court dealing with the matters envisaged by the provisions. Such powers, unless the contrary is proved, should contain, essentially as interim but rarely as definitive measures, jurisdiction to prohibit any proceedings with apart from the permission of the court against the Company. This would, ex facie, be necessary to prevent unfair or mismanaged affairs/

[51] *Muslim Commercial Bank Ltd v Dewan Salman Fibre Ltd Islamabad* (2009) CLD 1483 (Kar).
[52] *Muzaffar Ali Awan v Pioneer Alliance Pvt Ltd* (1989) PLD 106(Lah).

dealings of the company for in any other case an ill-disposed management may conspire to suffer decrees in other jurisdictions effectively and unilaterally applying checks to the kind exercise of the Court's functions.[53]

The Hon'able Sindh High Court was pleased to notice that the contention of the respondent has also not been strengthened through any statutory compliance before the Registrar of Company, while Registrar has established the holding of the petitioners through his comments. The Hon'able Court further held that keeping in view the circumstances and the Auditor's report, there is no grounds that the company should continue, therefore, it is ordered that the company be wound up hence official Assignee is appointed/ deputed as Liquidator to wind up the company.[54]

In re Tasnim and another, the Hon'able Sindh High Court observed that the winding up of Hospital will neither be in the interest of the appellants and respondents who are providing their time and rendering services to the hospital for providing medical facilities and health care to hundreds of patients every day nor in the benefit of the general public and the other persons suffering from diseases and ailments and it would be suitable, in the interest of justice and in agreement with the spirit of section 290 of the Companies Ordinance, 1984, that the minority share-holders be asked to sell their share-holdings in favour of the appellants and respondents so that they would continue to manage and run the affairs of the Hospital for the benefit of the sick and ailing people.[55]

In Alamgir Elahi case, the Hon'able Lahore High Court was pleased to notice that the petitioner even after hearing all this was adamant that his loan remained unpaid. If what he was saying, is correct then this calls for a thorough and elaborate factual inquiry through making of evidence in the usual way which may refute what has been stated before this Court. Because obviously, the parties did enter into a settlement, when there has been a subsequent agreement in which senior members of the family participated for resolution of the dispute then it no longer remains a matter simpliciter under the provisions of section 305(e) of the Companies Ordinance, 1984. Therefore,

[53]*National Bank of Pakistan v Banking Tribunal* (1994) PLD 358 (Kar).
[54]*Muhammad Iqbal v Razak Pvt Ltd* (2009) CLD 422 (Kar).
[55]*Tasnim V Rustom Ali* (2000) CLC 364 (Kar).

so far as the application under the Companies jurisdiction is concerned, on the basis of what 'was prayed in the relief part of the petition cannot proceed any further.[56]

In Muhammad Ashraf and another case, the Hon’able Sindh High Court was pleased to observe that under the circumstances, there is no alternative but to hold that the company is unable to pay its debts. Consequently, order for winding up of the company was made and the Official Assignee was appointed as Official Liquidator.[57]

The Hon’able Supreme Court of Pakistan was pleased to hold that it is worth-mentioning that "the statutory requirement under clause (a) of subsection (1) of section 306 of the Companies Ordinance, 1984, must be in stern compliance with the provisions of that clause. Unless the statutory requirement has been made in strict observance with the provisions of subsection (1) (a) the ignorance/ neglect of the Company to pay the debts cannot be made the basis of a supposition that the company is incapable/ unable to pay its debts even if notice of demand refers to other remedies existing to creditor under the law, but contains no specific reference to provisions of section 306 Companies Ordinance, 1984.[58]

In Hala Spinning Mills Ltd. Case, the Hon’able Supreme Court of Pakistan was pleased to observe that significance of books of account of the company to be kept at registered office of the company as well as preparation of Annual Accounts and balance-sheet can be well-anticipated. As under section 305(e) of the Companies Ordinance, 1984, a company can be ordered to be wound up if it is incapable of disbursing its debts, therefore, to drive out the impression that company is not incapable of clearing its debts the statement of accounts and balance-sheet duly arranged and audited by the Auditor of the company can provide strong defense. Appropriate maintaining of accounts and preparation of statement of account as well as balance-sheet of the company duly audited by the Auditor of the Company under section 230/233 of the Companies Ordinance, 1984, can be taken material documents to exercise the discretion either to allow petition for winding up or to reject it subject to true depiction of financial condition of the company.[59]

In National Bank of Pakistan, WAPDA House Branch, Lahore case, the Hon’able Lahore High Court was pleased to notice that subsection (e) of section 305 of the

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[56]*Alamgir Elahi v Elahi Enterprise Pvt Ltd* (2005) CLD 558 (Lah).
[57]*Muhammad Ashraf v Arbor Acres Pakistan Ltd* (1988) MLD 287 (Kar).
[58]*Rauf B. Kadri v State Bank of Pakistan* (2002) PLD 1111(SC).
[59]*Hala Spinning Mills Ltd v International Finance Corporation* (2002) CLD 1487 (SC).

Companies Ordinance, 1984, provides that a company may be wound up by the Court if the company is unable/ unsuccessful to repay its debts. However, in this case the winding up of the company has not been required only having the reason that company should be wound up on just and equitable but on other grounds viz. inability of the respondent company to pay debts, misfeasance and malfeasant etc. as provided/ mentioned in section 305 of the Companies Ordinance, 1984. The nature of proceedings in a winding up petition is different as it is a class remedy which has the support of section 318 of the Companies Ordinance, 1984, which provides that winding up order given by the court shall operate in favour of all contributories, creditors of the company if provided on the joint petition of a creditors and of a contributories of the company.[60]

In Humera Abdul Aziz Essa case, the Hon'able Sindh High Court was pleased to hold that this petition has been filed on the ground that company is required to be wound up having the reason of just and equitable, if the same is unable to pay its debts. In this matter the alternate relief by way of arbitration is accessible to the petitioner and the petitioner can get the amount after its resolve through arbitration process.[61]

In Faysal Bank Ltd. case, the Hon'able Lahore High Court was pleased to render that the petition has been filed on the position that it is just and equitable to wound up the company if it is unable to pay its debts. The Hon'able Court, observed and ordered the company under winding up while keeping in view the provisions of subsection (1) of section 314 of the Ordinance, 1984, to pay the undeniable amount to the petitioner within eight weeks from that day and on stoppage of the respondent to pay the said amount within the above set period the company/ respondent is asked to be wound up. The official assignee can be selected as liquidator to conduct/ perform winding up of the company as provided under the Companies Ordinance, 1984.[62]

In Eridania (Suisse) SA case, the Hon'able Sindh High Court was pleased to render that section 305(e) of the Companies Ordinance, 1984, gives right to a creditor to ask for an order of winding up provided conditions set at in sections 306 and 314 of the Companies Ordinance, 1984, are met. The respondent in this matter was not able to show that the winding up petition had been filed as a pressure tactic. Section 314 of

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[60] *National Bank of Pakistan v Ittefaq Foundries Pvt Ltd* (1998) PLD 332 (Lah).
[61] *Humera Abdul Aziz Essa v Al Abbas Cement Industries Ltd* (2008) CLD 214 (Kar).
[62] *Faysal Bank Ltd v Southern Networks Ltd* (2008) CLD 1336 (Kar).

the Companies Ordinance, 1984, provides that even if the Court was of the opinion that the facts warranted in making a winding up order, Court could pass other order as it may deems fit.[63]

In Messrs Aeroflot Russian International Airlines case, the Hon'able Sindh High Court was pleased to observe that the power to wind up a company is constrained by limitation laid down under section 314 of the Companies Ordinance, 1984, usually such discretion is to be used in severe cases. Courts in the first occasion attempt to discover ways and means to get rid of the incorrect objection and make such orders as may be suitable and that may deem just to control the behavior of the concerned. As such accusation could be successfully addressed under section 314(3) of the Ordinance, 1984, by asking/ directing the company to hold the relevant necessary meeting and also send legal report as the case may be. The legal powers of the Court as provided in the company law on the ground/ reason that the company is not financially capable of paying back its debts is not restricted by the limitation as provided for winding up orders on the position that it is just and equitable or that there is failure to fulfill with condition of statutory report or statutory meetings.[64]

2.13 AN ALTERNATIVE TO WINDING UP

As we know that corporate sector is the back bone of the economy; the courts have discretionary powers which are to be exercised in a judicial manner while adjudicating the winding up petitions. The study of cases reveals that the courts sometimes decide otherwise instead of ordering in a straight way for winding up of the company.

The Hon'able Sindh High Court was pleased to notice that the petitioner has effectively established the existence of circumstances mitigating the issuance of a winding up order. The court further observed that the company is fully operational and has undertaken very substantial projects, which are being performed in Pakistan and also that considerable sums, by way of direct foreign investment, have been arranged by the company for financing and completing the aforesaid projects. The issuance of a winding up order is likely to discriminate the shareholders of the

[63]*Eridania (Suisse) SA v Rajby International Pvt Ltd* (2008) CLD 1343 (Kar).
[64]*Aeroflot Russian International Airlines v Gerry's International Pvt Ltd* (2003) CLD 1075 (Kar).

respondent company, as well as the petitioner, and also perhaps the creditors of the company and those having transactions with it. This is a fit case in which the Court should use its powers under section 314(4) of the Companies Ordinance, 1984, to pass an order which can result in bringing to an end the subject complained of by the petitioner devoid of immediately announcing the winding up of the company.[65]

In Mrs. Salma Noorani case, the Hon'able Sindh High Court was pleased to observe that the substratum of the Company has disappeared, as the appellant's mill is stopped and it has been incurring losses year after year with no instant prospects of reversing the position.[66]

The Hon'able Supreme Court of Pakistan was pleased to observe that a simple reading of section 316(3) of the Companies Ordinance, 1984, will demonstrate that the High Court had no choice but to transfer the case to the Company Judge for disposal. So, no exception can be taken to the alleged order. If the petitioner has any objection with regard to the authority of the Company Judge to hear the appeal as a whole, he may move up the same matter before the Learned Company Judge.[67]

In Additional Registrar of Companies, Securities and Exchange Commission of Pakistan case, the Hon'able Sindh High Court was pleased to observe that the proviso of section 318 of the .Companies Ordinance, 1984, is very clear and says that the winding up order shall operate on the petition of a contributory or creditor and in favour all the relevant stake holders of the company.[68]

In United Bank Ltd v Shahyar Textile Mills Ltd. case, the Hon'able Sindh High Court was pleased to hold that the responsibility of the sureties had finished. It was further held, by the court that filing of a claim before the liquidator did not amount to leaving the claim against the sureties and that the Bank had not, by preferring a claim before the liquidator and by its claim being accepted by the liquidator, foregone its claim against the sureties.[69]

The Hon'able Lahore High Court was pleased to observe that the clear nature of an interim order of suspension is that the same does not obliterate and set aside the order

[65]*Integrated Technologies & Systems Ltd v Interconnect Pakistan Pvt Ltd* (2001) CLC 2019 (Lah).
[66]*Salma Noorani v Mandiviwala Estates Ltd* (1991) MLD 2675 (Kar).
[67]*Industrial Development Bank of Pakistan Abbottabad v J. Hazit International Ltd Abbottabad* (1997) SCMR 421 (SC).
[68]*Additional Registrar of Companies Securities & Exchange Commission of Pakistan v Bahawalpur Textile Mills Ltd* (2007) CLD 1568 (Kar).
[69]*United Bank Ltd v Shahyar Textile Mills Ltd* (1996) CLC 106 (Kar).

of winding up. Therefore, the Ex-Management of the company may be permitted/ allowed in consequence, of this order to use only day to day working and operation of the company for the reason of facility but does not in fact allow it to entrust, contract out, liquidate, frustrate or alienate Interests, assets and rights or liabilities of a Public Limited Company. If any such action is required to be taken, the same can only be done through seeking permission of the appellate Court like for filing of a case or entering into a long time contractual arrangement or transaction.[70]

The Court may, on application for a winding up order, issue the order applied for as it deems appropriate, by postponing the hearing conditionally or unconditionally, or make any interim or other order or dismiss the petition with or without costs. The burden is on those opposing the petition to demonstrate that the creditors will obtain no benefit. Winding up order cannot be made after the first application is unsuccessful, on the position that the matter is res-judicata, does not pertain where on the second application it appears that the parties are not the same and that the matter urged in favour of the second application is different, although the reason of the application is similar to that of the former. A winding up will only be ordered when it is in the benefit of all the relevant stake holders; in the case of a divergence between the creditors and shareholders the rights of the former are considered. When the petition is opposed by the majority of the creditors whose prospects of being paid would be diminished by a winding up under the Act the order will be refused.[71]

Where a petition is not made for a bona fide rationale, but merely to provide some collateral object, e.g., to put stress on the company for repayment of money paid on account of a stock subscription, the petition will be dismissed. In England the parties entitled to be heard on the petition are the company, its contributories and creditors, yet other people may be listening to as *amicus curiae*, but no appeal is allowed to them. Where there are several competing petitions the first applicant whose material is wholly regular will in general have the carriage of the order.[72] A fire insurance company had commenced a considerable business in France within the year, and

[70]*Hala Spinning Limited v Industrial Development Bank of Pakistan* (2002) CLD 978 (Lah).
[71]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 716-719.
[72]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 719-720.

intended to commence in England as soon as sufficient capital should be subscribed. An order to wind up was refused.[73]

An assignment for benefit of creditors had been made prior to the application for winding- up order and the first meeting of creditors had been held. The meeting was attended by almost all the creditors who established the appointment of the assignee and appointed inspectors, and the petitioning creditor then filed his claim and made no objection to the proceedings. Subsequently he launched the petition and it emerged that of thirty-five creditors he alone was in favour of compulsory winding up. The Court had discretion in granting or withholding the order. He stated that the Court must look, not merely at the one creditor who applies, but at the body of creditors who have the main interest in the assets and ascertain, if it can, their attitude.[74]

The Hon'able Indian High Court held that if the Reserve Bank of India has been made only judge, whether affairs of a particular banking company were being carried out prejudicially to the interests of the depositors, normally, a court of law would not obstruct with the decision of such body and order the winding up of such company on the application of the RBI. Such a provision, therefore, in the view of the Supreme Court (majority), could not be held ultra vires or unconstitutional.[75]

The Hon'able Patna High Court of India was pleased to hold that the properties/ assets of the company would be taken over by the official liquidator, some money would be used up over the winding up proceeding and ultimately the assets/ properties would be distributed amongst the shareholders of the company under winding up. Ultimately, therefore, it will mean only a waste of some money of the company over the winding up proceeding with no benefit either to the shareholders themselves or to any third party.[76]

In Madhusudan Gordhandas case, the Hon'able Supreme Court of India was pleased to hold that it is an important that in the fact and allegation that the substratum of the company is gone is very much required to prove as a fact, to build a case for winding up. In the present application only the reason of sale of the machinery was alleged for winding up. Moreover, the reason mentioned that the company has gone into trading

[73]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 215.
[74]W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 372.
[75]*Himachal Grameen Sanchayka Ltd v Reserve Bank of India* (2003) BC 361.
[76]*Registrar of Companies v Bihar Wire & Wire Products Pvt* (1975) 45 CompCas 194 (Pat).

losses will not destroy its substratum, so if there is no future hope/ reasonable prospect that company will get better business prospect of making a profit in the future then order for winding of the company would be made.[77]

The Hon'able Supreme Court of India held that the petition for winding up on its presentation will not itself prove that there will be a winding up of the company concerned. It was observed that there will be a delay in filling of application of winding up and may be quite a long delay, between the winding up order and the presentation of the petition. If the date of the presentation of the petition is to be treated, if and when a winding up order is made, as having been the date when the company went into winding up, there will be, following the presentation of the petition, a period of uncertainty during which no-one will know whether the scheme is to be administered as a continuing scheme or as a dissolved scheme, for instance whether or not employees contributions should continue to be collected.[78]

The Hon'able Supreme Court of Pakistan held that we are not convinced to accept this plea because it has not been reasonable by him with the support of documents available on record. It is also important to note that as per changed address of the registered office of the appellants notices were required to be sent to it at the company office and, therefore, publication in Newspapers of the area where appellants run their business ordinarily. Admittedly no such notice was served upon the appellants at its address. It may be noted that decisions of the cases on merits are always positive by the Courts instead of granting or refusing relief to the litigants on technical points. In instant case injustice has been caused to appellants by not affording them proper opportunity to defend proceedings of winding up against it.[79]

One of the important pre-requisites for order of winding up of the company, the service of winding up petition on the respondent company is also necessary for winding up order. The company's head office is closed, the petition may be left in the letter box, but in such a case it is enviable that the petition should be served on a member of company or the company's solicitor or one of the directors of the

[77]*Madhusudan Gordhandas & Co v Madhu Woolen Industries Pvt Ltd* (1971) AIR 2600 (SC), (1972) 2 SCR 201 (SC).
[78]*Emo Oil Limited v Sun Alliance & London Insurance Company* (2009) IESC 2 (SC).
[79]*Mehr Textile Mills Ltd v Investment Corporation of Pakistan* (2005) C L D 1026 (SC).

company. Where a company had transferred its business and closed its office the Court ordered service of a winding up petition on any five of the directors.[80]

Service of a winding up petition on a person authorized by the directors to accept service, e.g., a solicitor selected by the company, is enough though such service is not at proper address of the company. In case where a company had no known address of business, the Court intended for service of the petition on the chairman and general manager. Service on the vice president is insufficient; so, also service on an assignee for the benefit of creditors.[81]

The Hon’able Bombay High Court observed that the petitioner and the supporting respondents have raised principles similar to dissolution of partnerships in support of his submission on the reason through which a prima facie case for winding up of the company is made out/ established. The petitioner has at the most a debatable case on this point. The contesting respondents have also a similarly or perhaps more debatable case in support of their submission that the said principles are not relevant in this case.[82]

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[80]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 692.
[81]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 692.
[82]*Darshan Anilkumar Patel v Gitaneel Hotels Pvt Ltd* (1993) 2 BomCR 440 (Bom), (1993) 95 BOMLR 462 (Bom).

CHAPTER 3

COURT PROCESS AND CIRCUMSTANCES OF WINDING UP

In this chapter discussion/ research will be focused on important area of initiation of winding process in court, steps to be taken/ required in court proceedings and circumstances which are cause/ basis of start of winding up process. These important topics to be discussed are; commencement of winding up, circumstances/ grounds for winding up, stay of winding up proceedings, appeal against winding up order, commencement of summary winding up, revoking the winding up order, application of Limitation Act, suit or proceedings by or against the company, companies liable to be wound up, alternative remedy in cases of oppression and withdrawal of petition. These topics will be discussed keeping in view, the law regarding winding of the companies and the important decisions of Hon'able Courts from different Law Jurisdictions, especially common law countries and the literature/ material researched regarding these above mentioned topics.

The petition for winding up is to be submitted in court from the concerned person i.e. a creditor, a shareholder or company to get an order from the court to start the process of winding up. Before issuance of winding up order, notices will be issued to company and relevant parties to provide them an opportunity to file their objections against winding up petition. There lies an appeal against the company's Judge Order. After issuance of winding up order, the company assets are frozen and go into the custody of official liquidator for safe custody and sale/ disposal against the settlement of claims of creditors. During the court proceedings, the following important steps/ processes are involved/ observed from the resolution of winding up till the dissolution of company.

3.1 COMMENCEMENT OF WINDING UP

The process of winding up/ liquidation of the company starts when a legitimate resolution for winding up has been approved, irrespective of whether a liquidator has been appointed by court or otherwise.[83] When a creditor has determined and made a mind to apply for an order so that the process for winding up may be started, he gives notice to the company about the application and at the termination/ completion of that time, files the petition for such order by the Court. It is important to mention here that notice regarding the place and time of the submission of the petition must be served upon the company along with the petition. If the Court made an order for winding up of the company and that order appoints an interim liquidator, and after notice to creditors, a regular liquidator is chosen to wind up the company; a petitioner may ask to suspend proceedings before the winding up order is made, but other creditors who are not themselves petitioners are not allowed to be replaced as party in case.[84]

After the winding up order is passed, the Court will not permit its administration of the assets to be affected by other proceedings, distressing the estate administered.[85] The Hon'able Kerala High Court India, held that the majority of the creditors and members are opposed to a winding up, that the petitioners are fully paid-up shareholders who have supposed that the company is insolvent, and they opposed the case for ordering a winding up.[86]

3.2 CIRCUMSTANCES/ GROUNDS FOR WINDING UP

The process of winding up has an immense significance for the company which is going under winding up. Therefore, while considering for issuance of order of winding up of a company, the courts have to prima facie consider the strong reasons, grounds and circumstances which justify their judicial orders. In the following decisions/ judgments of the Hon'able courts, the circumstances/ grounds of winding up have been discussed in detail.

The Hon'able Sindh Court held that section 305 of the Companies Ordinance, 1984, (the Ordinance) lays down the circumstances and state of affairs while considering these the company may be ordered to be wound up by the Court. Clause (e) lays down

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[83]Consequences of a Winding-up Petition: Protection of Assets (September 1997) < www.insolvencydirect.bis.gov.uk/technicalmanual/Ch37-48/chapter45/part5/part_5.htm> assessed 04 December 2017.
[84]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 702, 703.
[85]W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 414.
[86]*VSVS Krishna Iyer Sons v New Era Manufacturing Co Ltd* (1965) AIR 241 (Ker).

one of the grounds that the debts are required to be paid by the company, and it is unable to pay its debts. When the company is unable to pay its debts and there is no run away from it being ordered to be wound up. On company being ordered to be wound up in terms of section 328 of the Ordinance, 1984, a statement as to the dealings of the company verified by an affidavit will be required to be submitted by its Directors to the Official Liquidator, who, in turn under section 329 of, the Ordinance, 1984, submits his preliminary report to the Court and also brings to the notice of the Court inter alia all reasons which have resulted in the collapse of the company and further report having his opinion of any fraud that may have been committed during the formation and promotion of the company by persons who have fiduciary relationship with company being director, officer, and any person, since its incorporation.[87]

The Hon'able Islamabad High Court was pleased to hold that section 305 of the Companies Ordinance, 1984, deals with a totally different state. If a company is fully financially sound to pay its debts and is solvent, the winding up order cannot be passed against it, even if the company failed and overlooked to pay/ adjust the debts to a particular creditor. The winding up order can only be passed if it is accepted before the Court that the company is not in a position or unable/ incompetent to pay its debts. Moreover, the court further observed that if a creditor being a financial institution or not, is to file a suit for recovery of its debts; it will invoke the jurisdiction of the Ordinary Civil Court or Banking Court as the case may be. However, if the creditor can prove before a Company Judge that the company is not in a position or unable/ incompetent to pay its debts, it can invoke the jurisdiction of the Company Judge under section 305 of the Companies Ordinance, 1984, for winding up of the company.[88]

The Hon'able Sindh High Court was pleased to observe that the company has become non-functional since 1993. It is ineffective to maintain its accounts and present statutory returns and that it sold its plant and machinery way back in 1999 and has become inactive. All these facts have gone uncontested. Hence it is a good case where provisions of section 305 (c) and (f) (IV) read with section 309 of the Companies

[87]*Muhammad Nasir Ghazi v GM Printo Pack Pvt Ltd Karachi* (2009) CLD 307.
[88]*Muslim Commercial Bank Ltd v Dewan Salman Fibre Ltd Islamabad* (2009) C L D 1483 (Kar).

Ordinance, 1984, be raised for winding up of the respondent company. The Hon'able Court allowed the winding up petition.[89]

A mere ground that a company is insolvent and unable to pay debts is not sufficient ground for winding up. A company is not in a position or unable/ incompetent to pay its debts for the reason that it is carrying on a losing business. Hence, an allegation that a company is bankrupt and incapable of paying petitioners' debts is not an adequate allegation within the meaning of the Company Act. Actions started before the winding up should be continuous.[90]

In Mushtaq Ahmad case, the Hon'able Sindh Court was pleased to observe that the point which needs consideration is, whether just being a creditor is enough to seek winding up of a company. Out of different requirements of law for the reason, one of the most important requirements is that the company should be "incapable" of paying rather than being "unwilling" to pay the debt. Moreover, the process for winding up should not be an alternative for a suit to recover the debt and the reason of filing the same should not be to coerce the company to pay disputed debts which in winding up proceedings has been considered to be an abuse of the process of law. It is also necessary that it should be an undisputed debt. A request and failure to pay a debt which is not otherwise payable does not amount to an "inability" to pay the said debt. In view of the mentioned above, the court refused to allow petition of winding up.[91]

In Additional Registrar of Companies case, the Hon'able Sindh Court was pleased to mention the grounds for winding up order: -- (a) The respondent Company has made default in holding seven (7) consecutive Annual General Meetings; the company is required/ liable to be wound up under clause (b) of section 305 of the Ordinance, 1984. (b) The respondent Company has suspended its business for the last several years and is liable to be wound up under clause (c) of section 305 of the Ordinance. (c) The substratum of the respondent Company has disappeared and it seems rational to wind up the Company, in terms of clause (h) of section 305 of the Ordinance. (d) The respondent Company is being used for fraudulent purposes and is being managed and run by a person who has committed fraud with general public and it is deemed rational to wind up the Company within the meaning of subsection

[89]*Additional Registrar of Companies v Karim Silk Mills Ltd Karachi* (2011) CLD 1095 (Kar).
[90]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 850, 852.
[91]*Mushtaq Ahmad v Sana Textile Pvt Ltd* (2001) YLR 1054 (Kar).

(f)(i)(iv) and (v) of section 305 of the Companies Ordinance, 1984.[92]

The Hon'able Indian Calcutta High Court disposed of the petition by holding that since it is a routine matter and supports the comfort of all in getting to learn from the complaint ex facie that who are the liquidators, entrusted with the bearing of the matter during the winding up proceedings of the company.[93]

The Hon'able High Court, in India held that there is not an iota of evidence on the record brought by the creditor to show the inability of the company to pay its debt. The winding up cannot be ordered only on the creditors' claim but it is only the legal responsibility of the company to pay its liabilities.[94] No doubt any public concern in the prosecution of serious offences would have serious affects. The prosecution of the company might attain little more than harmful interference of an orderly winding up.[95]

A company may be required to go under process of winding up where the company is not solvent nor is there any rationale of its doing business in the near future at a profit, because the reasons of an order to wind up a company on the reason of its insolvency, inability to pay its debts and the failure of a company to fulfill with the statutory notice of demand for the payment of debt raises a supposition of its insolvency, because such denial generally comes with a state of insolvency.[96]

In order to get a winding up order the petitioner is required to approach the court with sound reasons. So if the court considers that this would be a proper case for the application of the inherent power of the court, the plaintiffs can otherwise build their claim.[97]

3.3 STAY OF WINDING UP PROCEEDINGS

The courts can order the stay of winding up proceedings, if some facts are brought before the courts which may be against the interests of the shareholders, creditors and the public at large. So where a large number of the creditors preferred that the

[92]*Additional Registrar of Companies v Noorie Textile Mills Ltd Karachi* (2010) C L D 143 (Kar).
[93]*Eastern Coal Co Ltd v Sunil Kumar Roy* (1968) AIR 355 (Cal), (1969) 39 CompCas 126 (Cal), 72 CWN 424 (Cal).
[94]*Trilok Chand Jain v Swastika Strips Pvt Ltd* (1992) 75 CompCas 275 (PH), (1992) 102 PLR 47 (PH).
[95]*Ahmad Hamad Algosaibi & Brothers Company v Saad Investments Company Ltd* (2010) 1 CILR 553.
[96] Sh. Shaukat Mahmood, *Company Law*, (Galaxy Press 1982) 396-408.
[97]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 529.

winding up should continue under some form of voluntary winding up already entered upon as being more expeditious and inexpensive a stay was granted. So a stay may be ordered pending the maintaining of an entire list of contributories.[98] The courts can adjourn proceedings if any good reasons are shown to the Court that there is a likelihood of a payment of all the company's debts being made, provided the winding up order is not passed, the Court will not decline to adjourn the petition to permit the preparations to be made.[99]

The Hon'able Calcutta High Court, India held that the debt asserted is disputed bona fide by the company; the winding up proceeding cannot be permitted to proceed. This application succeeds and the court may issue an order in terms staying eternally the process of winding up. The respondent will be at right to take such steps and he may be advised for establishing the claim against the company on the basis of the record and evidence available.[100]

In Nilkanta Kolay case, the Hon'able Calcutta High Court observed that if a buyer purchases a property of the company before the commencement of winding up process, it would be unfair to dispossess the purchaser of that property. However, this is not the ground on which the winding up process should be stayed by the court.[101]

The Hon'able Lahore Court held that the outcome of winding up proceeding and final order in this regard are that all the assets/ properties of the company will be held under the control of the Court and the administration of the company lies with liquidator instead of Directors and the Chief Executive of the company. It is very important that the transfer and disposal of assets/ properties of the company by other persons apart from the liquidator, is unauthorized/ unlawful and such transaction is considered void.[102]

The Hon'able MR. Justice C. A. Hasten and William Kaspar Fraser in their book on Company law have discussed in detail after giving of winding up order by the court, the issues of limitation, role of liquidator, transfer of shares and sale of property. The Statute of Limitations does not run against a creditor after the order has been

[98]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 729-730).
[99]W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 374.
[100]*Ofu Lynx Ltd v Simon Carves India Ltd* (1970) AIR 418 (Cal), (1971) 41 CompCas 174 (Cal).
[101]*Nilkanta Kolay v Official Liquidator* (1996) AIR 171 (Cal).
[102]*Pakistan Industrial Leasing Corporation v Sunrise Textile Mills* (2009) CLD 1662 (Lah).

announced. The order nullifies as between the company and its creditors all contracts for interest unless there should turn out to be a surplus of assets. Contracts are not necessarily terminated by the mere fact of winding up.

The winding up order will not prevent a contingent liability on the part of the company from ripening into a debt; therefore the holder of a fire policy issued by a company may prove in the winding up for the full amount of loss covered by the policy, however, after the date of the winding up order, actually the fire occurred. The property of the company cannot be sold for taxes at any cost as per law after a winding up order by the court. A payment after a winding-up order has been made in order to avoid an execution is illegal.[103] Alfred V. Totiiam, has observed that after winding up, a director, who was also one of the four liquidators, accepted a bill of exchange, the Court made an order that the company was not bound to pay.[104]

W. R. Percival Parker and George M. Clark, in their book titled ‘the Law and Practice Connected with the Organization, Management and Winding up of Companies’ have observed that after the winding up is made the officer to whom the winding up has been referred requires the provisional liquidator to bring in an affidavit showing the estimated value of the assets of the company, and upon this being done he directs a bond, to be filed by the provisional liquidator. This bond is commonly drawn so as to be sufficient for the permanent liquidator in case the provisional liquidator is subsequently appointed permanent liquidator.[105]

The Hon’able Indian High Court observed that according to their plain meaning, the words occurring in Section 171 of the Indian Companies Act, 1913, in consequence of winding up order passed by the company judge or a provisional liquidator has been appointed by the court, no suit or other legal proceedings shall be carried on or initiated against the company, except with leave of the Court.[106]

The Hon’able Bombay High Court observed that the declining to wind up the company and postponing the petition after hearing it on merits to a future date is an order which is appealable under Section 202 of the Companies Act, 1956. However,

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[103]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 731, 732, 734, 739, 744, 747.
[104]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 230.
[105]W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 380.
[106]*Lahore Enameling & Stamping v A.K Bhalla* (1958) AIR P H 341.

this order in no way restricts the jurisdiction and powers of the Court to pass a winding up order and appoint a liquidator. What would be the relations between the liquidator and the Court Receiver is another matter altogether with which the Company Judge is not concerned.[107]

The Hon'able Calcutta High Court held that the grounds (just and equitable) provided in petition for winding up cannot be regarded as cogent reasons for winding up, in given and present circumstances of the matter. Moreover, such state of affairs cannot be agitated as rational and reasonable reasons/ grounds by the petitioner, however, if such state of affairs continues in future the winding up petition may be again filed.[108]

The Hon'able Calcutta High Court held that admittedly the alleged debt given in the petition for winding up does no longer exist. It is not likely to say what the total debt now is fairly due by the company to the respondent. In a case where the debt is disputed, the Court has first to see whether that issue is on the face of it genuine or merely a cloak of the company's real incapability to pay its fair debts. The choice should not be had to winding up process for the purpose of recovering a disputed debt or for stifling proceedings which seek to challenge such debts. On the facts of this case it is unfeasible to say that the defense of the company is a cloak or plan to put off payment of its fair debts.[109]

The Hon'able Gujrat High Court was pleased to hold that keeping in view the facts/ circumstances/ state of affairs of the case and the submissions joined with the pertinent proposition of law, the order of admission for winding up petition and the resultant directions are not warranted and justified.[110]

The Hon'able High Court, India held that a bona fide objection to the winding up including the prayer for the stay of the winding up proceedings in view of the arbitration clause can be applied and it will be scrutinized by the company court whether it is bona fide and likely to succeed on point of law, yet no utter right vests in a party to the arbitration agreement to use the arbitration clause by itself as a shield to winding up. It is for the party to raise the arbitration clause for stay of the proceedings, to convince the court that there is an arbitration clause and the dispute

[107]*Bachharaj Factories Ltd v Hirjee Mills Ltd* (1955) AIR 355 (Bom).
[108]*Jagannath Gupta and Co Private v Mulchand Gupta* (1969) AIR 363 (Cal), 72 CWN 872 (Cal).
[109]*Mohammed Amin Bros Ltd v Dominion of India* (1952) AIR 323 (Cal), 54 CWN 514 (Cal).
[110]*Tata Iron & Steel Co v Micro Forge India Ltd* (2001) 104 CompCas 533 (Guj), (2000) 2 GLR 1594 (Guj).

between the parties is also a bona fide to the accord and also there is a prima facie bona fide defense available to the applicant which necessitates resolve by the arbitrator before issuance of winding up order of the company on the reasons/ grounds provided by Section 433 of the Companies Act, 1956. It is the court's prudence to pass a suitable order as requested in by petitioner keeping in view grounds provided as per the facts and circumstances of each case.[111]

The Hon'able Calcutta High Court found that it is true that from the claim made in the winding up petition, the petitioning creditor was entitled to interest per annum. The learned judge however did not provide benefit in the absence of any evidence to that extent. The only document that was submitted in support of such claim of interest was a statement attached to the winding up petition, which was unsigned, and without any authentication. Hence, the evidence was not sufficient to establish the claim.[112]

The Hon'able High Court noticed that there is thus no decision either of the Indian or of English courts having the fact that a creditor submits a suit for the receipt of the debt could prohibit him from proceeding with his application for winding up the company. There is nothing either to confirm that the court in such circumstances has no authority to continue with the winding up proceeding or that it would even be right to stay the winding up proceedings itself or dismiss the petition for that cause alone.[113]

In Paramjit Lal Badhwar case, the Hon'able court was pleased to observe that although it would have been enough to dismiss the petition, but since there were other persons who came to support the petitioner, so in the circumstances it is fit to examine the entire petition on its merits and come to the decision that the company is not commercially bankrupt. It is not necessary to be wound up because suspension of its part business and also that the company has not gone its substratum. In the circumstances, the petitioner is not permitted to any relief and in any way and the company cannot be ordered to be wound up on the mere ground of just and equitable as advanced by the petitioner. It is not necessary to issue any order on the application/

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[111] *Goetze India Ltd v Pure Drinks New Delhi Ltd* (1994) 80 CompCas 340 (PH), (1993) 104 PLR 745 (PH).
[112] *Shree Balaji Steels v Gontermann Peipers India Ltd* (2003) 114 CompCas 193 (Cal), (2003) 47 SCL 821 (Cal).
[113] *Re Chapel House Colliery Company* (1883) 24 Ch D 259 (CA).

petition under Section 557 of the Companies Act, 1956, obtaining a direction for holding the meeting of the contributories for ascertaining their desires.[114]

3.4 APPEAL AGAINST WINDING UP ORDER

The order or judgment of the company's court may be appealed in High Court Division Bench. In this regard, W. R. Percival Parker and George M. Clark, in their book titled 'the Law and Practice Connected with the Organization, Management and Winding up of Companies' have also observed that if a winding up order has not been appealed against, a contributory or other person not an outsider to the winding up proceedings, cannot call into question its legality during the process in the winding up. When a winding up order has been made and become effective the proper way to this is by appeal, not by application directed to the judge who made the order to repeal it. A judge has no power to rescind his winding up order, at all actions where he has no additional material before him, and it is not obvious that he was earlier misled or that any fact was concealed. An appeal may be taken from an order declining to issue a winding up order by the court or from issuance of an order by a judge repealing his order for dissolution. An order granting leave to serve a misfeasance summons *ex juris* is not a matter affecting future rights, but is a mere matter of process.[115]

W. R. Percival Parker and George M. Clark, in their book titled mentioned above, have also observed that when an order has been issued giving leave to appeal such an order cannot be appealed from, as it is not an order from which an appeal will lie. This is on the principle that wherever authority is given to a legal authority to allow or refuse leave to appeal the verdict of that authority is, from the very nature of the thing, final and definite without appeal unless an appeal from it is specifically provided. The jurisdiction is dependent on the amount concerned in the judgment appealed from and not on the amount claimed in the proceedings on which the judgment was delivered.[116]

The Hon'able Calcutta High Court held that the company has no aim to proceed with the application for setting aside the said award, but the company at the same time aims that the point raised herein be determined first so that the court might hold that

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[114]*Paramjit Lal Badhwar v Prem Spinning and Weaving Mills* (1986) 60 CompCas 420 (All).
[115]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 686.
[116]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 854, 856.

the company cannot be believed to be incapable of paying its debts in relation with the said award until judgment and a decree would be ordered thereon in accordance therewith.[117] The Hon'able High Court held that the matter is untoward because it may be possible that there was out of court settlement which might efficiently get the money back by the petitioner.[118]

3.5 COMMENCEMENT OF SUMMARY WINDING UP

The Hon'able Courts while keeping in view, the procedure given in the company's ordinance, 1984, have laid down the land mark decisions which are very much relevant to this area of company law. The Hon'able Sindh Court held that in the present case that all the requests submitted by the petitioners pertain to performance of their rights as shareholders of the Company which is not owned and controlled by the Government. No infringement of any fundamental rights of the petitioners has been pointed out. Therefore, this constitutional petition is dismissed as not maintainable.[119]

In Rauf Baksh Kadri case, the Hon'able Sindh Court was pleased to observe that the recovery of debts and payable dues from the defaulted and insolvent companies through the prevailing difficult and complex civil suit proceedings which lasts for decades and the parties have to face the rigors of the system. The Hon'able Court further held that speedy disposal of cases cannot be considered a valid process as on the other hand to deny ample opportunity to the respondent to present his version in a fair manner. So, the courts would keep in mind the intention of the legislature, under section 9 of the companies Ordinance, 1984 while following the summary procedure.[120]

3.6 REVOKING THE WINDING UP ORDER

The courts have to revoke the winding up order in order to safeguard the interest of the creditors, contributors and company. In this regard, the Hon'able Sindh High

[117] *Dalhousie Jute Co Ltd v Mulchand Lakshmi Chand* (1983) 53 CompCas 607 (Cal).
[118] *Cornhill Insurance Plc v Improvement Services Ltd* (1986) 1 WLR 114, (1986) 2 BCC 98942.
[119] *Muhammad Masood Butt v S. M. Corporation Pvt Ltd* (2011) P L D 177 (Kar).
[120] *Rauf Baksh Kadri v National Technology Development Corporation Ltd* (2005) CLD 747 (Kar).

Court has held that the powers given under section 319 of the Companies Ordinance are independent. The only situation is that the application has to be submitted within three years of the order. The Court has powers to review its earlier winding up order, however the court may attach some conditions in order to safe guard/ protect the interest of the creditor/ contributors. The Hon' able Court further held that at this stage, if the winding up order is maintained, the share-holders' will receive an adequate amount on account of their money. However, if the company is permitted to function under the management and control of SECP and Official Liquidator this will be helpful to the shareholders and there is a chance that by restoration of the company the price of the shares will be improved and the shareholders will be benefited. Section 320 of the Companies Ordinance, 1984, provides that the Court shall have to protect the interests and benefits of contributors or creditors as to all matters relating to winding up, and for that reason a special General Meeting can be called to determine the desires of creditors and contributors.[121]

The Hon'able Kerala High Court held that it must not be unnoticed that in High Court the winding up is required to be carried out through the special company Judge and under the relevant provisions of law. The judicial course is barred only in respect of the important decision of the court that whether a winding up order should be passed or not.[122]

3.7 APPLICATION OF LIMITATION ACT

At the time of winding up proceedings, the application of Limitation Act has also its own significance and importance as if any petition or objection is not filed on proper time then there may be severe legal complications for this omission or commission. In this regard the Honorable Madras High Court was pleased to hold that article 137 of the Limitation Act is not the article relevant in all cases, but the appropriate article will have to be sorted out with position to the nature of the claim furnished by the liquidator, the proviso of law under which it is maintained and not with position to the nature of process which he has opted. If the claim could have made the subject matter

[121] *Additional Registrar of Companies Securities & Exchange Commission of Pakistan v Schon Textile Ltd* (2008) CLD 475 (Kar).
[122] *Joseph Kuruvilla Vellukunnel v Reserve Bank of India* (1962) AIR 1371 (SC), (1962) SCR (3) 632 (SC).

of a normal application in a regular court or if the application is submitted under any explicit proviso of the Companies Act, then the related article in the Limitation Act will have to be followed, and if no other definite article is relevant, the residuary article 137 would have to be applied.[123]

The Hon'able Andhra Pradesh High Court held that the time of limitation set under Article 137 of the Limitation Act is applicable not only to petitions considered under the Code of Civil Procedure (CPC) but to any other petition under any other law/ statute so long as they are submitted to a Court, The Hon'able Court finally held that there is no scope for the uncertainty that the provisions of the Limitation Act is applicable even to the procedures carried out by the Official Liquidator under Section 446 of the Companies Act, 1956.[124]

In Pennar Paterson Ltd. Case, the Hon'able Andhra Pardesh High Court observed that it is evident that all the time that is from the date of filing of winding up petition till the making of winding up order by the court therein, and in adding up thereto a time of one year after the date regarding the issuance of winding up order must have to be barred from the time of limitation as mentioned under the sections of the Indian Limitation Act.[125]

The Hon'able Delhi High Court has laid down the judgment which covers the important points about limitation of submission of claims under Section 446(2) (b) of the company Act, 1956 and it emerges clearly on the simple language of this provision that the exclusion is permitted in relation to suit or petitions that may be addressed on behalf of a company or in the name of company.[126]

The Hon'able Delhi High Court has laid down that the right to benefit of the relief by submitting a claim application, as opposite the suit, granted by Clause (b) of Section 446(2) of the Companies Act, 1956, can be achieved by simply in a court which is winding up the company and, so, it goes without saying that the right to gain the relief given by the above mentioned Clause (b) will come up merely after the making/ issuing of the winding up order. Therefore, as the winding up order is not made, no

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[123] *Official Liquidator Radel v Southern Screws P Ltd* (1987) (Mad) <http://indiankanoon.org/doc/> 11 June 2011.
[124] *Official Liquidator v Andhra Pradesh State Financial* (2001) (3) ALD 19 (AP), (2001) (3) ALT 334 (AP).
[125] *Pennar Paterson Ltd v LP Ploymers Ltd* (2003) 4 ALD 595 (AP), (2005) 128 CompCas 852 (AP).
[126] *Official Liquidator Security v Pushpawati Puri* (1978) 48 CompCas 385 (Delh), (1977) RLR 391 (Delh).

claim can be filed under Clause (b) of Section 446(2) of the Companies Act, 1956. As the right to avail of the relief given by Clause (b) of Section 446(2) of the Companies Act, 1956, can be taken into consideration only after the making/ issuing of the winding up order, the suitable date to be seen for reasons of calculating whether the claim was enforceable at law or not is the date of issuance of the winding up order by the court. Definitely, the claimant will be permitted to the complete advantage of Section 458 A of the Companies Act, 1956.[127]

The Hon'able Delhi High Court held that the lease hold concern in the property in question is not required for ably moving on winding up proceedings. Certainly, as long as the leasehold concern is not disowned, the burden of the company in winding up to disburse rents is of persistent nature. Thus, the only line open to the Court is to ask the Liquidator to disown the said leasehold concern in favour of the landlord and save the company (in winding up) from persistent financial liability to pay the rent.[128]

The Hon'able Calcutta High Court held a decision in favour of the applicant by allowing it to become a party in the proceeding being carried out against the company. So with permission of court the applicant not being a part to the proceeding could file an appeal against the order on the basis of the common principle of law that an appeal may be filed by a person or party with the permission of the court if earlier he was not part of the winding up process in court. If the order prejudicially influences his benefit, the given standard cannot in any manner be applicable in the present case, as the petitioner/ appellant has not requested for leave to submit an appeal and actually the appeal has previously been submitted by the company which is yet awaiting and the applicant is merely requesting to accept an application in an appeal in which the petitioner is not a party.[129]

3.8 SUIT OR PROCEEDINGS BY OR AGAINST THE COMPANY

During the winding up proceedings, civil suits and proceedings are instituted against the company. In this regard, the liquidator is mainly responsible for the suit or civil proceedings. The Companies Ordinance, 1984 provides the procedure in respect of

[127] *New Kerala Roadways Pvt Ltd v KK Nanu* (1989) 66 CompCas 715 (Ker).
[128] *Asoka Ghose v Official Liquidator* (2003) 3 CALLT 608 HC (Cal), (2004) 121 CompCas 229 (Cal).
[129] *Sonajuli Tea & Industries Ltd v Ashkaran Chatter Singh* (1982) 52 CompCas 568 (Cal).

instituting civil suits or other proceedings against the company. The intention of the law maker is to regulate the other proceedings or cases in other Courts so that none of the stakeholder may be deprived; their rights and interest are not badly affected. In this regard The Hon'able Sind High Court thrashed out/ pursued the relevant provisions of law and held that from the bare examination of sub section (1) of section 316, the Companies Ordinance, 1984, it is obviously clear that only pendency of the winding up application ipso facto does not place as a bar to suit or process by or against the Company. Bar, is only placed on definite winding up order for appointing the Manager/ liquidator of the company. Purpose of section 316 of the Ordinance, 1984, is to control the awaiting suit or proceeding pending in any other Courts so that none of the creditor may be discriminated, their rights and concerns are not unfavorably affected while allocating the assets of Company, between them, in accordance with their right and priority, if any. The Hon'able Court further held that the bar under section 316 of the Companies Ordinance, 1984, will not be placed in cases where a judgment and decree was ordered against a company earlier to its winding up order and where company in the financial problems is much concerned in defending its position to evade the judgment and decree against it. Such bar is only placed where any suit or process is to follow, started against the Company in terms/ conditions of section 316(1) of the Companies Ordinance, 1984.[130]

The Hon' able Lahore Court was pleased to hold that the matters related to the affairs of the company must be adjudicated before relevant courts of law and a civil matter against a company under winding up must essentially be proceeded by the Company Court of the High Court. The petitions for receiving of money submitted against a company under winding up must be proved before the Court of having authority; the decrees on such petitions are to be submitted to the liquidator of the company under winding up.[131]

The Hon'able Sindh Court held that the official liquidator must be provided an opportunity to defend the company and other stakeholders' interests while representing the company in civil suit or other proceedings initiated against the company. The rationale of proviso of prior leave under section 316 of the Companies Ordinance, 1984, is intended for the advantage of party who desires to originate the

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[130]*Agha Bashir Ahmad v Nippon Bobins Pvt Ltd* (1997) CLC1205 (Lah).
[131]*Muhammad Iqbal V N K Rice Mills Pvt Ltd* (2009) CLD 609 (Lah).

suit or other legal process. So, the company under winding up may be represented by the liquidator to reply and defend the claim against the company.[132]

The Hon'able Sindh Court held that the proceedings against guarantors/ mortgagers /beneficiaries, promoters and directors apart from the company; may be carried out without seeking permission of the court. Section 316(1) of Companies Ordinance, 1984, provides that after the passing/ making of the winding up order by the court or the appointment of provisional Manager/ liquidator by the court no suit or legal proceedings shall proceed with or commence against the company. Thus, upon the occurrence of abovementioned two eventualities, the process cannot originate or continue only against the company, while the proceedings against the other persons/ party in the suit as defendants in the form of guarantors/ mortgagers/beneficiaries, apart from the company, can be continued with, or even without the leave of the Court.[133]

The Hon'able Supreme Court of Pakistan was pleased to observe that the decision of the Learned Company Judge is not under the provisions of the company ordinance. The reason that different suits must have been submitted for realization of bank guarantee and the Learned Company Judge had no authority to ask for the realization of the same in winding up proceedings, which is devoid of any force. Section 316 of the Companies Ordinance, 1984, has provided the Company Judge superseding authority for deciding of some issue relevant to the winding up process.[134]

The Hon'able Sindh High Court held that the permission of the Company Judge is an essential requirement for instituting civil proceedings against the company. Hence the judgment submitted by the petitioner is an ex parte judgment devoid of merit in view of the virtues of the matter and the same was made in contravention of Pakistani Laws.[135]

The Hon'able Supreme Court of Pakistan held that a simple reading of section 316(3) of the Companies Ordinance, 1984 will demonstrate that the High Court had no other option but to refer the case to the Company Judge for decision. Hence, no exception can be taken to the alleged order. If the applicant has some doubt with regard to the

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[132] *Habib Bank Ltd v Schon Textile Ltd* (2010) CLD 1819 (Kar).
[133] *Tanis Akhtar v Agricultural Development Bank of Pakistan* (2005) CLD 503 (Lah).
[134] *United Bank Ltd v Pakistan Industrial Credit& Investment Corporation Ltd* (2002) PLD 1100 (SC).
[135] *Habib Bank Ltd v Muhammad Naveed Soomar* (2009) CLD 354 (Kar).

authority of the Company Judge to dispose of an appeal, he may file the issue in the court of the learned Company Judge.[136]

The Hon'able Lahore Court held that even the Hon' able High Court has no authority to exercise the powers inherited by the Company Judge, hence in the instant matter both the lower Courts have misunderstood the legal provisions of section 316 of the Companies Ordinance, 1984 and continued with the proceedings of the case and conceded the question of law and thus acted away from their authority, which is the subject to be cured in revision power of this Court. Therefore, the Hon'able Court by allowing the application of the petitioner, ordered to lodge the claims with the liquidators in accordance with law.[137]

The Hon'able Sindh High Court has noticed that the section 316 of the Companies Ordinance, 1984, has been concluded and held that selection of Administrator by the Lahore High Court is alike to selection of a Manager under section 316 of the Companies Ordinance, 1984. As such, the Hon'able High Court found that there is nothing incorrect with the order made by the Rent Controller; the same has been disputed through this appeal.[138]

In Messrs Ali Woolen Mills Ltd. Case, the Hon'able Supreme Court of Pakistan held that even a shareholder possessing 20 per cent of shareholding is not permitted to get relief under section 179 of the Companies Ordinance, 1984. The petition of the petitioner in connection with Section 314 of the Companies Ordinance, 1984, read with Order 39, rules 1 and 2, CPC is misunderstood and not maintainable.[139]

The Hon, able Sindh High Court observed that the permission of the Company Judge is required for initiation of legal process against the company. Therefore, a winding up order has been issued in relation to a Company or a liquidator has been nominated/ appointed in relation to such Company, It is very important that the transfer and disposal of assets/ properties of the company by other persons apart from the liquidator, is unauthorized/ unlawful and such transaction is considered void. Any

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[136]*Industrial Development Bank of Pakistan Abbottabad v J Hazit International Ltd Abbottabad* (1997) SCMR 421 (SC).
[137]*Mackinnons Mackenzai Pvt Ltd v Easatern Federal Union Insurance Company Ltd* (2002) CLD 779 (Lah).
[138]*Karimji Ebrahimji & Sons v Taj Company Ltd* (1997) CLC 734 (Kar).
[139]*Ali Woolen Mills Ltd v Industrial Development Bank of Pakistan* (1990) PLD 763 (SC).

legal proceedings/ process or no suit can be initiated or started against it, apart from with leave of the Court and subject to such terms and conditions as may be forced.[140]

In National Bank of Pakistan case, the Hon'able Sindh High Court observed that notwithstanding that the company is impleaded as Judgment--Debtor and requisite permission as contemplated by section 316(1) of the Companies Ordinance, 1984, has not been obtained, the execution application is maintainable against other Judgment-Debtors as the decree makes them responsible jointly and severally. There is no merit in this application which is accordingly dismissed.[141]

In Mian Munir Ahmed case, the Hon'able Sindh High Court observed that in certain matters, the permission of the Company Judge is not necessarily required when the company is under the proceedings of winding up. Thus, if an appeal is pending before a Division Bench of a High Court or one in the Supreme Court is shifted to a Single Bench of a High Court or even a lower court, under section 316(3) of the Companies Ordinance, 1984, obviously odd consequences should be observed. The irrationality of the state of affairs would deserve an understanding diverse than that protracted by the other party. A similar view, we may recollect, has already been considered related the process, faced by section 141 of the Code of Civil Procedure where also the word suits is utilized in the *juxta-position* with all process in any Court of civil authority. The dicta on section 141, CPC is to the consequence that the process submitted to in that section are restricted to process in the kind of a suit and process of all and sundry characters are not considered. There is no reasonable cause to move away from the law given above.[142]

3.9 COMPANIES LIABLE TO BE WOUND UP

The companies that can be wound up have been discussed in company's law. In this regard details are given by H.A.R.J. Wilson and T.W. South Ranking & Spicer's in their book on Company Law. The following forms of companies which are required to be wound up as per requirement of the relevant company law: (1). All companies on the register. (2). Unregistered companies: (a) any trustee savings bank certified under the Trustee Savings Bank Act, 1863; (b) any partnership, association or

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[140] *State Life Insurance Corporation of Pakistan v Ibrahim Management Ltd* (1990) CLC 206 (Kar).
[141] *National Bank of Pakistan v Allied Paper Industries Ltd* (1997) CLC 737 (Kar).
[142] *Mian Munir Ahmed v United Bank Ltd* (1998) PLD 278 (Kar).

company except: (i) railway companies incorporated by Act of Parliament (now obsolete); (ii) companies registered under any of the Companies Acts: (iii) association or partnerships, companies with less than eight members, not being foreign associations: (iv) limited partnerships which are registered in Northern Ireland or England 398 of the Companies Act). The mentioned classes also cover chartered and statutory, foreign and colonial companies, building and friendly, societies, British partnerships and associations of eight or more members, and any foreign partnerships or association irrespective of the number of members.[143]

Where there is coercion of a minority of the members, any member who forms part of the subjugated minority is legally allowed to apply to the Court for an order under S 210 of the Companies Act, 1985, as a substitute to requesting for winding up order. It emerges to be vivid to the Court, on an application/ petition under Section 210 of the Companies Act, 1985, to issue a winding up order if it thinks fit, as a case for winding up must be brought out.[144]

3.10 WITHDRAWAL OF PETITION

After filing of application for winding up of company, the same may be withdrawn with the approval of court. In this regard an applicant can submit an application/ petition to the court for permission to take away his application so long as he does so at least five days earlier to the consideration and assures the court that the same has not been publicized, that no summons/ notices have been acknowledged by him with situation to the application, and that the company approval to an order being approved.[145]

The above mentioned discussed topics are important during winding up proceedings. The commencement of winding up is started by resolution passed by creditors/ members of company and petition by creditors/ members or SECP officials. The courts have to go through the circumstances/ grounds for winding up given by the applicant and then keeping in view, the interests of all stakeholders winding up order is made out by court. The court will not stay winding up proceedings until and unless cogent reasons are given by the applicant party. The appeal against winding up order

[143]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 356.
[144]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 359.
[145]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 527.

is to be filed before High Court Division Bench. The courts held that after commencement of summary winding up proceedings, ample opportunity must be given to defendant to protect its rights. The prompt disposal of cases does not mean that these might cause injustice to other party. The revoking the winding up order must be in the interest of all stakeholders and company, so that company could restart its working and business. The application of Limitation Act is also applicable in winding up as after certain time as described in law, rights cannot be invoked and Limitation Act barred such proceedings. The courts and law do not wait for unlimited time. The suit or proceedings by or against the company can be filed and pursued by the official liquidator in court. The companies liable to be wound up are also mentioned in Companies Act. In cases of fraud and oppression, an alternative remedy can be sought from the relevant agencies and forums. The petition of winding up filed before court can be withdrawn with the consent of court.

PART II

CHAPTER 4

VOLUNTARY AND COMPULSORY WINDING UP

4.1 VOLUNTARY WINDING UP

In this chapter discussion/ research will be focused on important area of initiation of winding process in court, steps to be taken/ required in court proceedings and circumstances which are the cause/ basis of start of winding up process. In first part of chapter, voluntary winding up will be discussed. The important topics regarding voluntary winding up are: modes of winding up, voluntary winding up why, when and how, powers of court/ tribunal in voluntary winding up, appointment of liquidator in voluntary winding up, removal of liquidator in voluntary winding up, voluntary winding up under supervision of the court, stay of voluntary winding up proceedings, the effect of voluntary winding up, the resolution to voluntary winding up and its consequences. Further, in second part of this chapter, compulsory winding up will be discussed including the relevant topics i.e. procedure for winding up of company and filing of petition before court, compulsory winding up after commencement of voluntary winding up, grounds for compulsory winding up, nature and purpose of compulsory winding up powers of the court in compulsory winding up, the effects of an order for compulsory winding up, power to apply to court. These topics will be discussed keeping in view, the law regarding winding of the companies and the important decisions of Hon'able Courts from different Law Jurisdictions, especially common law countries and the literature/ material researched regarding above mentioned topics.

As per provisions of companies Ordinance 1984, there are two fundamental kinds of winding up: compulsory winding up and voluntary winding up. In order to complete the process of winding up of the company, the company's manager may be appointed as liquidator. The liquidator is appointed so that to protect the assets of company. However, some other person can be selected as per articles of the company or with a declaration of the general meeting as per provisions of the company law.[146] Moreover, by a special resolution, the company can decide, that the company may be wound up.

[146]Valova & Angelova, 'Closing up of a Bulgarian Company: Dissolving and Liquidation' (*HGE*, 2010) <www.hg.org/article.asp?id=7940> assessed 10 December 2017.

Further, by extraordinary resolution, on ground of legal requirement the company is not capable of carrying on its business and that it is wise and prudent to wind up the company.[147]

4.1.1 MODES OF WINDING UP

The winding up of the company is carried out under the companies Ordinance, 1984. In this regard, if the members desire that the company to arrive to an end, or if it turns into insolvent, or if for some other cause it happens that the company should finish existing, it is considered better to be wound up. Therefore, companies might have to be wound up in three forms/ ways: (1) Compulsory winding up by the court; (2) Voluntary winding up; (3) Winding up under the supervision of the court. Whichever means/ method is chosen, a liquidator or liquidators are chosen to manage the assets of the company, and they should consider that the assets/ properties of the company, first be utilized, in the disbursement of creditors loans in their appropriate order, and then in allocating the remains among the shareholders as per to their privileges.[148]

4.1.2 VOLUNTARY WINDING UP

In voluntary winding, the shareholders of the company initiate the process of winding up of company by a resolution. The company may or may not be solvent. If company is solvent then company is wound up, when the basic purpose of forming company have been achieved or for any reason as per law. If company is insolvent then may be wound up by shareholders to avoid bankruptcy or personal liability for the company debts. The subsidiary company may be wound up by the parent company. The petition for winding up is to be filed by the shareholders. In voluntary winding up, the liquidator is to be appointed by the shareholders, who finally dissolved the company after collecting and distribution of company assets as per liabilities of company to employees, creditors and shareholders.[149]

The shareholders of the company are also known as the members and contributories of the company. The voluntary winding starts at the time of passing of resolution. The

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[147]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 392.
[148]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 213.
[149]*Winding up* <www.investopedia.com/terms/w/windingup.asp> assessed 11 December 2017.

resolution is passed when company is capable of paying of its debts within a specified time limit of 12 months after start of winding up. The directors are required to submit the declaration of solvency. On the other hand, if company is not able pay its debts, the company can consider convening a meeting with its creditors to start creditor's voluntary winding up. [150]

The declaration of solvency from the shareholders must contain that the company is solvent and is in sound financial position to pay its debts within the specified time limit. The statement of company assets and liabilities must be annexed/ filed with the solvency declaration. The powers of the directors are ceased upon the appointment of liquidator in voluntary winding up.[151]

During the winding up process of the company, the vital feature of voluntary winding up is that the choice to wind up is adopted by the members of the company who are competent to announce a resolution to that consequence in general meeting. However, as in any sort of winding up the creditors can submit their claims being primary one, against the company assets for the disbursement of their debts. Except the director constructs a legal announcement of solvency the creditors have a vital authority on the carrying out of the winding up since it has to be understood that all the residual property will be given to them in arrangement, entirely or in part, of the company's debts due to them. Therefore, this is the one of the main differences between members and creditor's voluntary winding up.[152]

A voluntary winding up starts at the time of the passing of the resolution for winding up of the company by its members and it is also important that the company shall, finish its business and initiate steps which may be necessary for its beneficial winding up.[153]

It is important to mention here that any kind of winding up a company, either compulsory winding up or voluntary winding up, voluntary winding up is familiar and popular kind. It is entirely unlike from compulsory winding up. The company and its creditors, in voluntary winding up have given choice to resolve their matters without

[150] Liquidation and Winding up (*mlaw*) <www.mlaw.gov.sg/content/io/en/corporate-insolvency/about-liquidation-or-winding-up.html> assessed 11 December 2017.
[151] Voluntary Winding Up (*Business Dictionary*) <www.businessdictionary.com/definition/voluntary-winding-up.html > assessed 11 December 2017.
[152] J. M. Gullick, *Company Law* (12th edn, HFL Publishers 1981) 297.
[153] Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 392.

approaching the court. The members and creditors of a company meet jointly and put an end to the intricacies and disagreements which usually happens at the time of operation of the company's business and related matters.[154]

As discussed earlier a voluntary winding up starts on the passing of the resolution for voluntarily winding up by the members of the company. [155] In this regard, the members are not required to advance any reason for the same by a special resolution for a voluntary winding up of a company. However, it is essential that a special resolution of winding up the company has to be approved by the members. If that is not done then it is held to wind up the same.[156]

The winding up of the company can be carried out in different kinds, the one mainly common being a winding up order by the Court under section 305 of the Companies Ordinance, 1984. A Company can also be wound up voluntarily, either by its members or its creditors. The conditions in which the members can themselves place their company into winding up are mentioned in section 385 the Companies Ordinance, 1984.[157]

Occasionally death is forced by a private actor: in other cases, death is activated by technical action (for example, by striking off the register or winding up in the public interest). Also, it may be self-imposed in the shape of a shareholder resolution for winding up of the company voluntarily or by a shareholder applying on approaching the court for winding up of the company on the just and equitable ground. To broaden the metaphor, suicide may be a normal act in the planet of companies.[158]

The main focus and purpose of a voluntary winding up is that the company and its creditors shall be asked to resolve their dealings without going to the court.[159] At the occurrence of the particular event which the articles of the company provide that the company is to be wound up and is finally dissolved as per law. Moreover, the company in general meeting has approved an ordinary resolution necessitating the

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[154]Bagrial A.K, *Company Law* (10th edn, Vikas Publishing 2000) 413.
[155]*Lahore Enamelling and Stamping v AK Bhalla* (1958) AIR 341 (PH)
[156]Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 670.
[157]*Kazmia Trust v Kaz International Pvt Ltd* (2009) CLD 1713 (Lah).
[158]David Milman, *National Corporate Law in a Globalized Market* (Edward Elgar Publishing 2009) 54.
[159]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 227.

company to be wound up voluntarily. A restriction on a company's span is put into exercise is very exceptionally.[160]

4.1.3 VOLUNTARY WINDING UP WHY, WHEN AND HOW

It is important to study why, when and who company is wound up. In the following paragraphs this area of voluntary winding up is discussed. In this regard, R. J Sutton, Associate Professor of Law, University of Auckland, in his essay on Bankruptcy and the Execution Creditor, has discussed in detail the procedure of voluntary winding up with reference to provisions of the company law. Section 490 of the Companies Act, assumes the power of a company to appoint a voluntary liquidator and just once a liquidator is appointed, Section 491 of the Companies Act, states that the authority shall not be exercised by the directors, but for a restricted reason which is not very essential for reasons of discussion. It is legally mandatory and essential that a notice is required to be issued for the appointment of the liquidator on behalf of the company and each liquidator so appointed in rotation is obliged to his appointment. It is by now recognized that the place of a voluntary liquidator is not firmly that of a trustee, but he might concisely and certainly appropriately be described as a gentleman engaged by the company in order to complete the process of winding up of the company and enjoined to do definite functions and having certain powers. It is too obvious that the assets of the company do not devolve on him as the corporate nature of the company continues till dissolution. The liquidator so, acts as a catalyst to bring about the final dissolution of the company and during the procedure disburse all the creditors, clear liabilities and apportion the surplus assets to the contributories pari passu and in according to their shares. Even Section 512, of the Companies Act, which explains in voluntary winding up, the powers and duties of liquidator to pay back the debts of the company by the liquidator who shall regulate the rights of the contributories amongst themselves. Section 555 of the Companies Act, is certainly informative. It speaks that in case the companies are being wound up; if the liquidator has held any money or assets of the company then he is legally bound to distribute it between the creditors and other stakeholders as per their shares and priorities.[161]

[160]Denis Keenan, *Company Law* (11th edn, Pitman Publishing 1999) 480.
[161]R J Sutton, *Bankruptcy and the Execution Creditor* 349.

The Hon'able Sindh High Court was pleased to hold that under section 166 of the Companies Act, 1913, the company was ordered to wind up voluntarily as the same was incapable of paying its debts and was wound up on just and equitable ground/ reason. It is further revealed from the facts that the Government of Pakistan by no means made any effort at all to buy back the assets after reasonable time of three years from the date of the lease.[162]

In Alfred case, the Hon'able Court held that notices were given of a meeting for a resolution to be passed for the voluntary winding up of the company, if it might be determined to do so. An extraordinary resolution was passed for winding up. The notices were at fault, as they did not state that it was to be wound up for this ground.[163]

Mr. Denis Keenan, in his book on Company Law has explained the reasons as how and when a company may be required to wind up voluntarily: (a) firstly if any time-span/ period, given in the articles has been completed or the special occasion if any, provided in the articles of the company so happens, on the occurrence of which the company is to be wound up. Further, the company has passed an ordinary resolution in general meeting for the voluntary winding up of the company. A restraint on a company's period is in practice very exceptionally. (b) If through special resolution it is decided that the company be wound up voluntarily for any reason whatsoever. (c) If the company decides by extraordinary resolution that it is not financially sound with regard to its day to day business and it is in the interest of members to wind up the company.[164]

The Hon'able Madras High Court held that the notice for the meeting as well as the explanatory note attached thereto, when observed keeping in view of the resolutions made to voluntarily wind up the company and to appoint liquidators, obviously proves that a choice had been taken to wind up the company due to grounds of poor economy, financial constraints and declining business.[165]

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[162] *Pak Fertilizer Co v Government of Sindh* (2005) CLD 61 (Kar).
[163] Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 229.
[164] Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 480.
[165] *PN Ganesan Pvt Ltd v Commissioner of Income Tax* (1992) 196 ITR 455 (Mad).

4.1.4 POWERS OF COURT/ TRIBUNAL IN VOLUNTARY WINDING UP

During the winding up proceeding, the courts have to proceed with the winding up matters as per provisions of the company law and rules of the courts. Each and every step is taken with in law and due process is followed by courts. In the proceedings paragraphs the powers of the courts during winding up have been discussed. In this regard, the Hon'able Sind High Court has laid down the conditions for voluntarily winding up and held that section 310 of the Companies Ordinance, 1984, provides that (1) a petition for winding up may be filed by any person entitled so to initiate the process of winding up of the company either voluntarily winding up or under the supervision of court under section 309, of the companies ordinance, 1984 and subject to the provisions of that section. (2) The court is fully competent to pass such a winding up order until and unless it is satisfied that either the voluntary winding up or under the supervision of the court as case may be, however, the same would be in the interest and benefits of the creditors or contributories or both.[166]

The company normally finishes/ stops to carry on its business in the case of a voluntary winding up, from the beginning; however the same practice and process may be beneficial and helpful in winding up of such business. The reference to that provision might not be pertinent as that provision does not forbid the company, which is being voluntarily wound up, from getting income from other basis and concern on securities.[167] The company's stratum had gone, the company might be permitted to wind up its own matters and move to a voluntary winding up.[168]

Vanessa Stott, in book of Company Law has discussed the case law title Falcon RJ Developments Ltd and stated that there was a voluntary winding up in development, the court was not appreciative to offer equivalent weight to debts of equivalent amount, but should also regard as the value of the debts; other benefits which might affect the views of the creditors; and the general values of equality and ethics which inspire the insolvency law. So as to minimize the damage to his commercial reputation, any thought of the personal benefit might not be permissible to surmount over the views of the mainstream of other creditors. The other creditors could also be

[166] *Islamic Republic of Pakistan v Sabah Shipyard (Pakistan) Ltd* (2009) CLD 999 (Kar).
[167] *Commissioner of Income Tax v Liquidator of Ratlam Electric* (1982) 138 ITR 184 (MP).
[168] Richard Clark, *The Dispute Resolution of Review* (2nd edn, 2010) 108.

distressed that the winding up was in the control of a liquidator prima facie accountable for the company's insolvency.[169]

Some grave allegations were leveled against the manager of deceiving the public. The company gone into voluntary winding up, but some creditors desired to have it wound up by the court. The Court held that fraud towards the external world is no reason for compulsory winding up.[170]

The Hon'able Lahore Court has observed that section 391 of the Companies Ordinance, 1984, is about a situation taking place through or in the course of a voluntary winding up, for the resolution of the queries surfaced during the voluntary winding up and helpful for any contributory, or liquidator, or creditor, to approach the Court. Section 391 of the Companies Ordinance, 1984, certainly does not relate to the query of whether the Company must have been voluntarily wound up at all. That is a question outside the capacity and/ purview of this section.[171]

The petition by the company prior to the start of the voluntary winding up without requiring any alteration of any place is valid. The only distinction, it creates, is that the liquidators shall have to pursue the matter, and not the Board of Directors, whose authority is no further. The liquidators may continue with no change of the petition.[172]

The Hon' able Calcutta High Court held that the matters regarding realization of dues of the company and proceedings under the Companies Act might be carried out simultaneously for the just and speedy completion of proceedings. So, it is reasonably obvious from Section 518(1) (b) of the Companies Act, 1956, that in a voluntary winding up the court having, authority over a company has its registered office within its jurisdiction, being the court provided under the Companies Act, has all the authority which the court could implement as if the company was wound up by the court. Section 446 read with Section 518(1) (b) of the Companies Act, 1956, authorizes this court, being admittedly the court within the meaning of the Companies Act, to shift the mentioned suit from the other court to this court and decide under Section 446(3) of the Companies Act, 1956. It is important that the suit is required to be shifted and decided urgently as the circumstances of the issue in hand requires the

[169]Vanessa Stott, *Company law* (2nd edn, BPP 1990) 226 -7.
[170]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 217.
[171]*Kazmia Trust v Kaz International Pvt Ltd* (2009) CLD 1713 (Lah).
[172]*Eastern Coal Co Ltd v Sunil Kumar Roy* (1968) AIR 355 (Cal), (1969) 39 CompCas 126 (Cal), 72 CWN 424 (Cal).

same so that the winding up process may come to an end as soon as possible and it will be very difficult to get the suit heard at other place urgently and it will be disadvantageous to the benefit and concern of the shareholders, creditors and the company. The suit respects to collection of the dues of a company, prima facie an asset, and reasonably a considerable one.[173]

The "Court" referred to in section 215 of the Companies Act, 1913, is the Court having authority under the Companies Act vide section 2, clause (3) and section 3 Section 215, 1913, permits the Court to act in a voluntary winding up anything it can make in a compulsory winding up, except there is something in the Act to the opposite. In a case of a voluntary winding a broad discretionary power is given to the Court by Section 215, 1913, to what is just. This section (215), 1913, has been understood by the Court in England in the broadest and most wide sagacity. In a voluntary winding up, a liquidator may approach the Court to make a decision on any issue reasonably arising in the winding up.[174]

The Hon'able Court held that the infant could not be allowed to change his status after the commencement of winding up. So, special resolution to wind up made on August 7th. The person has transmitted his shares to an infant on August 14th and the resolution was confirmed on August 23rd. The infant had attained full age in October. The infant then confirmed the transfer. The transfer was invalid. Q. was an infant at the date of the winding up, and consequently, cannot vary his position for ratification after the winding up.[175]

In Alfred case, the plaintiff obtained judgment for a debt against the company on the same day as the voluntary winding up started. Next day the sheriff obtained control in implementation of the judgment. Therefore, on a compulsory winding up the implementation must be stayed *ipso facto*; afterward the court has authority to do so at any time prior to the sale.[176]

A voluntary liquidator is more precisely explained as the agent of the company. An agent who has no doubt particular duties, amongst which may be described the duty

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[173]*Agra Electric Supply Co Ltd v Nagar Mahapalika* (1982) 52 CompCas 337 (Cal).
[174]Kaikhosru J. Rustomji, *Company Law* (1st edn, Empire Publication 1926) 267.
[175]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 229.
[176]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 240.

of applying the company's assets in paying creditors and distributing the excess among the shareholders.[177]

4.1.5 APPOINTMENT OF LIQUIDATOR IN VOLUNTARY WINDING UP

In voluntary winding up the liquidator can be appointed by the shareholders of the company to control/ mange the affairs of the company. With the appointment of the liquidators the role/ powers of directors ceased. Further, in the matter of, a members' voluntary winding up the liquidator can introduce proceedings in the name and on behalf of the company with the approval of a special resolution of the company. In winding up by the court all process is taken under the commands and instructions of the court. In winding up which is subject to supervision of the court, there is better autonomy for the members or the creditors and the position of the court is administrative. The Section 526(1) of the Companies Act, 1956, contained the leading words in the subsection are "without the sanction or intervention of the court". The Parliament, consequently, has specifically laid down that the court's approval is not essential and its interference is to be as slight as possible.[178]

The Hon'able Court of UK Jurisdiction has held that the companies' dealings were inextricably entangled. They both gone into voluntary winding up and one person was chosen as liquidator of both companies. The selection of a liquidator was reasonable since it gave an independent liquidator which is desirable in view of the apprehension between the both companies.[179]

4.1.6 REMOVAL OF LIQUIDATOR IN VOLUNTARY WINDING UP

During the voluntary winding up, the liquidator can be removed with the consent of court. In the proceedings paragraphs the process for the removal of liquidator has been discussed in the light of courts decisions. In this regard, the Hon'able Indian court held that it is understandable that in the voluntary winding up of a Company the

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[177] LS Sealy, *Cases and Materials in Company Law* (7th edn, Lexisnexis 2001) 531.
[178] *Rajaraman Liquidator of Globe v Hindustan Brown Boveri Ltd* (1974) AIR 200 (Delh), (1975) 45 CompCas 184 (Delh).
[179] Vanessa Stott, *Company law* (2nd edn, BPP 1990) 227-8.

shareholders or creditors or the liquidator only are concerned. Section 215 of Act VII of 1913 of the Indian Companies Act, 1913, under the state of affairs mentions the persons as allowed to file petitions to the Court, to decide any question coming in the voluntary winding up of a company. If any stranger tries to interfere with the winding up of the Company, obviously the Court would ask the question "What is the interest of that outsider" In order to leave no room for uncertainty Section 215 of the Indian Companies Act, 1913, particularly states the three sorts of persons who can file petitions to the Court in a voluntary winding up. This section is comprehensive of the parties who are permitted to file petitions, and the Registrar of Companies, not being one of them, has no *locus standi* to file the petition.[180]

The Hon'able Madras High Court was pleased to hold in detail that in such conditions, can it be said that the petitioner has "shown cause", to remove the voluntary liquidator? The phrase "on cause shown" is not to be taken as an equal or alternate for "if the court thinks fit". Although a factor of discretion is obvious in Section 515 of the Companies Act, 1956, however such judicial discretion should be astutely applied. It is not each act in the past of the voluntary liquidator that should be considered, experienced and examined to unearth a case for his removal. In cases where companies make a choice to voluntary winding up, it must not be forgotten that it is a conclusion made by the members in the implementation of their fair and just judgment. No doubt, the rule of majority overcomes on all such events. The members are concerned in liquidating and safeguarding its existing assets at the minimum expense, so that the creditors may be paid and if feasible the shareholders acquire what slight they can. Whereas thus keeping in view their own concern which mainly emerges large in their minds, it is imprudent to anticipate that the general body of members will assign such administration of the dealings in the hands of someone whom they cannot believe or trust. It is not improper for the man that comes up for a minute assessment, when the substance is brought up before the court for removal of the voluntary liquidator. The unfitness must go to the origin of the substance and must be evident from the evidence. If the general body of members themselves were ready to disregard the past, forgive the faults and rest confidence on one amongst them, and choose him as voluntary liquidator, such a voluntary choice reached in such a free

[180]*Peoples International v Unknown* (1940) 42 BOMLR 1021 (Bom).

way that has not been even interfere by courts while implementing discretionary jurisdiction under Section 515 of the Indian Companies Act, 1956.[181]

The selection made by the creditors/ members of the voluntary liquidator must not be meddled with but the courts also glanced wider a field and observe the reason of the appointment of the liquidator which rationale in all cases is the sincere concern of the winding up. The ratio of that decision is that a voluntary liquidator must not be removed in an illogical way and devoid of justified grounds.[182]

When a special or extraordinary resolution has been made to wind up the company voluntarily, the court may ask that the winding up shall continue under the supervision of the court, or a creditor or any stake holder may apply that the company be wound up in the interest of stake holders under the supervision of the court. The court has discretion, both as to whether the order shall be passed, and as to the amount of constraint that shall be made on the liquidator.[183]

4.1.7 STAY OF VOLUNTARY WINDING UP PROCEEDINGS

During the winding up proceedings the courts have ample powers to stay the winding up proceedings to safeguard the interests of company and interested parties. The Court does not have a lot to say in the case/ substance of member's voluntary winding up, which provides the company, its contributories and creditors, to settle their dealings, without coming to the Court. The Act, nevertheless, grants restricted powers to have questions settled or authority used still in case of voluntary winding which may lead to compulsory winding up or a supervision order. The extent of the section is, though limited. The High Court on such a petition cannot decide the questions, which mainly engage queries of facts. The resolution of voluntary winding up does not, similar to an order of winding up by, or under the supervision of the Court, stay the proceedings or avoid suits or process brought or sustained against the company with no position to the Court. The Court, on the other hand, under Sub-section (2) has powers on a petition by liquidator, creditor or contributory to stay against the company, which has made resolution for voluntary winding up after the beginning of

[181]*Rangaswami Achari v Mandhai Viswa Brahmana Sarvajana* (1967) 37 CompCas 730 (Mad).
[182]*Hardit Singh Giani v Registrar of Companies* 1969 AIR 112 (Delh), (1968) 4 DLT 6.
[183]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 238.

the winding up. The Court will not decide the disputed matters between the liquidator and creditor. It might, though, meddle if the obstruction is for fair, valuable and useful winding up. The expression, 'any other matter', in Sub-section (1) (b) of Section 518 of the Companies Act, 1956, not to be read *ejusdem generis*, to the expressions used in the same sub-section specifically implementing the calls, as many state of affairs may arise where the Court may have to interfere on the petition of liquidator, contributories or creditors in case of voluntary winding up, for just, beneficial and effective winding up. The Court might in the particular conditions stay execution proceedings against a company in voluntary winding up, to make sure just division of the assets.[184]

In the winding up process the liquidator becomes the trustee because the property/ assets of the company on commencement of the winding up process ceases to be constructively belong to company and passes into his custody, to be applied by liquidator as directed by the law. A liquidator is in the position of a trustee for the shareholders when distributing surplus assets in a winding up, so that no beneficial interest passes in the property conveyed or transferred. The crucial dates are (a) the commencement of winding up, which the date of the company resolution in the case of a voluntary winding up of the company, however, the date of filing of the petition by the creditors in case of a compulsory winding up petition, and (b) the date on which a meeting for a resolution of the winding of the company is to be presented to the execution creditor.[185]

The crucial distinction between a voluntary and a compulsory winding up is that firstly, there are a range of incidents for filing a petition to the court in a voluntary winding up, it is in its usual path accomplished out of court. Secondly, the official liquidator has no role to play in the early phases the liquidator is appointed by members or by creditors and is not an officer of the court.

A voluntary winding up is generally simpler and not as much costly as a compulsory winding up. The creditors of an insolvent company will frequently push the directors to start a voluntary winding up earlier than they option to apply for compulsory winding up, if their stress does not work. The directors favour voluntary winding up

[184]*Dhankari Investments Ltd A v Official Liquidator* (2006) 132 CompCas 749 (All), (2006) 6 CompLJ 519 (All).
[185]R J Sutton, 'Charging Orders in the District Court*' (IANL*, 1967*)* < www.austlii.edu.au/au/journals/OtaLawRw/1984/4.pdf> assessed 05 December 2017.

as of the provisions for public examination in open court in a compulsory winding up because of the provisions for public assessment in open court in a compulsory winding up. Though public assessment is rare, it is a danger which it is better to evade. On the other hand the creditors may choose for compulsory winding up as, if no other liquidator is appointed the official receiver carries out the winding up at public cost.[186]

For the convenience of companies, the summary below follows the references to sections of the UK Insolvency Act 1986, regarding process of winding up. The choice to wind up made by passing a resolution in general meeting, has no retrospective consequence. Winding up is believed to begin at the passing of the resolution. (S 86) The company's assets should be utilized first in making payment of its debts and any excess may then be dispersed to members. (S 107) A relocation of shares or a modification of the position of members is invalid except approved by the liquidators. (S 88) There is no usual control on capture of company property or taking lawful process against the company. But the liquidator may approach the courts under s 112 to get an order to that consequence against a creditor. On the appointment of the liquidator, the directors stay in office but their powers insofar as the liquidator or the company in general meeting (in a members voluntary winding up) may sanction the continuation of their powers S 91 (2) and S 103. The employees' contracts of service carry on except confirmed by the liquidator. A sale of the business may consequence in the usual movement of the employees to the service of the purchaser. The placement over the company's assets is the same as in compulsory winding up. The company just has power to continue its business for reasons of useful winding up s 87. The effect on charges and preceding transactions is the same as in compulsory winding up.[187]

In the light of above mentioned facts and circumstances it analyzed that each and every type of voluntary winding up is usually started by passing/ issuing a resolution in general meeting called upon by the members of the company. The kind of resolution necessary differs as per to the situations: If the articles provide the time of duration of the company or give that upon the occurrence of an incident it shall be dissolved or the incident has occurred, it is sufficient to make an ordinary resolution,

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[186] J. M. Gullick, *Company Law* (12th edn, HFL Publishers 1981) 300-1.
[187] J. M. Gullick, *Company Law* (13th edn, Butterworths 1987) 302.

referring to the articles, and deciding that the company be wound up consequently. In observance articles hardly ever contain any such mechanical winding up provisions. The company may decide to wind up by special resolution (which explains not causes). This is the usual process of winding up a solvent company. The company might by extraordinary resolution decide that by cause of its legal responsibilities the company is incapable of carrying on its business and that it is prudent to wind up. [188]

H.A.R.J. Wilson and T.W. South in their book on Company Law have also described the procedure of voluntary winding up. The company may be wound up voluntarily.' The consequences of passing such kind a resolution are as follows: The beginning of the winding up is dated form it, still if an order for compulsory winding up is consequently issued. The company, from the beginning, should stop to continue with its business, however, the corporate position and its legal entity will remain persistent for the efficient and useful winding up; till final dissolution of the company (S 281). All statements, claim for goods or letters must contain a report that it is being wound up (S 338). Firstly, the transfers of shares which are not authorized by the liquidator, secondly, changes in the position of members incorporated after the beginning, are void (S 282). The powers of the directors do not hold devoid of opportunity of restoration, while in compulsory winding up, except they might only be used with the approval of the liquidator, company, creditors or committee or inspection. It is not common to award any such sanction, although it might be essential or desirable for the reason of authorizing the board to affect a meticulous deal, such as passing an exact transfer of shares. A liquidator or liquidators should be appointed. The property of the company is legally required to be used in discharge of its liabilities pari passu, so that definite privileged debts should be paid first, and secured creditors might have alternative to their securities. The liquidator shall initiate the required steps in consequence of the final dissolution of the company. He shall submit statement of closing account, or shall submit copies of his accounts at approved intervals according to conditions. Other notices shall be publicized, etc., as many are requisite. Finally, the books and papers of the company shall be disposed of by the liquidator as required by the members or creditors, as per to the situations. Any capital from available assets of the company or undivided dividends affirmed by the company or by the liquidator

[188]Chris Shepherd, *Company Law* (8^{th} edn, HLT Publications 1996) 306.

is also necessary be deposited into the Companies Liquidation Account opened and operated for the winding up purpose.[189]

Denis Keenan, in his book on Company Law has described the procedure of voluntary winding up. If there is requirement of a members' voluntary winding up, the director might have to issue a statutory declaration of solvency in five weeks prior to the special resolution was required to be passed/ issued for winding up, however prior to the resolution was passed (S 89). In the statement they would have to explain that in their view the debts in total can be paid back by the company with in a mentioned time period which shall not be more than 12 months, and a declaration of properties and liabilities shall be annexed. While the directors and the members manage the procedure in a member's voluntary winding up, there is a strong enticement for the directors to pass a declaration, still if it is not entirely reasonable.[190]

4.2 COMPULSORY WINDING UP

The compulsory winding up of the company is initiated when, if the company passed an extra- ordinary resolution as, it is unable to continue its business due to heavy liabilities. The reasons for the compulsory winding up are special resolution, failure to commence business, statutory report / meeting, reduction in number of members, inability to pay debts and court decision. The transfer and disposition of property after commencement of winding up is void unless transferred with the permission/ consent of court.[191]

An application for compulsory winding up can be filed from company, a shareholder, creditor or any interested party. After the filing of petition, the courts decide the application in the interest of company. The winding up proves as beneficial for the creditors as in case of shareholders. In case of company is unable to pay its debts then notice must be given to company in this regard before filing of application for winding up in court. The liquidator is appointed on the application of applicant or the

[189]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 380.
[190]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 493.
[191]Voluntary Winding Up (*Business Dictionary*) <www.businessdictionary.com/definition/voluntary-winding-up.html> assessed 12 December 2017.

court deems as fit. The company ceases its business as going concern unless it is beneficial for the company with the permission of court.[192]

Denis Keenan, in his book on Company Law has also described the procedure of compulsory winding up (or winding up by the court). Therefore, the compulsory winding up is a process by which the assets of a company are sold, and the proceeds realized thereof are distributed among the creditors and members of the company. For the commencement of a compulsory winding of a company, a court's order is required. Moreover, at the end of the winding up of a company, the company is dissolved to put an end the life of a company.[193] The company may compulsory wound up by the court under the provisions of the company law. The court may issue an order of compulsory winding up of a company upon submission of a petition to the court which may be submitted by the registrar of the companies representing the public interest, a member of the company, a secured or unsecured creditor, by the directors of the company, and by the company. The company's unsecured creditors have the legal right to appoint a liquidator of the company.[194]

Following voluntary winding up started, some fully paid shareholders submitted an application for compulsory winding up, although there were sufficient properties, on the present position that some of the directors had also received presents. A compulsory order might be passed on the application of entirely paid shareholders, wherever there are excess assets, and yet although there is no deception.[195] The court has authority to turn a voluntary winding up for the interest of the company or members or creditors into winding up by the court, or the court may loosen up the limitations as per requirements of every matter.[196]

Where a company which was struck off the register after it went into voluntary winding up was yet again restored to the register by an order of Court and after such restoration it was ordered by the Court to be wound up; the case was not one of voluntary winding up but winding up by the Court.[197]

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[192] Gurnsey, 'Compulsory Winding up of Company'(*Ogier*, 20 April 2010) < www.lexology.com/library/detail.aspx?g=ab2fbce8-f594-44e4-9eea-524354cbe95c, assessed 14 December 2017
[193] Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 480.
[194] Mayson S. W, French. D & Ryan C. L, *Company Law* (14th edn, Blackstone Press 1997) 659.
[195] Alfred F. Topham, *Principles of Company Law* (4th edn, Butterworth 1914) 256.
[196] Alfred F. Topham, *Principles of Company Law* (4th edn. Butter Worth 1914) 257.
[197] Sh. Shaukat Mahmood, *Company Law*, (Galaxy Press 1982 edn) 373.

The present and prevailing company's law provides a number of reasons because of which a company may be wound up by the court and however, the majority of these reasons are not concerned whether the company is solvent or otherwise. The some of the main reasons are: (a) The company can be wound up by the court by special resolution, as an ultimate of the decision of the company; (b) A company can be wound up when it is not in a position to clear its debts; (c) It can also be wound up if it fails to start its business within a year of its inception or its functions remain suspended for full one year.[198]

As earlier discussed the winding up of a company by an order of the Court is known as the compulsory winding up of a company. In this regard section 305 of the Companies Ordinance, 1984, provides the conditions in detail, under which a company may be wind up by the Court on the application filed it by a person who is legally authorized :- (a) A company may be wound up by the court if by a resolution it so desires; (b) The court also wound up a company if it fails to holds its statutory and any two successive annual general meetings: (c) The company can also be wound up by the court if it fails to commence its business till a year from its inception or its activities remain suspended for full one year; (d) if the Court during the winding up process is of view that it is just and equitable that the company must be wound up; (e) if the company stops to has a member.

4.2.1 PROCEDURE FOR WINDING UP OF COMPANY AND FILING OF PETITION BEFORE COURT

The process of winding up company starts with the filing of petition. In the following paragraphs the procedure of compulsory winding up is explained, in the light of decisions of courts. A Company may be wound up by the court when a number of conditions occur/ happened. The mainly frequent being when the company is incapable of paying its debts. An application for winding up may be filed by the company or on behalf of Govt., but is usually filed by a creditor. When there is a petition for winding up , the court is not required to issue an order, but if it does, a liquidator is appointed who re takes into possession the assets and pays the creditors, handing over the surplus (if any) to the shareholders. When the company's affairs are

[198]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 390.

fully wound up, the court will issue an order dissolving the company. The order is registered with the Registrar of Companies by the liquidator, and the Registrar makes an entry on the Register dissolving the company form the date of the court order.[199]

The grounds for compulsory winding up are as follows: a special resolution by the members to wind up; the company has failed to start its business within one year since its incorporation or the company has suspended its business for an entire/ whole year.; if the number of members fall below two, though not in the case of single member company; however if it is not in a position to return its debts completely to its creditors then it is reasonable that the company must be wound up. In addition, to earlier reasons for winding up of the company a newly incorporated public company may be wound up if it fails to get a certificate under the Companies Act within one year of incorporation. The application may be filed by the State.[200]

In a voluntary winding up before the company's court it can obtain a stay it should apply to the company Court in which the winding up of the company will happen if it was compulsory. That is clearly the proper Court to resolve any question between the company or its liquidator and any other person.[201]

Voluntary winding up of a company under the companies' law is no bar to its being compulsorily winding up at instance of the contributories or creditors. However, where a company goes in to winding up, the liquidators appointed by the company cannot challenge the order asking for the compulsory winding up, in the light of the application.[202]

4.2.2 COMPULSORY WINDING UP AFTER COMMENCEMENT OF VOLUNTARY WINDING UP

The process of voluntary winding up can be transfer into compulsory winding up. When official liquidator or creditors felt that company is not remained solvent and it is unable to pay its debts. In a voluntary Winding up, any provision of the company law does not bar any creditor or contributory to have the company wound up by the court. A creditor of a company in voluntary winding up is not permitted to a

[199]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 480.
[200] Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 489.
[201]K Kaikhosru J. Rustomji, *Company Law* (1st edn, Empire Publication 1926) 227.
[202]Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 670.

compulsory winding up order and the visualization of the contributories must be taken into consideration, unless and until the company is insolvent. The court would necessitate grounds as to why the voluntary winding up is inappropriate A compulsory order should be passed wherever the creditors would otherwise be left with a reasonable objection that he had been disallowed from having the company's affairs examined by a liquidator who was not appointed by the directors.[203]

4.2.3 GROUNDS FOR COMPULSORY WINDING UP

The compulsory winding is carried out in presence of certain essential grounds. The grounds for compulsory winding up are as follows: firstly, a special resolution by the members to wind up; the company has failed to start its business within one year since its incorporation or the company has suspended its business for an entire/ whole year, secondly, if the number of members of the company falls below two, although not in the case of the company having a single member. Moreover, if the company is not able to return back its debts then it is just and equitable that the company be wound up.[204]

The creditor might also base on other enough proof of the company's incapacity to pay its debts such as its stops to pay the trade dues, or has not issued it's a declaration of the company's assets and liabilities, which may comprise its reliant and future liabilities.[205]

The company is likely to be compulsory wound up, because the company is unable to adjust and return its payable debts. It is acknowledged that the applicants have submitted separate suits for recovery of loan and the same have been decreed in favour of the petitioners: execution proceedings are pending before the Company which facts itself directs to the ultimate conclusion that the company is unable to adjust and return its payable debts.[206]

In majority of the cases liquidations are voluntary, which are initiated by way of resolution passed in general meeting for useful winding of the company. Moreover, even if a company is insolvent, unable to pay back its debts and is under the pressure

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[203]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 563.
[204]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 489.
[205]J. M. Gullick, *Company Law* (13th edn, Butterworths 1987) 285-6.
[206]*Security Leasing Corporation Ltd v Diamond Food Industries Ltd* (2003) CLD 861.

from its creditors, it still is in the best interest of the stakeholders to continue and go for the voluntary winding up which is a less expensive. However, compulsory winding up should be considered as a measure that must be used as a last resort for creditor or member, if company inflexibly refuses to satisfy their legitimate demands or is simply unresponsive usually because it has been abandoned by the director. However, all petitions for compulsory winding up should be supported by sufficient and appropriate evidence and must have definite grounds upon which the court in its discretion may order compulsory winding up.[207]

4.2.4 NATURE AND PURPOSE OF COMPULSORY WINDING UP

The process of compulsory winding should not be purposeless. An application/ petition may be submitted to the court for compulsory winding up by mentioning the reason for winding up of company. The most common reason of application is the incapability of the company to pay its debts and the company's law explains how this can be established. If a creditor files a written demand for return of dues as per legal requirement and it were not paid by the company for definite period, therefore, the company is considered and deemed to be unable to return its debts to its creditors.[208]

There was no common rule that special grounds were necessary to rationalize issuing an order for a compulsory winding up in place of the present continuing a voluntary winding up. It would be erroneous to decline a compulsory order to wind up where the creditors would be left with a reasonable wisdom of criticism that they had been destitute of a chance to have the dealings of the company examined by a sovereign liquidator, i.e., one not selected by the director. On the facts, the members had resolved to wind up the company voluntarily and to appoint a liquidator; regardless of the latter's appointment being agitated by the company's main trade creditor. The most of trade creditors supported the application to wind the company up compulsorily. There were obviously materials which needed investigation. The trade creditors must

[207]Chris Shepherd, *Company Law* (8^{th} edn, HLT Publications 1996) 298.
[208]Jennifer James, *Company Law* (4^{th} edn, 2003-4) 265.

have a reasonable sense of accusation if the person supported by them was not appointed liquidator. A compulsory winding up order was passed.[209]

In practice, compulsory winding up is frequently raised in respect of insolvent companies and so might be considered an insolvency process, but there are also important conditions in which solvent companies might be subject to compulsory winding up. The company may be wound up in consequence of an order by the company court under the provisions of the pertinent law. A secured person or creditor or by the State representing the public or the directors of the company may file application for compulsory winding up. The company's unsecured creditors have the right to appoint a competent insolvency practitioner to perform as liquidator of the company.[210]

4.2.5 POWERS OF THE COURT IN COMPULSORY WINDING UP

As mentioned in case of voluntary winding, there are ample powers with courts provided by law to issue order for winding up of company. The powers of courts are discussed in court cases, as how the courts are exercising their powers while dispensation of justice. In this regard the Hon'able Indian High Court was pleased to observe that there is a constructive provision in the Companies Act 1956, however, by which the aid of the court may be raised in a voluntary winding up. Under its jurisdiction to decide questions, the court may, for example, force the liquidator to pay regard to the desires of the committee of inspection or the creditors or members in exercising his powers. Under its jurisdiction to use the powers the court has jurisdiction to stay the voluntary winding up itself, which it has in a compulsory winding up, or may stay actions or proceedings which were pending against the company when the winding up resolution was passed, or which are brought against it subsequently, or may transfer any such pending action brought by or against the company to the Companies Court. The liquidator must demonstrate good cause for the proceedings being stayed, and the court will not entail a stay if the liquidator renounces all liability of the company to the plaintiff, for in that event if the plaintiff were referred to proving in the winding up, the liquidator would reject his evidence,

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[209] Vanessa Stott, *Company law* (2nd edn, BPP 1990) 227.
[210] Mayson S. W, French. D & Ryan C. L, *Company Law* (14th edn, Blackstone Press 1997) 662.

and the court would have to try the issue on an appeal from the liquidator's decision. Furthermore, in no state of affairs will the court stay an action by a creditor if the company is solvent, as it will not prejudice the other creditors to permit him to proceed, and the members have no explanation for depriving him of his right to exact payment by obtaining judgment and levying execution in the normal way. Finally, the Court may make/issue an order on a petition in a voluntary winding up only if it would be just and beneficial to do so. It means, it is just and beneficial to the creditors or contributories, and the court will not make an order if it's only effect to defend directors of the company from an individual liability to a creditor by statute or otherwise.[211]

The High Court has authority to wind up any company registered in England and Wales, and the Court of Session has authority to winding up any company registered in Scotland. The country court (Sheriff Court in Scotland) has concurrent authority with the High Court (or Court of Session) to wind up companies with a share capital paid up or credited as paid up. Section 122 of the insolvency Act, 1986, states the situation in which a company may be wound up by the court. The significance of the ground is that the Court has formed an opinion that it is quite reasonable, just and equitable that the company must be wound up.[212]

Under these conditions, the Court might have refused to approve the deal. The approval of the Court to such a deal should be got at the time of the deal and cannot be provided afterwards was negated by the Court, if approval had been useful for at the date of the deal, it must have been given particularly on the ground that there was a legal contract of sale with the Company a violation of which would have uncovered the company to a liability for compensation, and that the deal was reasonable and bona fide on the reason that the directors assumed a personal liability which was not presented earlier. The Imperial Bank were motivated more by a wish to protect their own benefits than to harm the benefits of the other creditors, but the agents of the Mill reduced their own personal liability by providing the debentures of the company as

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[211]*Dhankari Investments Ltd v Official Liquidator* (2006) 132 CompCas 749 (All), (2006) 6 CompLJ 519 (All).
[212]Richard Smerdon, *Palmers Company Law Manual (*1st edn, *Sweet & Maxwell* 2000) 842.

security to the Imperial Bank and did not act reasonably towards the depositors and the other creditors of the company.[213]

The Hon'able Indian High Court has given the verdict that section 168 of the Companies Act, 1913, states the winding up of the company commences at time when petition for winding of the company has been submitted. The *raison-d'etre* of this provision is to prevent transfer of the property of the company done after filing of the application for compulsory winding up, without the consent of the Court, with a view to evading deceitful preferences and avoiding other mistreatment to employee on transfer of properties of the company in consideration of its winding up.[214]

The question of whether a solvent financial organization can be positioned under compulsory winding up under the statutory provision relating to 'unsafe and sound practice' even when the financial institution is not insolvent. This matter challenges the usual view that insolvency has to lead to a compulsory winding up. A financial institution can be positioned under compulsory winding up if it is determined that the financial institution has been attracting unsafe and unsound practice even though financial institution is not insolvent. The provisions of the company law have also emphasized the role and the legal responsibility/ liability of the company directors and others officers of the company for doing the wrongful trading, deceitful trading and including the prominent and relevant features of deception that has gone into winding up.[215]

The Hon'able Court held that in the alleged order it was held that the company had suspended business for five successive years, as a consequence of which it must be wound up under clause (c) of section 305 of the Companies Ordinance, 1984. The court while exercising of its powers which are conferred on it under clause (b) of section 309 of the Companies Ordinance, 1984, allowed the liquidator to submit winding up application in the High Court.[216]

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[213] *Tulsidas Jasraj Parekh v Industrial Bank of Western* (1930) 32 BOMLR 953 (Bom).
[214] *Lahore Enamelling and Stamping v A.K. Bhalla* (1958) AIR 341 (PH).
[215] Kenneth K Mwenda, ' Legal Aspects of Banking Regulation Common Law Perspective from Zambia'(2010) <https://download-plaza.com/download/book/Legal%20Aspects%20Of%20Banking%20Regulation:%20Common%20Law%20Perspectives%20From%20Zambia.html?aff.id=9325&aff.subid=6544> assessed 17 December 2017.
[216] *Tri Star Power Ltd v Executive Director CL* (2010) CLD 162 (Kar).

In Messrs Excel Financial Services (Pvt.) Ltd. case, the Hon'able Court held that the case of the applicant is convincing to the level that administrative orders are not appealable; which has particularly been given by proviso (a) section 33(1) of SECP Act. However, the case that as opposite to administrative orders all quasi-judicial orders are appealable. Provisos (b) to (d) of section 33(1) of SECP Act provides circumstances where quasi-judicial orders passed by the Commission or its authorized officers are not appealable. Provisos (b) to (d) of section 33(1) of SECP Act is entirely concerned as the alleged order provides sanction to the Registrar to submit winding up of the appellant, which is not appealable order.[217]

The EC Regulation allowed the English courts to verify the authority of a foreign company being positioned into creditors' voluntary winding up. This, in many quarters, characterized an unanticipated extension of the English winding up authority, which earlier was supposed to be restricted to compulsory winding up.[218]

Vanessa Stott, in her book on Company law mentioned and elaborated the process of winding up. The court considered a company which had gone into a contract for the sale of its leasehold goodwill, fittings and fixtures, premises and its stock in trade. Three months later an order for its compulsory winding up was made. If a company has entered/ made an unconditional contract for the sale of assets which is particularly enforceable, then the conclusion of that contract as per its terms and conditions after the filing of a winding up application does not make up a transfer within the meaning of section 182 of the Companies Act, 1980. Where, however, a contract is provisional or void, the waiver or verification of the contract, or any deviation of its terms, would comprise a transfer of the assets/ properties of the company. Until and unless a valid and legal contract is fairly clearly enforceable and there is no probable defense, it would be discreet to look for the consent of the court for the conclusion of the contract otherwise; there may be a transfer within section 182 of the companies Act, 1980, mentioned above.[219]

An application was submitted for compulsory winding up of the company and it is proved that the company was formed to carry out a fraud; and was desperately uncomfortable by a lot of events for deception; consequently it is quite reasonable and

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[217]*Excel Financial Services Pvt Ltd v Executive Director Registration* (2010) CLD 205 (Lah).
[218]David Milman, *National Corporate Law in a Globalized Market* (Edward Elgar Publishing 2009) 132.
[219]Vanessa Stott, *Company law* (2nd edn, BPP 1990) 231.

equitable that it must be wound up.[220] After voluntary winding up commenced, some entirely paid shareholders submitted an application for compulsory winding up, though there were sufficient properties. A compulsory order may be passed on the application of fully paid shareholders, where there are surplus assets, and although there is no fraud. It must not bring anything to the shareholders. The court has power by restrictions imposed on the voluntary liquidator, the court has the powers to turn a voluntary winding up into compulsory winding up, or it might relax the restrictions as per the necessities of each matter.[221]

The intention of law is again, very well expounded and provided in a case of compulsory winding up. When a company had an authentic and stern cross-claim which it had been incapable of litigating, the court should, in the absence of special situation, dismiss or stay the winding up application in exercise of its discretion.[222]

The Hon'able Sind High Court was pleased to hold that the situation appears to have been established that an order by the court for compulsory winding up of a company decides the powers of directors, effects their discharge or dismissal and puts an end to their employment.[223]

The Hon'able Gujarat High Court held that Government has submitted the court to ask the Official Liquidator to deliver the control of immoveable assets of under Section-457(l) (e) of the Companies Act, 1956. It is true that the wording of Section 457(1) (e) is to the division of assets amongst members are not as clear as in Section-511. Section-511 of the Act deals with division of property of Company voluntarily wound up. However, Section 457(1) (e) read with Section-475, the result is not different. Therefore, in the case/ matter of compulsory winding up of a company by the Court, the debts and liabilities will have to be paid first by the Liquidator and then the Court has also powers with regard to the legal rights of the contributories and also regulating these between themselves and further to divide the surplus amongst the members of the company and other persons allowed thereto.[224]

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[220] Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 217.
[221] Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 234.
[222] *Tata Iron & Steel Co v Micro Forge India Ltd* (2001) 104 CompCas 533 (Guj), (2000) 2 GLR 1594 (Guj).
[223] *National Development Finance Corporation Karachi v Sindh Glass Industries Pvt Ltd* (1994) PLD 186 (Kar).
[224] *State v O Gujarat High Court* < http://indiankanoon.org/doc/> 17 June 2011.

4.2.6 THE EFFECTS OF AN ORDER FOR COMPULSORY WINDING UP

There are certain effects after the announcement of compulsory winding up order by the court. In this respect the renowned author J. M. Gullick in his book on Company Law has stated/ described the main legal effects of an order for compulsory winding up which are as follows: Winding up is believed to have started/ commenced at the time of filing of application for winding up of a company or if the company was before in voluntary winding up at the time of passing the resolution which is required also for voluntary winding up. Any disposition of shares or modification of the position of a member done after the commencement/ beginning of winding up of the company is void except the court otherwise orders or with the permission of the court. Any disposition of shares or modification of the position of a member done after the beginning of winding up is invalid. But the court might express that it shall continue in force. No legal process might be started or sustained against the company after the issuing of the winding up order of the company under the provisions of the company law unless and until the court provides leave. This is to stop one creditor getting an inequitable benefit over other. The liquidator i.e. the official receiver or any person replaced as per law in place of liquidator in succession to him is vested with broad powers of management. An effect of this management is the routine dismissal of the directors. The employees of the company are also sacked and they might claim compensation for violation of agreement. However the liquidator might be by joint accord hold them in the service of the company. He might require doing so if he carries on the business. The properties of the company remain its assets but in the management of the liquidator, who has authority to sell them. The liquidator might if needed submit an application to the court for an order vesting all or any part of the company in him. The liquidator may carry on the day to day and routine business of the company which may be essential and useful for its efficient winding up. The charges over the company's assets and some of its transactions, if affected within some specific periods before winding up, might be happen to void.[225]

The petitioner got issued judgment for a debt against the company on the same day as the voluntary winding up started. Next day the sheriff took control in implementation

[225] J. M. Gullick, *Company Law* (13th edn, Butterworths 1987) 296.

of the judgment. If on a compulsory winding up the implementation may be stayed ipso facto, then the court has authority to do so at any time before the sale.[226]

During a voluntary winding up if any legal question arises that is required to be decided by the court, a creditor, the liquidator, or any contributory may approach the court to settle such question in the winding up of the company or the court has to use its authority/ power if the company was being wound up by the court. The position of the liquidator in a voluntary winding up is the same for the assistance of the court as in a compulsory winding up of the company.[227]

In the light of above mentioned facts and circumstances, regarding voluntary or compulsory winding up, it can safely be said that whatever procedure is adopted, either by the shareholders or creditors of the company. The main focus should be that the winding up must be taken in the interest of company. No party should adopt any course of winding up until and unless the same is beneficial for the all stakeholders. The important topics which have been discussed in chapter had great importance and without following these provisions, procedures and processes of courts, the process of winding up would not be beneficial/ fruitful for the company, creditors, members and corporate sector.

[226]Alfred F. Topham, *Principles of Company Law* (4th edn, Butterworth 1914) 273.
[227]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 556.

CHAPTER 5

MEMBERS AND CREDITORS VOLUNTARILY WINDING UP

The affairs of a company may be voluntarily wound up, if it is not capable of carrying on its business or the formation of the company was only for the limited purpose, or the financial position of the company is such that it is unable to pay its debts to its creditors, and etc. Further, a company which is in the process of winding up may be voluntarily wound up, either by passing an ordinary resolution, or by way of special resolution, under any of the two modes:

A. Members voluntarily winding up.

B. Creditors voluntarily winding up.[228]

Each and every sort of voluntary winding up is started by passing a resolution in general meeting. The kind of resolution differs as per to the situation: If the articles mention the time period of the company or give that upon the occurrence of an incident it shall be dissolved and the time has finished or the incident has happened, it be sufficient to make an ordinary resolution, referring to the articles of the company, and consequently deciding/ resolving that the company is required to be wound up as per provisions of the companies Law. As commonly articles seldom contain any usual winding up provisions, the company might resolve to wind up by special resolution. This is the usual process of winding up a solvent company. The company might by extraordinary resolution determine that because of its liabilities the company is prudent to wind up.[229]

5.1 PROCEDURE MEMBERS VOLUNTARY WINDING UP

A creditors' voluntary winding up must be initiated by the company's directors as soon as they happen to become conscious that (i) the company is insolvent (generally

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[228]Legal Light, *Company Liquidator* <www.companyliquidator.goVsin/winding_up_4.html> assessed 10 December 2017.
[229]Chris Shepherd, *Company Law* (8th edn, HLT Publications 1996) 306.

be situation to the test that it is incapable of paying back its debts as they become outstanding) and (ii) they arrive to the decision that there is no rational hope of the company evading insolvent winding up. It is significant that the directors do not permit the company to trade previous level when they think that there is no rational vision of evading insolvent winding up, for if they do, they will be susceptible to a claim by the liquidator for unjust trading.[230]

5.1.1 DECLARATION OF SOLVENCY

For the purpose of initiation of voluntary winding up proceedings against the company by its members, the directors, or a majority of them if there are more than two, might at a meeting of the board issue a statutory statement that they have done a complete enquiry into the affairs/ matters of the company and are of the opinion that the company is self-sufficient and is fully competent to pay back its debts due toward its directors in complete within a given period from the commencement of the winding up. It is important that this declaration is also required to be issued within prescribed period, and should be mailed/ sent to the relevant Registrar of companies of the regulatory body of the companies for registration, and should annex a report of the company's property and liabilities as the most recently prepared by the company and such report must be prepared before the issuing of the declaration by its members and directors although mistakes and oversight will not essentially make the report unacceptable.[231] There is an important difference between two types of voluntary winding up of the company. As in a members' voluntary winding up, statutory declaration of solvency is necessary from the directors and members. However on the other side in a creditors' voluntary winding up such a declaration is not required or supplied.[232]

The directors are necessary to issue the statements, where a company's capital is involved; there is no straight participation of the company's auditors, although a director who issues a declaration without having rational causes for the reason that the company will be capable of paying its debts is responsible to detention or a fine or both. Moreover, if the company is wound up within prescribed time after the issuing

[230] Richard Smerdon, *Palmers Company Law Manual (*1st edn, *Sweet & Maxwell* 2000) 839.
[231] Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 481.
[232] Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 392, 393.

of the declaration and its debts are not paid in complete, then assumption is formed that the members and the directors of the company have failed to form a true opinion based on actual reasons for their declaration and view.[233]

If a statutory declaration of solvency is given then there is a member's voluntary winding up. But if the directors are not satisfactorily certain of the result to give such a declaration there is a creditor's voluntary winding up. This is important that the statutory declaration is required to be given at a meeting of the directors/ members and should be to the consequence that the directors have conducted a complete inquiry into the matters of the company and have formed the view that the company will be competent to pay its debts in complete with interest within a specified period (from the start of winding up). The declaration must annex a declaration/ detail of the assets/ properties of the company and its liabilities as at the most recent possible date prior to issuing the declaration. The declaration should be given by each of the directors of the company or if there are more than two directors by a majority of the directors.[234]

Member's voluntary winding up is not an insolvency process; it can be raised only in relation to solvent companies. The participation of the court is in no way necessary for starting or substantiating to utilize of this process. It is started when the members of a company assumed a resolution for voluntary winding up subsequently a statutory declaration of solvency by the company's directors. The members appoint a liquidator of the company.[235]

The Hon'able Lahore High Court has discussed in detail the process of winding up in the light of provisions of the Companies ordinance and held that section 316 of the Companies Ordinance, 1984, is relevant only to a winding up of a company by the Court or to a winding up of the company under company law subject to the supervision of the Court. A member's voluntary winding up provided under sections 358 and 359 of the Companies Ordinance, 1984, this winding up is not a winding up by the Court and not taken as a winding up subject to supervision of the Court under company law. Section 316 is relevant even to a voluntary winding up. Liquidator of the company had from time to time submitted petitions before this Court under

[233]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 393.
[234]J. M. Gullick, *Company Law* (13th edn, Butterworths 1987) 298.
[235]Mayson S. W, French. D & Ryan C. L, *Company Law* (14th edn, Blackstone Press 1997) 659.

section 391 of the Companies Ordinance, 1984, praying additional period for carrying out the winding up. The Hon'able High Court in its authority under the Companies Ordinance had permitted such petitions and had given time for implementation of the winding up of the company. The voluntary winding up of the company turned into a winding up subject to the supervision of the Court. This argument is devoid of strength and cannot, consequently, be acknowledged. A voluntary winding up keeps its character as such until and unless the High Court of its own part or in pursuance of a petition, supposes management of the voluntary winding up under section 396 of the Companies Ordinance, 1984. No application has been filed by some person under section 396 of the Companies Ordinance and the High Court has not also taken cognizance in the matter/ issue of the winding up of the company under the company's law provisions. Section 316 of the Companies Ordinance, 1984, consequently, has no relevance in the subject matter.[236]

Simon Goulding in his book on Company Law has narrated that a members winding up is a voluntary winding up, where statutory declaration of solvency is necessary from the directors and members. However on the other side in a creditors' voluntary winding up such a declaration is not required or supplied/ issued.[237] In voluntary winding up the liquidator is legally bound and should invite as early as possible a general meeting of the company when the company's affairs/ matters are entirely wound up by him after the completion of the process of winding up. It is important that at this meeting, the liquidator is further required that he should present before the meeting, the complete details of the account of the winding up of the company. He is further legally bound to present the details about how the winding up was carried out and how the company's property has been disposed of for the benefit of the members and other persons. Moreover, he has to clear all the matters and company account to the meeting.[238] It is considered that a members' voluntary winding up is more appropriate and feasible that if the members of a solvent company, make a declaration that the company can pay its debts and its members also choose that they no longer desire the company to survive and it is useful to wind up.[239]

[236] *Muhammad Saleemullah Khan v National Construction Company Pak Ltd* (1999) PLD 456 (Lah).
[237] Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 392, 393.
[238] Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 393, 394.
[239] Jennifer James, *Company Law* (4th edn, 2003-4) 265.

Shaukat Mehmood and Nadeem Mehmood both in their book on Company Law have explained provisions of the Companies Ordinance through case studies. Without conformity to the provision of section 362 of the Companies Ordinance, 1984, there may be no valid member's voluntary winding up. If a voluntary winding up is dire in so far as it does not match to the provision of section 362, 1984, then the appointment of the liquidator himself is invalid and also further the persistence of the voluntary winding up with the voluntary liquidator. Still, the particular consequence of the provision of section 362 is to separate all voluntary winding up, which re-started under section 358, into two forms, namely, creditors' voluntary winding up and members' voluntary winding up. If a certain stipulation is fulfilled namely, that a declaration of solvency has been given by the directors, the winding up succeeds for the narration "members winding up" but if this stipulation is not pleased, the winding up will be named as a creditor's winding up.[240]

The members' right to play a part in winding up earnings is delayed until and unless all the creditors have been paid, and it is frequently the case on a winding up that the company has been mishandled to such a degree that it has been disgustingly undervalued. Secondly, even where there are assets adequate to conform to company's debts and depart an excess from which the shareholders can claim, the base upon which the funds of the company are assessed on a winding up is less than reasonable. The danger in winding up a solvent company's properties on a wind up is that the funds may be sold "at break-up worth, devoid of regard to goodwill and the 'know-how' of the company, and a winding up by the court can be long and expensive.[241]

In the Matter of Auto Oils, the Hon'able Lahore High Court held that voluntary winding up under section 359 of the Companies Ordinance, 1984, of the company, is believed to have started when the special resolution to this regard was passed. The winding up proceedings were necessary to be concluded according to section 387(5) of the Ordinance, within a prescribed time frame beginning from the relevant date of the winding up of the company. In case of incapability to wind up the winding up procedure, the liquidator was under a legal compulsion to approach this Court for the

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[240]Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 670.
[241]Derek Dunne, 'The Position of the 'Quasi-Partnership: Type Private Company in Irish Law' (*JSIJ*, 2004) <www.ijsj.ie/assets/uploads/documents/pdfs/2004-Edition-01/article/the-position-of-the-quasi-partnership-type-private-company-in-irish-law.pdf> assessed 16 December 2017.

further extension of time under section 387(5) of the Companies Ordinance, 1984. The applicant was legally allowed to the award of extension in view of the aforesaid provisions of law.[242]

In Messrs Kazmia Trust case, the Hon'able Lahore High Court has observed that it has long been advanced by English Courts Judgments/ decisions that the legal right of the shareholders of a Company for the issuance of a special resolution before starting a voluntarily winding up of the company. It is an issue of the inner management of the Company, and will not even be obstructed by the Court by way of an injunction or else. The law is well-settled that a mere accusation will not be enough, corroboratory evidence is also required, the worth and character of which lies on the details and conditions of every case. It is factual that section 203 of the 1984 Ordinance places/ keeps a bar/ embargo on the Chief Executive of a public company from doing a business that is the same as or directly competitive with the business of the Company of which he is the Chief Executive. However, in this matter, the Company is a private and not a public company and even otherwise, nothing has been brought on record to ascertain that the other party's business is in competition with that of the Company. The fact that the Company is a going concern earning good profits is no reason at all for be setting a resolution under section 358 of the Companies Ordinance.[243]

The Hon'able Lahore Sindh Court has discussed the procedure of members voluntary winding up and observed that a company can be wound up voluntarily. (a) The company can be wound up on the expiration of the time limit designed for the legal life of the company by its Articles of Association at the time of incorporation of the company. The company also follows the process of winding up as a result of occurrence of special incident which resulted in to dissolution of the company as given in the Memorandum and Articles of Association. In voluntary winding up the company has to pass a special resolution in general meeting of the directors and members to wind up the company voluntarily within the stipulated time for submitting of declaration of solvency that the company is capable of paying back its debts and useful to wind up the company. (b) Moreover, the company can also be wound up on passing of the special resolution with respect to that the company may be wound up voluntarily. Therefore, a voluntary winding up is legally taken as to start when the

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[242]*Re Auto Oils Pvt Ltd* (2005) CLD 1657 (Lah).
[243]*Kazmia Trust v Kaz International Pvt Ltd* (2009) CLD 1713 (Lah).

resolution for voluntary winding up is passed by the directors and its members. (c) The company has to stop to do the business just on start of winding up of the company. Hence, the company could do on its normal day to day activities and business for advantageous and useful winding up of the company.

The Hon’able Court further held that the applicant has requested this Court through this application under section 387(5) of the Companies Ordinance, 1984, read with section 151 of the CPC for extension of time for concluding winding up proceedings of the subject company. The Liquidator under the given conditions and in the light of the report issues a notice for obtaining permission in an extraordinary general meeting of the members of the company and to determine that the time for finalization of winding up process may be extended for a further prescribed time. The mentioned extraordinary General Meeting was conducted, in which after thorough process all the members collectively decided and passed/issued the Resolution whereby the period for completion of winding up process was extended for further time as agreed.[244]

The Hon’able Indian High Court has expressed its views regarding exercise of its powers in case of member's voluntary winding. The Court shall not usually, in member's voluntary winding up use its powers as the members in such case do not decide to call the powers of the Court in aid. The members proceed their own and hold all the powers with themselves apart from the powers, which are awarded on the liquidator appointed by them. Unlike the resolution of the creditors to wind up the company, the resolution to voluntary wind up the company by the members continues on their prudence. The members are entirely aware of the fact that in the case of voluntary winding up of the company the relevant events and proceedings against a company are not stayed. The Court may, however in situation, when it is fair and useful to do so to the creditors or contributories, issue an order, if its consequence is to guard the directors of the company from individual legal responsibility or a creditor by statute or otherwise. This power contains the power to stay the voluntary winding up itself overall, when the Court is pleased that the grounds for which the voluntary winding up resolution was passed, if any revealed to the Court, no longer be present, the company is not indebted and commercially solvent and a real endeavor has been done to restore the company. The Court will, though, not act on a simple changing of view of the members/ contributories and may like to be satisfied with difference in

[244] *Re Indus Polyester Company Ltd* (2010) CLD 460 (Kar).

situation in which such resolution is passed. The power must be used carefully and only where it is just, beneficial and expedient to do so while keeping in mind the purpose of formation of the company, the resolution of the deviations, if any; the presence of the assets, in favour of the resolution to carry on with the business, and the phase at which such resolution has been issued that the liquidator has not continued to put up for sale the properties, and to pay the creditors and contributories.[245]

The Hon'able Bombay High Court held that it shows that this company had controlled several items of properties/assets like cash, shares in other companies, etc. It is prudent to wind up the affairs/ matters of that company voluntarily as members' winding up under section 484(1) (b) of the Companies Act, 1956. Consequently, actions were followed by submitting the essential report of dealings and statement of solvency and notice was issued for conducting/ arranging for passing special resolution through an extraordinary general meeting of the company.[246]

A member's voluntary winding up is exercised when it is planned to stop the company's trade in conditions where all creditors will be paid in full because the company is solvent. The members' winding up is mainly exercised where a group company is no longer requisite and this frequently attracts to United Kingdom subsidiaries of groups with their headquarters outside the United Kingdom. A member's voluntary winding up is frequently a tax motivated arrangement as certain tax benefits accumulate to the group given that member's voluntary winding up of the company.[247]

A voluntary winding up of the company may be carried out when the members of the company decide by special resolution for the winding up of the company or the members of the company through extraordinary resolution decide that it shall not pay back its liabilities and is unable to carry on its business. It is prudent and wise to wind up the company if the directors, after a detail and final investigation, consider that the company will be capable of paying its debts in complete (with interest) within given time from the beginning of the winding up, the winding up is a 'members' voluntary

[245]*Dhankari Investments Ltd A v Official Liquidator* (2006) 132 CompCas 749 (All), (2006) 6 CompLJ 519 (All).
[246]*Commissioner of Income Tax v D.M Turner* (1978) 48 CompCas 144 (Bom), (1978) 111 ITR 943 (Bom).
[247]Richard Smerdon, *Palmers Company Law Manual (*1st edn, *Sweet & Maxwell* 2000) 841.

winding up. As mentioned above declaration of solvency is required in member's voluntary winding up and if no declaration of solvency is issued the winding up turns into a creditors' voluntary winding up of the company. In this matter a creditors' meeting should be conveyed and the liquidator should attend the creditors' meeting and furnish a report on use of their powers. Therefore, the properties/ assets of the company in a voluntary winding up, is to be utilized first in disbursing/ paying the privileged debts, then in payment of its liabilities, and lastly it is to be divided among the members as per their rights, privileges and interest as provided by the articles.[248]

5.2 CREDITOR'S VOLUNTARY WINDING UP OF THE COMPANY

5.2.1 PROCEDURE OF CREDITORS VOLUNTARY WINDING UP

The procedure in a creditors' voluntary winding up is based on the presumption that the company is insolvent. The authority to appoint the liquidator is in the hands of the creditors, and there is provision for committee of inspection, if preferred, to which is generally left the fixing of the liquidator's payment. In other respects, the process is analogous to that in a members' voluntary winding up.[249]

In case the directors of the company are simply well conscious that the company is not in a position or capable of paying back its debts within a prescribed period, so we shall have to have a creditor's voluntary winding up and move as per law and procedure, summon an extraordinary general meeting. An extraordinary resolution shall be passed that the company is not capable of adjusting its liabilities and carry on its business. It is the resolution which makes the start of a voluntary winding up. In a members voluntary winding up the liquidator is appointed by the company and in case of a creditors voluntary winding up through the members, may be by ordinary resolution have chosen their selection, the creditors have powers to supersede and choose their own nominee, subject to the right of any member or creditor to appeal to the court within given time.[250]

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[248]Janet Dine & Marios Koutsias, *Company Law* (6th edn, Palgrave Macmillan 2007) 316.
[249]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 389.
[250]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 494.

The Hon'able Lahore High Court held in detail about extension in time during voluntary winding up of the company that section 368 of the Companies Ordinance, 1984, provides that if the liquidator is of the opinion at any stage of time that the company is not in a position to pay back its debts in total within a time frame provided in the declaration of solvency under section 362 the Companies Ordinance, 1984, or that time has finished devoid of the debts having been returned in total, he must immediately convene a meeting of the creditors and put in front of the meeting the report with regard to the assets and liabilities of the Company and in such a possibility, the creditors can appoint a different liquidator. This provision is scarcely pertinent to the position at subject and in any case, no such view as is relevant to this section 368 has been articulated by the present liquidator and, consequently, this provision cannot be attracted. This provision is also of no assistance as it only provides in case proceedings for winding up are not concluded during the first year and further time is extended/ allowed under section 387, of the Companies Ordinance, 1984, the liquidator shall convene the meeting of the Company within given time. Section 371 of the Companies Ordinance, 1984, only provides that where section 368 has consequence, and sections 381 and 382 of the Companies Ordinance, 1984, shall apply to the winding up, to the exclusion of sections 369 and 370 as the same was not members' voluntary winding up, however was a creditors' voluntary winding up. Assuming without deciding that section 381 applies; it does not take the case of the applicant any more as it is implied in approximately the same language as section 369, of the Companies Ordinance, 1984. Section 382 of the Companies Ordinance, 1984, just gives for the final meeting and dissolution of the Company on its matters being completely wound up and it does not talk of any extension. It is therefore obvious that none of the provisions cited upon even indirectly considered the extension of period for implementation the voluntary winding up beyond six months obviously provided in the proviso to subsection (5) of section 387 of the Companies Ordinance, 1984.[251]

There is no declaration of solvency and in its place the company is demanded to call a meeting of its creditors not later than the given time after it conducts its own meeting to decide to wind up. The meeting of creditors is called on notice and this is publicized in the Gazette. The notice shall either provide the name and address of an

[251] *Ch. Muhammad Saleem v Combined Industries Pvt Ltd* (1994) PLD 125 (Lah).

insolvency counsel from whom creditors might get relevant information in advance or shall identify a place where, in the final two business days earlier than the meeting creditors might get a list of all the creditors. No charge is to be issued for these services.[252]

If we have a creditors' voluntary winding up and which carry on as follows: - Summon an extraordinary general meeting, pass an extraordinary resolution that the company is not able to pay back its liabilities/ debts and to carry on its business. It is their resolution which initiates a voluntary winding up. In case of a member's voluntary winding up the liquidator is required to be appointed by the company. In a creditor's voluntary winding up, although the members might be through an ordinary resolution have nominated their representative, the creditors have authority to supersede and assign their personal candidate, subject to the legal right to appeal to the court of any member or creditor.[253]

Where a company recommends winding up voluntarily and the directors are not in a place to issue the statutory declaration of solvency, the company shall call upon a meeting of its creditors not afterward given period after the members meeting at which the required resolution for voluntary winding up of the company shall be placed for the approval of the members of the company. Notices of this meeting are to be transmitted and delivered by post to creditors of the company well before the day of the creditors meeting.[254]

Creditor's voluntary winding up is an insolvency procedure: it is generally concerned in relation to insolvent companies and not solvent companies. The participation of the court is in no way required for commencement or substantiating the utilization of this process. The creditor's voluntary winding up is started at the time when the members of a company resolved and approved a resolution for voluntary winding up of the company instead of a statutory declaration of solvency by the directors of the company. The company's unsecured creditors have the legal right to appoint a qualified insolvency counsel to act as liquidator of the company.[255]

A creditor's voluntary winding up should be prompted by the company's directors as soon as they turn into conscious that (i) the company is insolvent, and (ii) they arrived

[252]Chris Shepherd, *Company Law* (8th edn, HLT Publications 1996) 307.
[253]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 494.
[254]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 483.
[255]Mayson S. W, French. D & Ryan C. L, *Company Law* (14th edn, Blackstone Press 1997) 659.

to the decision that there is no rational view of the company evading insolvent winding up. It is significant that the directors do not permit the company to trade further than the position when they believed that there is no rational view of keeping away from insolvent winding up, for if they do, they will be susceptible to a claim by the liquidator for illegal trading.[256]

When the applicants' debt is certain but majority of creditors submitted for a voluntary winding up of the company. In this case the order between the petitioning creditor and the company is ex debito justitiae, and the extension of the hearing was approved on the requirements of creditors, not on the petition of the company or of contributories.[257]

Simon Goulding in his book on Company Law has also discussed the procedure of creditors' winding up and members' winding up with respect to both types of voluntary winding up of the company. The company is legally required to call a meeting of its creditors for the resolution of voluntary winding up. The notice in this regard be given for the time according to which meeting is to be conducted. Moreover, the role and responsibility of the liquidator is a alike in a creditors' winding up as he is under a members' winding up in connection of summoning a general meeting of the company at the time when the all the company's matters are fully wound up. However, in creditors' winding up the liquidator is also responsible to call a meeting of the creditors in order to placing the account of the company before it.[258]

As discussed earlier a meeting of creditors of the company shall be summoned in case of a creditors' voluntary winding up, and a list containing the debts of the company shall also be filed/ placed before the members in that meeting. It is important to mention here that a creditors' voluntary winding up is managed through a liquidation committee consisting/ comprising of representatives both from the members and creditors of the company. Therefore, this is the economical and beneficial method for a winding up of an insolvent company through a voluntary winding up.[259]

The certain creditors had taken a winding up application against the company, which was disallowed with costs. They afterward convinced a shareholder to file an

[256]Richard Smerdon, *Palmers Company Law Manual (*1st edn, *Sweet & Maxwell* 2000) 839.
[257]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, *Carswell* 1920) 712.
[258]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 393, 394.
[259]Jennifer James, *Company Law* (4th edn, 2003-4) 265.

application for the reason of frustrating the company. The Hon'able Court held that, the application is malafide and bad.[260]

The debenture holders were doing on the business in the name of the company, but no receiver/ manager had been appointed. There was no evidence that there would be everything for the other creditors. The Hon'able Court held that still if there is not anything economic prospects for the usual creditors of the company, so in the light of present circumstances and facts of the matter it is most appropriate and just and equitable that the company is legally required to be wound up, for they are getting credit from persons whose rights might be consumed up at any time by the debenture holders.[261]

Alfred Totiiam, in book on Principles of Company Law stated that a creditor has a legal right to initiate a process for a winding up of the company by the court despite the fact that a voluntary winding up started on the stance of the members of the company. But the court will not issue the order except it believes that the creditor's rights are biased by the voluntary winding up, or except the general body of creditors calls in a winding up by the court. The court will not decide upon the application of a contributory to issue an order for compulsory winding up after a voluntary winding up has started, until and unless: (1) the voluntary winding up is fraudulent; or (2) there is state of affairs of suspicion; or (3) a searching investigation is needed. But the court has discretion and power to issue the order at any time if the contributory would be unfairly dealt with a voluntary winding up.[262]

The Hon'able Andhra Pradesh High Court held that in the matter of voluntary winding up of the company the companies Act has no such provision for not including any period in the matter/ case of voluntary winding up of the company. On the other hand, Section 458 A of the Companies Act, 1956, provides a sign that in the case of voluntary winding up, no time could be excluded. No amount more than three years of the petition could be received by the voluntary winding up. Any application or suit for that amount must to have been submitted inside three years thereof. As the instant application was submitted after given time, it was held to be barred by time.[263]

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[260]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 215.
[261]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 221.
[262]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 233.
[263]*Voluntary Liquidator Linsen v Aknar Dawood Ali Kassam Nathoo* (1982) 52 CompCas 503 (AP).

The Hon'able Bombay High Court held that the sense to be specified to the words used in section 512(1)(b) of the Companies Act, 1956, shall be the same when a company is being wound up in a members' voluntary winding up as in the matter when a company is being wound up in a creditors' voluntary winding up. It appears reasonably obvious that as far as a creditors' voluntary winding up is relevant no permission of the court is necessary for the use of the powers given to in section 512(1) (b) of the Companies Act, 1956. The same meaning must be provided to the same words when they are concerned with a members' voluntary winding up. The plain reading of the provisions of section 512 of the Companies Act, 1956, reveals that it is not an essential requirement for the liquidators in a voluntary winding up to approach the court to get the approval for the sale/ disposal of the assets/ properties of the company.[264]

J. M. Gullick in his book on Company Law has provided that if no statutory declaration is issued and filed, the liquidation should be conducted as a creditor's voluntary winding up, but not if the company has rational prospects of paying and or does really pay its debts in complete within given time. The supposition which highlights the process of a creditor's voluntary winding up is that the outstanding resources will all be subjected to the payment of debts and so the creditors must have supreme control on each point of the winding up. But the liquidator has a responsibility to contributories as well as to creditors to fulfill his job in an appropriate way. It is considered that at the time of general meeting of the company which has conducted first three matters of the company, a resolution for winding up, generally an extraordinary resolution referring to the company's failure to pay its debts and the nomination of a liquidator and it is the requirement of the law that there will be not more than five persons to be members of a liquidation committee constituted for the a winding up of the company. The decision whether to have such a committee is adopted by the creditors.[265]

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[264] *Re Whittle Anderson Ltd v Unknown* (1957) 59 BOMLR 1016 (Bom), (1958) 28 CompCas 150 (Bom).

[265] J. M. Gullick, *Company Law* (13th edn, Butterworths 1987) 299.

5.2.2 WINDING UP OF THE COMPANY SUBJECT TO THE SUPERVISION OF THE COURT

Janet Dine, in his book on Company Law has narrated that a company may be wound up voluntarily when the members resolve by special resolution to wind it up or if it resolves by extraordinary resolution that it is not feasible for the company to pay back its liabilities towards its creditors with regard to its business and that it is prudent to wind it up. If the directors, after a complete investigation, consider that the company is presently in such a position that it is competent to pay its debts/ liabilities in full within a prescribed time from the beginning of the winding up; the winding up is a members voluntary winding up. If no declaration of solvency is given the winding up turns into a creditor's voluntary winding up. In this case a creditors meeting should be convened/ summoned and the liquidator should attend the creditors meeting and provide a report on any use of his powers. Therefore, In a voluntary winding up, first the assets/ property of the company is to be attached/ allocated in paying back the privileged debts of the company, then in fulfillment of its liabilities, and lastly it is to be divided/ distributed among the members of the company as per their shares, rights and interests as provided by the articles of the company.[266]

5.2.3 MEETINGS OF CREDITORS IN MEMBERS' VOLUNTARY WINDING UP

In a creditors' voluntary winding up where the company is required and supposed to be capable enough of paying back all its debts to the creditors of the company within a time frame provided in the statutory declaration of solvency there is not anything in the Act or the Rules to necessitate to allow a meeting of the creditors of the company to be called by the liquidator. Should he believe it prudent, he should most likely submit the substance to the members and obtain their power to call such a meeting and charge the expenses of doing so to the assets.[267] In a creditors' voluntary winding up, the necessary approval is sought for clearance of the books and papers of the company and of the liquidator, through a resolution of the committee of inspection of the company or, in general meeting if there is none of a resolution of the creditors of

[266]Janet Dine & Marios Koutsias, *Company Law* (6th edn, Palgrave Macmillan 2007) 316.
[267]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 387.

the company.[268] One or more liquidators of the company are to be appointed or nominated in general meeting, and by ordinary resolution, for the reason of winding up the company and allocating its property/ assets as per shares of the creditors and members of the company, and in the meeting may resolve to allow the remuneration to be paid to him or them from the assets of the company.[269]

Chris Shepherd, in his book on Company Law has stated that any voluntary winding up of the company is a creditors' voluntary winding up except the directors of the company have made to the registrar a declaration of solvency. It is not a question of whether the company is solvent, which might be unsure when it goes into winding up. It ought to be unspecified to be insolvent until and unless the directors recognize personal liability for affirming that they deem it is solvent. If there is no declaration of solvency, as an alternative the company is necessary to call a meeting of its creditor. The notice should moreover, provide particularly the name and address of an insolvency practitioner from whom creditors may get information in advance[270]

L.B.C. Gower, D.D. Prentice and B.G. Pettet, in their book on Company Law also explained the matter of voluntary winding up and provided that the essential difference between members' and creditors' winding up is that the former is possible only when the company is solvent, on which occasion the company members appoint the liquidators, where it is not, its creditors have a thrash hand in choosing who the liquidator shall be appointed. In all three cases, and not only, in the course of particularly, if the company is insolvent, the winding up procedure is not exclusively directed towards realizing the assets and dividing the net proceeds to the creditors and, if anything is left, to the members, according to their given priorities; it also enables an examination of the behavior of the company's management to be undertaken. And this may result in civil and criminal proceedings being taken against those who have occupied in any misconduct thus exposed and in the modification or evasion of various dealings.[271]

Therefore, it is explained that any voluntary winding up of the company is a creditor's voluntary winding up until and unless the directors have issued and transmitted to the

[268]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 391.
[269]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 481, 483.
[270]Chris Shepherd, *Company Law* (8th edn, HLT Publications 1996) 306.
[271]Gower L.B.C Prentice D.D and Pettet B.G, *Gower's Principles of Modern Company Law* (5th edn, Sweet & Maxwell Ltd 1997) 762.

registrar a declaration of solvency. It is not a question of whether the company is solvent, which might be unsure when it goes into winding up. It shall be understood to be insolvent until and unless the directors believe individual liability for explaining that they consider it is solvent.[272]

[272]Chris Shepherd, *Company Law* (8th edn, HLT Publications 1996) 306.

PART III

CHAPTER 6

COMMON PROCESS INCIDENTAL TO BOTH VOLUNTARY WINDING UP AND COMPULSORY WINDING UP

In this chapter discussion will be made regarding the important elements/ aspects which have also key role during the winding up proceedings of the company. These elements are the rights, responsibilities and liabilities of the creditors, contributories, shareholders, employees and directors of the company. Further some other significant areas such as statement of affairs of the company, distribution of company assets/ payments, pari passu and unity/ plurality principles. Furthermore, discussion will also be made in the light of the law regarding winding of the company and the decisions of Hon'able Courts from different Jurisdictions of Law and the literature/ material researched in this area.

6.1 CREDITORS

Creditor is an individual, person, institution or body that provides credit/ loan which is intended to be repaid/ returned in future. Creditors can be divided into two forms, personal or real.[273] The real creditors are banks, investment and finance companies. These may be divided/ classified into secured, unsecured, preferential, senior and junior creditors of the company.[274]

As we know that Companies Ordinance is a complete set of laws to conduct the proceedings of winding up. Section 405 of the Companies Ordinance, 1984, identifies that claims which are to be paid to the creditors in precedence and priority to all other debts against the company. During the winding up process the secured creditor has a legal right to take his security to recover its debts and he will be allowed to establish the debt to the level of the balance remained after fulfillment from the securities. The second class of secured creditor is that who surrenders his security for the advantage

[273]Definition of Creditor (Investopedia) <www.investopedia.com/terms/c/creditor.asp> assessed 19 October 2017.
[274]Definition of Creditor (Business Dictionary) <www.businessdictionary.com/definition/creditor.html> assessed 19 October 2017.

of the creditors and, consequently, he is permitted to establish his entire debt. No ' credit/ benefit is provided for the security, he keeps. In third class, falls such a creditor who has neither realized nor given up his security. He keeps the security intact for satisfaction of his debt. Earlier than the debt of such a creditor is entering the schedule he will be asked to state the details of his security and the price at which he evaluates it. If a secured creditor has not given up his security and afforded adjustment of the security. He can submit claim with regard to such remaining amount of debt which is unpaid after realization of the security. [275]

The burden is on the secured creditors to demonstrate/ prove that the unsecured creditors will obtain no advantage from the winding up. The mind/ focus of the Court may to make/ issue the order, if the winding up will be helpful to unsecured creditors.[276] Law is reasonably well established that a person maintaining to be a secured creditor cannot be forced to establish his debt in winding up. He can remain outside the winding up process and rely upon a security and when such a person requests for permission to sue, the prayer must generally be allowed, until and unless there are particular basis to maintain the different mode.[277] In the following paragraphs the decisions of the Hon'able courts have been discussed in detail regarding rights of different categories of creditors in the process of sale/ disposal of assets during the winding up proceedings.

The Hon'able Lahore High Court held that the assets of the company were disposed of by the Liquidators rather than by Court auctioneers in the execution process. The intention of the concerned bank to realise its security better than relieving it, is evident from its actions. It is evidently clear that there is not anything on the evidence/ record to express the bank at any time, whether specifically or impliedly, given up its security. The truth that it was the liquidators who realized the sale of the property in place of an executing Court, therefore, in the present state of affairs of this matter, has no good cause on the rights of the applicant bank as a secured creditor of the Company. The different unsecured creditors as well as the Government departments claiming special dealing under section 405 of the Companies Ordinance, do not have any legal right to obtain payments from the sale proceeds of the assets forming part of

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[275] *United Bank Limited v PICIC* (1992) SCMR 1731 (SC).
[276] W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 374.
[277] *Re Shaafi Woollen Industries Ltd Lahore* (1993) PLD 691 (Lah).

the bank's security, because the bank has the first claim to the same and the said proceeds are not enough to meet/ satisfy the decree acquired by the bank against the company.[278]

In another case the Hon'able Sindh High Court was pleased to hold about the realization of assets by the creditors during winding up process. On a careful examination of the winding up rules the following position surfaces/ emerges with regard to the rights of a secured creditor in relation to winding up process. (1) The creditor may realize his security and subsequently take away the net amount so realized and might establish for the remaining in the winding up process. The creditor might give up his security to liquidator for the common advantage of creditor and then prove for his whole debts. If the creditor neither gives his security nor realizes the same he shall before positioning for dividend, present his evidence before the liquidator the details of his security against his debts. Where the creditor has got priced/ evaluated the security, the liquidator might get back the property at any time on payment of the evaluated price to the creditor. If the Official Liquidator is dissatisfied with the price evaluated by the creditor, he might want the mortgaged property to be placed/ presented for sale at such time and according to the terms and conditions which are required to be agreed/ consented upon between the liquidator and the creditor. In the occasion of a difference between the creditor and the Official liquidator with respect to terms and conditions of such sale, the property might be sold by the Court.

Further, if the sale of mortgaged property is by public auction, the creditor or the Liquidator on behalf of the company might offer or buy the property. The creditor may although, at any time by notice in writing require the Official Liquidator to choose whether he will or will not apply his power of getting back the security or asking/ requiring it to be realized, and if the Official Liquidator does not prescribe time limit of receiving the notice/ summon, suggest in writing to the creditor his choice to apply it, he must not be capable of implementing the same subsequently, and the equity of redemption or any other concern in the assets included in the security which is vested in the Official Liquidator shall lie in the creditor and the total amount of his debt shall be reduced by the amount at which the security has been assessed. Anyhow, if the creditor has assessed his security he might at any time

[278] *Orix Leasing Pakistan Ltd v Sunshine Cloth Ltd* (2001) PTD 3146 (Lah).

modify the evaluation and evidence on showing to the satisfaction of Official Liquidator or Court; that the evaluation and evidence were based on a bona fide error or that the price of the security has since improved or reduced since its last evaluation; but each and every such modification must be done at the cost of creditor and upon such conditions as the Court must order until and unless the Liquidator permits it, keeping view the status of any petition to Court.

Furthermore, where evaluation of the security has been changed as explained above the creditor must immediately make reimbursement of any excess dividend got in surplus of that which he should have got on the amended evaluation. Likewise, he must be allowed to be paid out of the money for the time being kept for bonus, any bonus or share of dividend which he has been unsuccessful to obtain by cause of incorrectness of the basic evaluation, before that money is used for payment of any future dividend. But this right of the creditor to receive dividend shall not disturb the division of any bonus confirmed before the date of such amendment in the evaluation of assets. Where the creditor subsequently has got valued his security, consequently realizes that the net amount realized shall be substituted for the sum of any evaluation earlier done by the creditor and shall be treated in all forms/ respects as modified evaluation done by the creditor. If the secured creditor does not fulfill the preceding rules, he must be debarred from all shares in any bonus. No creditor must be paid in any case more than 16 annas in the rupee and the interest as admissible.

The Court must, either upon the petition by any person stating to be a mortgagee of any element of the company's real or lease hold assets, whether such mortgage is by a deed or otherwise; and whether the same is of a legal or just nature, or upon the petition of Liquidator with the permission of such person continue to ask whether such person is such mortgagee and for what concern and under what state of affairs and if it is found that such person is such mortgagee, and if no adequate assertion emerges to the title of such person to the same stated by him under such mortgage, the Court must express such accounts and inquiries to be admitted as might be essential for determining the foremost, concern and costs due upon such mortgage, and of the profits, rents, interest, dividends and other proceeds acknowledged by such person or by any other person by his order or for his use in case he is in control of the property, over which the mortgage extends or any part thereof, and the Court if pleased that there must to be a sale, shall express notice to be sent in such newspapers as the Court believes fit, where and when and in what way and by whom, the said premises or assets, or the concern therein so mortgaged, are to be disposed of, and that such sale be done and the Official Liquidator must have to complete such sale.[279]

6.2 CONTRIBUTORIES

A contributory is every present and past member of the company who is liable to contribute at the time of winding up company, with certain exceptions to safeguard the rule of limited liability. Further, they are likely to be shareholders who have not paid for their shares in full and members of unlimited companies.[280] Moreover any person alleged to be a contributory of the company. The liability which is liable to be contributed shall be considered/ deemed assets of the company and to be a debt due to the company by a contributory.[281]

The term “contributory” has been defined in section 300 of the companies Ordinance, 1984, means every person related to company who is liable to contribute in the process of winding up of a company to make a payment as per his share to assets of the company.[282] It is important to mention here that the words “liable to contribute to the assets of a company” in the process of winding up are very broad, and might have been held to embrace a simple nonpayer to the company, but the company has long since been established, and it is obvious, glancing to the entire Companies Act, that it refers only to members and past members responsible to make a payment. A simple debtor of a company is not a “contributory” of the company. A person who is holder of fully paid up shares of a company is a “contributory.” But since he is not responsible for contributing something, he will not be put on the list of contributories until and unless by his own wish. The term “contributory” as defined contains any person supposed to be a contributory, and is not limited to a person whose liability as a contributory has been acknowledged.[283] In the following paragraphs research/ discussion has been made with regard to creditors of the company and their relationship with other persons during winding up proceedings.

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[279] *National Insurance Corporation v Saifee Development Corporation Ltd* (1988) CLC 956 (Kar).
[280] Company <https://uk.practicallaw.thomsonreuters.com/9-201-9480?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> assessed 20 October 2017.
[281] Company <http://nslegislature.ca/legc/statutes/companwu.htm> assessed 22 October 2017.
[282] Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 505.
[283] Kaikhosru J. Rustomji, *Company Law* (2nd edn, Butter Worth 1934) 372.

On the occasion of the Company's winding up a person whose name is on the register of members, shall be taken as a contributory, yet although he is allowed to the shares only as a trustee. Certainly each and every shareholder of the Company is mainly responsible for making a payment, subject to proviso connecting to sum which he may be called upon to disburse being a possessor of entirely paid up share as a contributory.[284]

The Hon'able Delhi High Court also held that the term "contributory' by simple words means each and every person who is held responsible and contributes his share to the assets of a company at the time of winding up of a company, and also includes a person who is holder of fully paid up shares of a company. Any person who is to be assumed a contributory of a company for the reasons of all proceedings for establishing and final resolution by the persons related to a company who are to be believed contributories. This definition particularly embraces the owner of any shares which are entirely paid up. The consequence is that under the definition of the term "contributory" not only those persons, who are responsible for giving their shares to the assets of a company while the company is being wound up, but also the persons possessing entirely paid up shares, shall fall in the category. The petitioner keeps entirely paid up shares, just for the reason that the official liquidator has not revealed/ taken him as a contributory in the list of contributories arranged by him, does not signify that he finishes to be a contributor. Section 556 of Companies Act, 1956, provides a legal right to any creditor or contributory of the company to seek definite relief from the Court.[285]

J. M. Gullick in his book on Company Law has discussed the role of contributory in process of winding up. So the present and past members of the company at the start/ beginning of winding up process, in addition the special legal representative of deceased members of a company and the trustee in bankruptcy of a bankrupt member are supposedly responsible for giving to the company's assets, and treated as contributors, still if they have no real responsibility. A member is responsible to add his share in the winding up process if the company is limited or unlimited by guarantee or if he keeps partially paid shares or shares which have been issued for an insufficient consideration in a normal case, although a member keeps entirely paid

[284]*Arshad Tanveer v Sindh Industrial Trading Estates Ltd* (1997) CLC 456 (Kar).
[285]*Gulzar Lal Bhargava v the Official Liquidator* (1972) 45 CompCas 419 (Delh), (1972) ILR 401(Delh).

shares of a limited company and is a contributory with no definite responsibility to add. Those who are at the beginning of winding up remained members of the company are on the list contributories since they have main liability. Those persons who are no longer members but have been earlier are B list contributories. For them liability happens/ occurs only if the A list contributory who at the present keeps their shares, is responsible for making a payment but he cannot pay and they were to be members within the year before winding up started. Their liability is limited also to contributing to pay debts of the company acquired while they were members and yet unpaid.[286]

The Hon'able Sindh High Court has observed that section 439 of the Indian Companies Act, 1956, is similar and identical to section 309 of Companies Ordinance, 1984. A petition by a contributory shall be given a close analysis than a winding up petition filed by a creditor, etc. Although under the English law a winding up would be declined where a contributory had no substantial concern in the winding up of a company because of its liabilities more than its assets has no relevance under the Indian Act, yet the Courts in India may decline a winding up order in such conditions on "just and equitable ground". The Courts must, consequently, order winding up in such cases where it would be logically needed to be done so.[287]

Presenting a winding up petition against a solvent fund can be a high risk strategy. Winding up petitions should not be used to put pressure on a fund and, if a winding up petition is used for this purpose, it is liable to be dismissed as it will be treated as an abuse of process with the direction that the shareholder is liable to meet the legal costs of the fund. A shareholder in a fund needs to ensure that it does not has a more practical and beneficial alternative remedy available before presenting a winding up petition before the court for the benefits of the entire bona-fide beneficiaries on the just and equitable ground for the useful winding up.[288]

In State Life Insurance Corporation of Pakistan case, the Hon'able Sindh High Court observed that order of priorities as set down in section 405 of the Companies Ordinance, 1984, would only pertain to cases where the amount is realized in a

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[286]J. M. Gullick, *Company Law* (13th edn, Butterworths 1987) 306-7.
[287]*Arshad Tanveer v Sindh Industrial Trading Estates Ltd* (1997) CLC 456 (Kar).
[288]Colette Wilkins, Ingrid Pierce, Matthew Goucke and Rupert Bell, 'Winding up Solvent Funds Loss of Substratum' (Mondaq 14 December 2010) <http://www.mondaq.com/article. asp?articleid= articleid> assessed 11 December 2017.

consequence of winding up of the company. However, where the assets/ properties of a company are sold in a mortgage suit or against a money claim then priorities are done in accordance with Order XXXIV, rule 13, CPC section 73, CPC and section 57 of the Transfer of Property Act, as the case may be. Admittedly in the present/ instant case, the property of the judgment-debtor was sold in a mortgage suit submitted by the State Life Insurance Corporation and not as a consequence of winding up proceedings. Thus, the preference as claimed by the employees union under section 405 of the Company Ordinance, 1984, would not be applicable in the instant case. Sequential order of priority among various claimants in a nutshell could be given as set down (a) all expenses incidental to the sale and preservation of mortgage property, (b) payment of all interest due on account of the mortgage and of the cost of the suit in which the decree directing the sale was completed (c) principal due on account of the mortgage in result whereof the sale was directed (d) interest on following mortgage (e) principal amount due on succeeding mortgage or encumbrance according to respective interests therein in sequence of priority of mortgage or encumbrances. (f) Residue, if any, amongst holder of money decree followed by (g) unsecured creditors and left over, if any to the (h) judgment debtor.[289]

If the company had undergone a loss and subsequently went into winding up and this may be the reason for non-payment of contribution. As a result, added liability of increase on unpaid contribution may not be forced and it was to be constrained to the original amount as provided by the Official Liquidators.[290] A possessor of completely paid shares may be positioned on the list of contributories on the petition of the liquidator or on his own application.[291]

When a supposed contributory emphasizes that some other person is responsible and instead he should file petition against the proper person before the court. A person who is merely a debtor to the company is not a contributory, still in logic he may be liable to contribute to the assets, and when shares are in custody by A in trust for B the latter is not a contributory. But it is or else where he is also constructively interested and an equitable mortgagee of shares is not a contributory.[292] A contributory is not permitted to set up all defenses against the liquidator which he

[289] *State Life Insurance Corporation of Pakistan v Hussain Mumtaz* (2006) CLC 415 (Kar).
[290] *NWFP Employees Social Security Institutions v Industrial Development Bank of Pakistan* (2002) CLD 1006 SCMR 1777 (SC).
[291] CA Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 780, 782.
[292] CA Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 782, 784.

must have been permitted to set up against the company in an act for calls. The liquidator stands for the creditors as well as the company, and the rights of the creditors shall be regarded.[293]

In the winding up petition, in spite of dues being acknowledged by the Company, there was nonpayment on the part of the Company which had been stated in the application. The petition instituted by a 'contributory' was maintainable in the eye of law, it was no more relevant and necessary for court in the winding up process to consider the fact whether the company's petition duly filed by the company was maintainable in the capacity as a creditor.[294]

The Hon'able Kerala High Court held that the definition of, "contributory" in Section 428 of the Companies Act, 1956, so as to include as holder of fully paid-up shares and the express provision in Sub-section (3) of Section 439 of the Companies Act, 1956, to the consequence that a contributory, despite the fact that he may be holder of fully paid up shares of a company shall be allowed to file a petition for winding up. Neither provision gets place in the English Act or in the Companies Act of 1913, put it beyond uncertainty that owners of entirely paid up shares like the applicants are allowed to bring a winding up application yet when they claim, as the applicants do, that the company is insolvent.[295]

The Hon'able Indian Court held that the consequence of the process of keeping of the name of a person in the list of contributories through settlement of the list of contributories of a company, except the order is set aside on appeal, to make the matter of liability final and decisive. The substance is res judicata. The responsibility of a member to be incorporated/ included in the list of contributories which is finalized through the process is *ex-legis and not ex-contractu*. Thus if he fails to point out in time, he will be liable as contributor and estopped from rejecting the same. In deciding the list of contributories the Court is not bound by the register of shareholders, and has power to correct the register, and might go into all questions of law and fact in order to decide the question as to who is the real owner of the shares. The power to correct the register is not restricted to the time when the Court is resolving the list of contributories. The company court has inherent powers, may

[293]W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 374.
[294]*Severn Trent Water Purification v Chloro Controls India* (2008) CA 1351 (SC).
[295]*VSVS Krishna Iyer Sons v New Era Manufacturing Co Ltd* (1965) AIR 241 (Ker).

before the pronouncement of order of the dissolution of the Company, modify/ amend the list of contributories at any time, and, if essential, for that reason, correct the register. There is nothing in the Companies Act which stops the Court even after the list of contributories is settled to resettle it. The Court is capable of changing the list at any time at any time it discovers it just and fair that it must be so changed.[296]

On the single reason, still despite whether the company having cured the same, the applicant is allowed for requested relief that the register of members of the company, if one exists, should be corrected so as to demonstrate that the applicant did not subscribe for certain paid up equity shares, but that he was allotted only a small number of paid up shares. The official liquidator was asked not to put the applicant on the list of contributories.[297]

When a person signs a stock subscription book, having an agreement to obtain stock, and asking for the shares to be allotted, he will not be responsible to be positioned on the list of contributories, if no allocation has been done. After the issuance of the winding up order a shareholder cannot evade his responsibility as a contributory by setting up faults or illegalities in the organization/ company which can simply be taken upon direct proceedings of winding up by the concerned department. The liquidator is not allowed to get benefit of any abnormalities in the proceedings earlier to forfeiture. The common rule is that where a person has moved his shares and the transferee has been registered as the holder thereof; the transferor is no longer to be regarded/ taken as a shareholder and cannot be taken a contributory.[298]

When a winding up order is given, it turned into the responsibility of the liquidator subject to the power/ discretion of the court as an officer of the Court, to resolve a list of contributories, with power and with permission of the Court to correct the Register of members where necessitated by the Act, and to assemble the assets and properties of the company and use them in fulfillment of its liabilities. The Court has authority to give out with the completion of the list where it is not essential to issue calls or correct and amend legal rights of the contributories. Moreover, it is an important fact that the list shall differentiate in clear terms between those persons who are considered contributories of a company in their personal right and those persons who

[296] *Indian Commerce & Industries v Free Press Journals Ltd* (1960) 1 MLJ 146.
[297] *Manabendra Shah v Official Liquidator Indian* (1975) ILR 594 (Delh).
[298] CA Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 785, 786, 791, 798.

stand for or are held responsible for the liabilities against a company for the debts of others.[299]

As per section 318 of the Companies Ordinance, 1984, it is considered that once an order for winding up of a company is issued the same has to operate/ function in favour of all the contributories and all the creditors of the company as if issued on the joint application of a creditor of a company, thus, the winding up application when made shall be believed to have been submitted not just by the original principal applicant but the other creditors also.[300]

The Hon'able High Indian Court has held that an order made devoid of authority is a nullity and so one of the checks of an order is having no authority is to get/ take as, if it can be taken as not having a binding effect. Can the order of a winding up court declining permission, completely be taken as a nullity? Can it be unnoticed after a realistic time such as may be deemed enough to permit the winding up court to choose what steps/actions might be followed which pertain to the claim of the secured creditor? If a winding up court has no authority to decline permission without indicating a rational time that order must be finished having binding consequence after a realistic time. It appears that there is a disagreement in conditions in the proposal that a court has no authority to decline permission for all time but can decline permission for such period of time as it believes rational.[301]

The Hon'able Bombay High Court held that the phase for surrendering security happens when a secured creditor requests to prove his entire debt in the line of winding up. If, he chooses to establish in the line for winding up the entire debt owing to him, he has to essentially forego his security in order to benefit and advantage of the common body creditors. Consequently, it might be entirely unsuitable and inappropriate to necessitate the secured creditor at the phase when he submits company's application for winding up to use the choice of surrendering his security since that phase does not happen until and unless the debt is to be proved.[302]

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[299]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 404.
[300]*Agha Bashir Ahmad v Nippon Bobins Pvt Ltd* (1997) CLC1205 (Lah).
[301]*Hansraj v Official Liquidators Dehra Dun* (1929) AIR 353 (All).
[302]*Canfin Homes Ltd v Lloyds Steel Industries Ltd* (2001) 4 BomCR 84 (Bom), (2001) 106 CompCas 52 (Bom).

A creditor does not end to be a creditor if he gets a decree in his support against the company. Clause (a) happens to be relevant when a creditor has held against the company, an order necessitating it to pay the sum payable and the company has ignored to pay the same. If the creditor has a decree of a court in his support and the execution came back unfulfilled in entire or in part, the company shall be believed to be incapable of paying its debt, does not indicate that the effect is negated in the case of a decree-holder creditor. The company concerned is incapable of paying its debts. Action can be taken against any of them.[303]

The Hon'able Supreme Court of India held that the applicant being a secured creditor to a very small extent regarding as the entire amount of the company's business, for which he had previously opted to suitable remedy for recovery and also in light of the established provisions of law that he being secured creditor, yet in the case of a winding up order of the company being passed, can stay outside winding up and receive back his debt by realizing securities, yet without going to the court is unchanged by this winding up application going either way and other creditors having revealed their concern on the showing the applicant himself in keeping the corporate personality of the company by vigorously thinking ways and means to bail out the company from its current mess, continuing the application awaiting is to the advantage of nobody but that it may be utilized as a Damocles' sword for continuing the company on tenterhooks in its day-to-day functions.[304]

The Hon'able Karnataka High Court was pleased to permit the Karnataka State Financial Corporation, to forego its lien and put up the company assets for sale, the same which are earlier in its custody as a secured creditor of the company in winding up process.[305] The Hon'able Delhi has observed that there is no divergence in between the provisions of section 446 of the Indian Companies Act, 1956 and provisions of the Debt Recovery Act and that each case has to be considered on its facts and merits and the company court shall have the complete power and authority to consider the best concern of the creditors, both secured and unsecured, as also the workman who has been taken at par with the secured creditors and other present state of affairs, and then

[303]*Madhuban Pvt Ltd v Narain Dass Gokal Chand* (1971) 7 DLT 371 (Deh).
[304]*Re Pradeshiya Industrial and Investment Corporation* (1994) 79 CompCas 835 (UP).
[305]*International Coach Builders v Karnataka State Financial* (1993) 76 CompCas 119 (Kar), (1992) ILR 2207 (Kar).

make essential orders under the provisions of section 446 of the Indian Companies Act, 1956.[306]

The assets and property of the company were under the charge of the State Financial Corporation. The financial corporation shall keep the sale proceeds ready for the claims of the workmen and other secured creditors until and unless the order in this behalf by the court.[307]

The Hon'able Kerala High Court held that the right of the corporation to walk in and take over all the assets and property is available/ accessible to a company and the industrial concern is in physically in charge and also manage its assets/ property. The same not when the industrial concern or a company has lost control over its assets/ property in consequence to another person through the due process of law or otherwise. The provisions of section 529-A Companies Act, 1956 having ultimate powers, even if this was reason of some loss to the secured creditor by a little delay in sale of properties and assets by the official liquidator.[308] The Hon'able Supreme Court of India observed that the Legislature has modified the Indian Companies Act in 1985, keeping in view the a social reason to safe guard the rights and financial dues of the workmen of a company and industrial concern. Therefore, if circumstances in the corporate sector are not forced to be modified in order to safeguard the rights of the workmen there is likelihood and every opportunity that secured creditor of the company may worsen the pari passu right of the workmen in the assets/ properties of a company in the near future.[309]

Now, by operation of law, a statutory security has been produced in support of the workmen of the company under winding up and all the secured creditors as well as the workmen rank pari passu with regard of their dues and the securities. Thus, the official liquidator on behalf of the workmen is allowed to realize the said securities by process of law and guard the concern of the workmen. It is the need of the time to provide a harmonious interpretation to the various provisions of the two legislations.[310]

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[306]*Mayur Syntex Ltd v Punjab & Sind Bank (1997)* IVAD (Delh) 821, (1999) 96 CompCas 974 (Delh).
[307]*Andhra Pradesh State Financial v Electrothermic P Ltd* (1996) 86 CompCas 402 (AP).
[308]*Karnataka State Financial v Patil Dyes Chemicals P Ltd* (1991) 70 CompCas 86 (Kar).
[309]*AP State Financial Corporation v Official Liquidator* (2000) AIR 2642 (SC), (2000) 102 CompCas 1(SC).
[310]*Indian Textiles v Gujarat State Financial* (1994) 81 CompCas 599 (Bom).

It is open for State Bank of India to go on to sell the protected assets as publicize by it, after fulfilling with and providing undertaking to the Official Liquidator as mentioned by Section 529 and 529 A of the Indian Companies Act, 1956. It is made clear that State Bank of India is not permitted to sell the movable given by it in the advertisement or otherwise under Securitization Act as the same is in custody of Official Liquidator.[311] If the contention advanced in favour of the official liquidator is acknowledged it means that the protest to each and every step in execution of a decree has to be determined only by the High Court under Section 456 of the Banking Companies Act.[312]

Section 456 of the Indian Companies Act 1956, does not entirely supersede the residual and the jurisdictional control of this winding up Court under the Companies Act, not only as the Court in legal custody of all the property, effects and processes of administration for winding up but also as being the Court in on the whole and superseding administrative power to employ that the winding up of the company is appropriately managed and that the control, protection, power and the management of the property and assets of the company are accurately and efficiently carried out. This construction which will protect the absolute right of entry of liquidator to this Court, still in the case where the liquidator faces any trouble for getting possession due to closed doors.[313]

The Hon'able Court held that although this Court does not aim to lay down a law to the consequence that the court does not have a plenary authority as the said query does not happen for our deliberation or supposing that the court has a plenary authority having regard to the rule of exclusivity as imagined by the Hon'able Apex Court the method and way laid down for revitalization of the debts owing to Banking or Financial Institutions shall, not only sternly, be remained to having regard to the provisions contained in the Income Tax Act which has been incorporated by reference of the Companies Act.[314]

The Hon'able Indian Gujarat High Court held that the liquidator is consequently asked to hand over the control of the entire assets/ properties immovable as well as

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[311] *Akola Oil Industries v State Bank of India* (2005) (5) BomCR 706 (Bom), (2006) 66 SCL 147 (Bom).
[312] *Alphonse Ligouri v Official Liquidator* (1967) 37 CompCas 138 (Ker).
[313] *Re Indo Burma Wood Products P v Unknown* (1968) AIR Cal 198 (Cal).
[314] *Official Liquidator High v Koganti Krishna Kumar* (1993) 3 ALT 542 (AP), (1997) 89 CompCas 672 (AP).

movable of the company in winding up to the recovery officer chosen by the Debt Recovery Tribunal. The recovery officer shall assume the duty of sale of the assets/ properties of the company in winding up by following suitable process of law and in accordance with the statutory provisions. After the assets/ properties are disposed of and the amount is realized, the Debt Recovery Tribunal shall decide the priority claim of the secured creditors keeping in mind the provisions contained in Section 529 A of the Companies Act, 1956 and before any division of the amount is done amongst the creditors, the liquidator having concern of workmen’s' interest and the present applicant might also be made a party in the issue. The Court has not determined the priority claims of the relevant contesting parties. The Court shall glance into it and after minute examination and appropriate study of the documentary evidence that might be led; the rival claims of the parties shall be determined. The liquidator is further directed to provide all help to the recovery officer appointed by the Debt Recovery Tribunal for effectively and efficiently conducting the sale and disposal of the properties/ assets in the process of winding up of a company. It is open for the parties to move toward this Court if there is any difference of opinion with respect to division of sale proceeds.[315]

In order to distribute the assets of the company, the financial corporation being the creditor of the company shall fall/ situate in the line and category of the secured creditors of the company pari passu with the claim of the other secured creditor Bank.[316] It is not in dispute in the case before the Court that if the sales tax department was a "creditor" of the company within the meaning of section 391 of the Companies Act, 1956, as ordered by the Court, it was an unsecured creditor and is, hence, permitted to receive only deserve of its claim.[317] The test in law, as appears that if a secured creditor who has first charge over the mortgaged assets of the company has also priority to other secured creditors of a company, having second charge for the same assets of the company, if he chooses to establish his debts before the liquidator then he has to relieve his security for sale by the liquidator of a company.[318]

[315]*Indian Bank v OL Satnam Export India Ltd* (2005) (Guj) <http://indiankanoon.org/doc/> 12 June 2011.
[316]*Remu Pipes Limited Hyd v Industrial Finance Corporation* (2001) 6 ALD 11 (Ald), (2001) 5 ALT 265 (Ald).
[317]*Seksaria Cotton Mills Ltd v AE Naik* (1967) 37 CompCas 656 (Bom).
[318]*ICICI Bank Ltd v Sidco Leathers Ltd* (2006) CriLJ 502.

While giving payment or dispensing dividend after issuing of the winding up order, the payments to be paid to the secured creditors have to be confirmed and calculated. For the reason of Section 529 and 529 A of the Companies Act, 1956, all the secured creditors as well as those having second charge are taken care of evenly and their claims cannot be distinguished. In the same way, the claims of all the workmen have to be worked out and accordingly in terms of Sections 529(3) and 529 A of the Companies Act, 1956, payment is to be given in the ratio and share as specified.[319]

In liquidation proceedings under the Companies Ordinance, 1984, still the foreign creditors or the company are allowed to establish their claims. A bank whose registered office was in India was wound up. The court in Pakistan declined to recognize that winding up and permitted the branches in Pakistan to carry on their business as a distinct unit. When Pakistani creditors, who were asked to establish their debts against a company in the winding up process in India, the Court allowed only such of them whose debts were enforceable in India, under the Private International Law, to establish the debts, declining to pertain to the case the rule of English Law under which all creditors, irrespective of the source of their debts, are permitted to establish them, subject only to condition that they should take them for division of assets which they may receive abroad in satisfaction of their debts.[320]

The ex-debito justitiae rule applies only between the petitioning creditor and the company. As if someone being a petitioning creditor of a company is invoking a class right and so it is inappropriate for him to submit an application for some private reason. On the other hand if the petition is authentically for the advantage of the group of creditors, mischievousness on his part will not make the request improper. This provides the court a broad free discretion to choose whether to issue the order or not. Once an administration order has been made, however, no winding up order can be issue any such application must be rejected.[321]

A secured creditor is one who possesses some security for debt payable to him from the company, such as mortgage, charge or lien. He shall provide the credit or the realized or estimated value of his security unless he surrenders it. Thus he may: (1) Realize his security and establish, as an unsecured creditor, for any balance payable to

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[319] *Re Bokiyu Tanneries Ltd* (Delh) <http://indiankanoon.org/doc/> 17 June 2011.
[320] Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 629.
[321] Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 520-1.

him after subtracting the amount realized; or (2) Value his security and establish, as an unsecured creditor, for any balance payable after subtracting the value of the security; or (3) Give up his security and prove, as an unsecured creditor, for the entire debt; or (4) Where he is entirely secured, rely on his security and not establish at all. A secured creditor who has realized his security for less than the total amount of his debt, part of which is not preferential, so that he can establish for the preferential part. If the creditor has done a mistake in the evaluation of his security, he might modify by petition to the court. If he afterward realizes his security, the amount realized shall be alternated for the amount in the evidence.[322]

On a winding up, a secured creditor is in the desirable position of having the option of discharging his security and, if this does not provide enough to pay him in whole, to establish for the balance, or to give up his security for the advantage of the common body of creditors and establish for the entire debt. Normally of course, he will assume the earlier choice.[323]

The motive why the Legislation relating to solvent companies winding up with regard to Insolvency Act is almost certainly to evade duplicating those many provisions that pertain whether or not that the company is insolvent. To repeat them is the Companies Act would have added considerably to the length of the combined legislation. But it can also be reasonable as practical. Once a company goes into winding up the difference between shareholders and creditors develops into more than generally hard to draw; the members' interests will, in effect, have become entirely financial interests deferred to those of the creditors.[324] The foreign creditors of a company which is incorporated outside Pakistan (in England) and carried on business in Pakistan can establish their claims in the winding up proceedings of the company in Pakistan.[325]

6.3 SHAREHOLDERS

Shareholder is a person who has consented to be a member of a company and it is essential with regard to him that all the legal required formalities have to be

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[322]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 587.
[323]Gower L.B.C Prentice D.D and Pettet B.G, *Gower's Principles of Modern Company Law* (5th edn, Sweet & Maxwell Ltd 1992) 770, 771.
[324]Gower L.B.C Prentice D.D and Pettet B.G, *Gower's Principles of Modern Company Law* (5th edn, Sweet & Maxwell Ltd 1992) 761.
[325] Sh. Shaukat Mahmood, *Company Law*, (Galaxy Press 1982) 379.

completed to accrue his rights during the winding up of company. As result of his legal status, he has some rights/ liabilities being a shareholder of the company.[326] He is also an owner of one or more shares of the company. The benefits for shareholder are, receiving of dividends, right to vote, to bring a suit and participate in division of assets of the company during the liquidation.[327]

They are owners of the company and they gain the benefits from the company in the case of increase of stock valuation, company worth and shares. If in case company fails to perform well, they can lose investment/ money. They have right to inspect books of the company and sue the company for the misdeeds of the directors and officers of the company. They have right to attend the meetings of the company. The rights given to common and preferred shareholders are given in the company corporate governance policy.[328] In the following paragraphs discussion will be made regarding different aspects of shareholders of the company.

If in an action for calls prior to the winding up, the shareholder counterclaims for cancellation on the ground of deception, falsification, etc., he can find all benefit in the winding up which he could have gained in the action. And this is so still although the counterclaim is not brought prior to the start of the winding up, where the shareholder in differing a movement for speedy judgment, submits an affidavit giving that he aims to counterclaim for cancellation and he is given leave to defend on that ground.[329]

As the company had been a trustee of the properties for the shareholders, a vesting order should be made under the provisions of the Trustee Act. In consequence the Learned Court accepted in principle that the liquidator exercises definite duties and functions in a fiduciary capacity when he effectuates the fair distribution of the surplus assets of a company while in the course of the winding up. The assets have to be dispersed. The rights arising from uneven contributions on shares of equal amounts shall be accustomed.[330] Since the liquidator has no authority to discharge any one

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[326] Shareholder (BLD 2nd edn.) <http://thelawdictionary.org/shareholder/> assessed 21 October 2017.
[327] Shareholder (Dictionary Law) <https://dictionary.law.com/Default.aspx?selected=1948 > assessed 21 October 2017.
[328] Shareholder (Investopedia) < www.investopedia.com/terms/s/shareholder.asp> assessed 23 October 2017.
[329] W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 414.
[330] *Madurai Mills Company Ltd v Commissioner of Income Tax* (1969) 39 CompCas 946 (Mad) (1969) 74 ITR 623 (Mad).

(except under power of the Court) without the Court's authorization, any action on his part will not discharge contributories.[331]

The Hon'able Madras High Court held that section 187 of the Companies Act, 1913 would apply also to cases/ matters to calls made prior to winding up. So those calls must fall outside Section 186 of the Companies Act, 1913. This construction would provide complete scope to the words of Sec. 186 of the Companies Act, 1913, which particularly excludes from its process call dues due under the Act. Section 186 of the Companies Act, 1913, would be relevant only to the case of a claim *ex-contractu* other than call money whether unpaid or yet to be called, while S. 187 of the Companies Act, 1913, would apply for the recovery of all call dues whether eligible at the time of winding up or otherwise.[332]

In Bhai Mohan Singh case, the Hon'able Madras High Court was pleased to hold that the Hind Iran Bank Limited was ordered to be wound up by this Court. The call under Section 187 of the Indian Companies Act, 1913, analogous to Section 470 of the Indian Companies Act, 1956, was issued upon the contributories in pursuance of the order of the Court. Not only at the time of filing the application under Section 19 of the Displaced Persons (Debts Adjustment) Act, but also when the call was issued upon the contributories, the Company was being wound up.[333]

The liability of the past member would arise only if the existing assets plus the contribution of the present members for the unpaid call are not sufficient to pay back the debts and liabilities of the company alongwith cost thereto costs. Therefore, in the present case it appears from the report of the official liquidator that the present members had paid the share capital in full. This means that if the assets themselves are sufficient for the payment of the debts and liabilities and costs, charges and expenses of winding up, there is no need to contribute.[334]

The resolving of the list of contributories is a situation instance to the giving of a call. The requirement for regulating the rights of contributories among themselves might take place from the truth that some shareholders have paid more than others on their shares. In that winding up it was established that some subscribers had paid in

[331]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 773.
[332]*Official Receiver v AR RM Ramanathan Chettiar* (1962) AIR 192 (Mad), (1962) 32 CompCas 395 (Mad).
[333]*Bhai Mohan Singh vs. Hind Iran Bank Ltd* (1959) AIR 225 (PH).
[334]Re Prabhakar Glass Works Ltd (Mad) <http://indiankanoon.org/doc/> 19 June 2011.

complete and others unstable proportions on their shares, and the entire nominal share capital subscribed was not necessary for meeting creditors ' claims. The liquidator accordingly issued a call for the reason of equalization on all subscribers who had paid less than one half on their subscriptions. Shareholders who had done a voluntary payment to the company's reserve fund were held not to be allowed to rank as creditors consequently.[335]

The liquidator scheduled to supplement the list of contributories by a list of completely paid shareholders who owe money for subscriptions, drinks, etc. to the club. The Hon'able Court held that these shareholders cannot be placed on the list only to provide the court authority to implement disbursement of debts payable from them.[336] However, under particular state of affairs when a contributory challenges his liability and fails to prove he shall give the costs and still in some matters when the contributory is unsuccessful, costs have been permitted.[337]

Until and unless there is an excess of assets/ properties existing after payment of the principal of the debts all interest finishes at the beginning of the winding up. A creditor is a secured creditor if he has any security for his claim to be adjusted against the property/ assets in the winding up process of the company. However, where a security is removed and out to the creditor, he is not a secured creditor. Secured creditors cannot be forced to submit their claims and prove under the Companies Act if they desire to rely on their security and not request to share in the division of the assets/ properties.[338] If the liquidator wishes to issue a call: If there is no committee of inspection formed for this purpose, he is supposed to legally obtain the permission/ leave of the court by summons, which shall be served on every contributory. If there is a committee, he must call a meeting of the committee. Notice of the meeting should be provided in time to arrive at each and every member of the committee and shall give the anticipated amount of the call and the rationale for which it is to be issued. The notice should also be advertised. Any statements or representations given by contributories to the committee or liquidator should be considered before the call is approved. The majority of the committee may sanction the call. The liquidator shall submit with the registrar the document issuing the call, and should serve on each

[335]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 803, 804, 809.
[336]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 246.
[337]C. A. Hasten & William Kaspar Fraser, Company Law (2nd edn, Carswell 1920) 782.
[338]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 808, 823, 824.

contributory a copy the resolution of the committee or order of the court with a notice affirming the amount or balance payable from him with regard to the call. The call might be imposed by an order.[339]

Once a member is upon the list of contributories unless he shows he is wrongly placed, he is responsible for adding to the assets/ properties for payment of debts and winding up expenses. The responsibility of a member under section 156 of the Companies Act in respect of the shares is complete and flows from the fact of his being on the register in respect of those shares. Where a father with his son's own money acquires shares of company or his minor sons and signs the application form on behalf of his sons, the father must be regarded as owner of the shares and must be put on the list of contributories. The same standard applies where the father purchases by transfer shares by signing his minor sons names on the transfer form as transferee through himself. The liability of its members in the case of companies limited by shares to contribute in the winding up extends to the entire amount due on the shares irrespective of whether calls to pay the amount have been made or not. But section 156 of the Companies Act inflicts new liabilities upon shareholders in respect of the unpaid calls as soon as the winding up proceedings begin. As the debt under the statute is a new creation, apart from any pre-existing contractual liability, the liquidator's claim to recover from the shareholder, as a contributory in the winding up, the unpaid share money will not be affected by the fact that prior to the winding up the company had issued calls for the amount and allowed the recovery under those calls to become time barred.[340]

The reality that a payment order has been issued against a deceased contributory and it cannot be executed because it is a nullity does not in any manner influence the liability of the estate of the deceased for the amount which happens. The liability arises from the fact that the deceased had been put on the list of contributories and the same is not affected from the order of payment made in the winding up process. There can be no doubt that upon the death of a contributory his estate turns into accountable for the balance due from him as a contributory his estate becomes responsible for the balance due from him as a contributory but to pass an effective order fixing the estate with that responsibility it is essential to bring the person who represents the estate on

[339]Alfred F. Topham, *Principles of Company Law* (4th edn, Butterworth 1914) 280.
[340] Sh. Shaukat Mahmood, *Company Law*, (Galaxy Press 1982 edn) 375, 377,378, 382.

record. The devolution of the contributory's responsibility on the representative for the deceased within the period prescribed by the Limitation Act is not necessary for the rationale.[341]

6.4 EMPLOYEES CLAIMS

A person is considered to be an employee of the company if he is employed by a company under an enterprise agreement, agreement based transitional instruments, award and contract of employment for a salary, wages or commission. Employees are ordinary unsecured creditors of the company. They have priority over other unsecured creditors and to be paid into the classes as, outstanding wages and superannuation, outstanding leave of absence and retrenchment pay. This is an offence, if someone intends to avoid employee claims/ entitlements of the company. Employees can appoint their representative to watch their interests during the winding up proceedings.[342]

Due to prevailing economic crunch in the world economy and corporate sector, a large no of companies are going into the liquidation process worldwide. Therefore, the employees of the companies would be interested in protecting their rights. The court through an order can give to the employee preferred creditor's status. The contracts of the employees with company would be considered as terminated upon the winding up order made by the court. The purpose of giving of little preference to employees is that they have not accepted the possible risk of default of the company, likewise other creditors. It is better for the company management to inform their employees well in advance at an early stage of the winding up of the company, so that they can watch their interest and find new job to avoid economic hardship of their families.[343] In the following paragraphs research/ discussion has been made with regard to employees and their rights winding up proceedings.

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[341] Sh. Shaukat Mahmood, *Company Law*, (Galaxy Press 1982 edn) 389.
[342]*Liquidation: A Guide for Employees* (*ASIC*, 01 September 2017) <http://asic.gov.au/regulatory-resources/insolvency/insolvency-for-employees/liquidation-a-guide-for-employees/> assessed 23 October 2017.
[343]Doug Pyper and Lorraine Cownay, 'Employment Rights and Insolvency' (HC, 09 June 2017) < http://researchbriefings.files.parliament.uk/documents/SN00651/SN00651.pdf> assessed 23 October 2017.

As discussed earlier, employees are taken as priority unsecured creditors and have to take precedence over other unsecured creditors. As per provisions of Section 556 of the Corporations Act 2001, claims owed to employees are to be paid to the employees. The payments of employees work during the winding up proceedings will be taken as a cost of the winding up and is to be paid out before other employees' payments.[344]

The status of claims of employees has been already discussed above in light of the legal provisions and the decisions of the Hon'able Courts. The Hon'able Bombay High Court has held about status of an unpaid employee as a creditor under the provisions of the Company Law. One employee is sufficient to become a cause of a tragedy in the industrial field if he is permitted to submit a winding up application as a creditor of the company. There is another good motive for not treating a union and unpaid workmen as creditors of a company to allow them to file a winding up petition as legal remedy has been given to the State for recovery of their dues. Malice, ulterior motives, trade union rivalry and unprincipled trade union leaders set up by the rivals in the trade and industry cannot be ruled out in the present days when the tribe of honest enthusiastic trade union leaders is getting missing. By construing Section 439 of the Companies Act, 1956, neither the trade unions nor the employees, even if unpaid, can be added as a group of creditors to use the right to submit an application for winding up a company. It would establish to be a further weapon in the hands of unprincipled to terrorize the employers who decline to give up to any irrational, unfair and unlawful demands by them. These provisions still for indisputable creditors are called as "vehicle of coercion" to pressurize the debtor companies. No trade union leader can be permitted to be seated on the steering wheel of this vehicle of domination by stretching the definition of a creditor.[345]

The Hon'able Supreme Court of India held that the petitions were submitted by unions of the company; on behalf the workmen of the company. The petitions were filed by the representatives of the union on the behalf of the workers. Therefore, the legal point which is required to be considered is that whether the workmen of the company have such legal right when an application for a winding up of a company is

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[344]Who Gets Pay First: When Company Goes into Liquidation (*ADS*, 24 May 2016) <https://australiandebtsolvers.com.au/research-centre/gets-paid-first-company-goes-liquidation/> assessed 23 October 2017.

[345]*Mumbai Labour Union v Indo French Time Industries Ltd* (2002) 3 BOMLR 201 (Bom), (2002) 110 CompCas 408 (Bom).

submitted against it. The Hon'able court further mentioned that it would figure out that the public interest of the related persons to a company while in the process of winding up; will also be taken in to consideration along with the best interest of its members for their benefit and profit. Therefore, the element of public interest which is an important feature of the Companies Act enters into the management and control of the companies after 1963.[346]

Once the companies have multiple shareholders and multiple directors functioning by means of consultation among those persons in the mode company law requires, there is a clear public interest. It is contrary to that public interest for one person to take over the role of the body of persons and to function in the way in which the body is meant to function.[347]

The Hon'able Supreme Court of India has laid down an important decision to safe guard the interests of the workmen who are actually the back bone of the corporate sector and economy. The expression of provision of the Companies Act, 1956 under section 529 A (1) (a), the 'workmen's dues' which are required paid back by the company; have priority over all other creditors, either secured or unsecured. Therefore, the dues of the workmen have not been paid as per available substance/ evidence already submitted before the Hon'able Court.[348] In Andhra Bank case, the Hon'able Court held that a substantive/ handsome amount has been paid to the workers towards their past dues in accordance with legal provisions of company's law. Further payments have also been made in the process of winding up not only to the statutory authorities/ departments but also to the secured creditors, the Special Officers of a company and related persons too.[349]

All amounts spent by the liquidator for the preservation or protection of the assets before it is sold or at the instance of the protected creditor should be reimbursed by creditor to the liquidator . If the secured creditor does not give up the security, it is proper that he should pay the expenses of preservation or protection of the assets

[346] *National Textile Workers Union v PR Ramkrishnan* (1983) AIR 75 (SC), (1983) SCR (1) 9, (1983) SCC (1) 228 (SC), (1982) SCALE (2)1144 (SC).
[347] *Pham Thai Duc v Pts Australian Distributor Pty Ltd* (2005) NSWSC 98.
[348] *Allahabad Bank v Canara Bank* (2000) 2 CTC 723 (SC), (2000) 4 JT 411 (SC), (2000) 3 SCALE 169 (SC).
[349] *Andhra Bank v Official Liquidator* (2003) CA 1321.

during the pendency of the winding up proceedings and before the sale of the assets.[350]

The proofs led by the petitioning Companies entirely establishes the declaration made by the applicant Company and there is no escape from the conclusion that the hire-purchase agreements are unacceptable for the cause that the same were effected on behalf of the petitioner Company by the persons who were not allowed to do so. No consideration has passed under the alleged hire-purchase agreements since the petitioning Companies were not the owners of the vehicles supposedly given on hire to the appellant Company. Hire-Purchase agreements are devoid of consideration for the causes that the necessary ingredients of the hire-purchase agreement have not been recognized.[351]

Since the right of the liquidator to submit under Section 446(2) (b) of the Companies Act, 1956, happens only on the passing of a winding up order of a company by the court or on the appointment of a provisional liquidator, the starting point of limitation for claims under the relevant provisions is the date on which the winding up order of a company is made or court has appointed a provisional liquidator. Since the claim is summary and is by way of an application, it should also be held that Article 137, Limitation Act applies to such proceedings.[352]

The court must use its authority and transfer the said suit under section 446(3) read with section 518(1) (b) of the Companies Act, 1956. Thus, it will be observed that the winding up court has authority to transfer before it suits pending against the company in winding up at different places because it is suitable for the winding up of the company's dealings expeditiously and swiftly. It would be preferable to use discretion in support of the liquidator for the grounds given in the report of the liquidator.[353]

The financial institutions submitted petition and through which strongly argued that no interim order can be made at this phase. So far as inter se contribution is concerned, all the banks as well as these financial institutions are intrinsically sound/ good. It cannot be recommended that observance with the eventual order of adjustment of payment as and when issued by the court will meet with any complexity. Consequently, no injustice will be affected to these financial institutions

[350] *Re New Swadeshi Mills v Unknown* (1985) 58 CompCas 86 (Guj).
[351] *Ambala Bus Syndicate Pvt Ltd v Roop Nagar Credit & Investment* (1993) 105 PLR 449 (AP).
[352] *KP Ulahannan v Wandoor Jupiter Chits P Ltd* (1989) AIR 41 (Ker), (1989) 65 CompCas 178 (Ker).
[353] *Cotton Corporation of India Ltd v Radhakrishna Mills Ltd* (1993) 76 CompCas 637 (Mad).

if each of them is made to contribute on ad hoc basis. Application on behalf of the financial institutions to stay the operation of order is discarded as the very reason of issuing the present order will be aggravated by ordering any stay. [354]

The secured debt of the workmen with interest ranking pari passu with the claims of the other secured creditors as well as those of the petitioner Bank, if discarded or abridged, would be made accessible for division among the secured creditors etc., and in that occasion, they will obviously be permitted to claim improved amounts.[355] The courts have pronounced through a number of precedents and it is also a well-recognized and established principle of law that if there is an obvious divergence between two such provisions of law, regarding decision of a particular fact; then the special provision must prevail.[356]

The liquidator has to probe the claims of the creditors as well as those of the workmen of the company in winding up for wages. The liquidator has to investigate those claims filed before him. He is capable of admitting or decline the evidence in entire or in part and to write his decision to the concerned creditor. If a creditor is disgruntled with the decision of the official liquidator with regard to his evidence, he may, appeal to the court against the decision. Therefore, right of appeal is bestowed on the creditor whose claim has been discarded in entire or in part.[357]

Section 178(3) of the Act read with Sections 529(A) and 530 of the Companies Act, 1956, the petitioner is not allowed to any relief as requested for and it is required to be dismissed by declaring that the claims of the secured creditors as imagined in the process of winding up of a company; would have a preference/ priority over the dues of the Income tax department, under Section 529 of the Companies Act, 1956, meaning thereby the dues of the Income tax department against the company would not have any preference or priority over the claims/ dues of the workmen or secured creditors as further provided and given under Section 529(A) of the Companies Act, 1956 [358]

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[354] *Re New Swadeshi Mills v Unknown* (1985) 58 CompCas 86 (Guj).
[355] *State Bank of Hyderabad v Official Liquidator* (1999) 3 ALD 301 (AP), (1999) 3 ALT 257 (AP).
[356] *Polyolefins Industries Ltd v Kosmek Plastics Manufacturing* (1999) 98 CompCas 481 (Bom).
[357] *Canara Bank A Nationalized Bank v Mopeds India Ltd* (2004) 4 ALD 738 (AP), (2004) 55 SCL 686 (AP).
[358] *Assistant Commissioner of Income v O.L Minal Oil & Industries* (2007) 136 CompCas 399 (Guj), (2007) 210 CTR 445 (Guj).

The Hon'able Supreme of India was pleased to hold that after beginning of the winding up process a debt due to a secured creditor, which is received by realization of the security against the due debt of a secured creditor. The same resulted in consequence of reduction of the assets of the company in the hands of the Liquidator. The section 529(A) of the Companies Act, 1956, anticipated to guard the benefits of the workmen in proceedings for winding up of a company.[359] The Hon'able Rajasthan High Court has observed that a floating charge on the properties/ assets of the company was made within the given time; straight away earlier than the beginning of the winding up of the company under section 534 of the Companies Act, 1956.[360]

On the passing of the ex parte decree with a direction to recover the decretal amount by sale of the mortgaged property and the hypothecated property and the hypothecated goods, the bank is in the position of a secured creditor. When any charge is created by a company on its property, it has got to be registered as required under Section 125 of the Companies Ac, 1956. If the bank has attached property/ goods other than those mortgaged or hypothecated, the bank would finish to be a secured creditor, the other amount of sale proceeds of such property or goods would be available/ present to the liquidator or the court for division proportionately according to law among the creditors after meeting the other essential responsibility.[361]

The Hon'able Andhra Pradesh High Court held that any better right of the Corporation over the properties/ assets hypothecated to them, would be accessible to them only earlier to the date of the company going into winding up, and when once an order of winding up of a company is passed, whatever better rights that were accessible to the Corporation, developed into subjected to and were to work in conjunction with the special rights given to the workmen under Sections 529 and 529-A of the Companies Act, 1956, who have pari passu charge over the properties/ assets of the company in winding up. The Corporation cannot be permitted to contend that having regard to the power conferred upon them, they can sell the properties hypothecated to them and appropriate the proceeds realized through the sale in their total for themselves nor can they be allowed to say that neither the liquidator nor the

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[359] *UCO Bank v Official Liquidator* (1994) 5 SCC 1 (SC), (1994) 6 JT 350 (SC).
[360] *Rajasthan Financial Corporation v Official Liquidator Jaipur* (1997) 88 CompCas 192 (Raj).
[361] *Hindustan Forest Co Pvt v United Commercial Bank* (1994) 79 CompCas 669 (PH), (1992) 102 PLR 588 (PH).

secured creditors have any role to play, apart from to the extent of pari passu charge of the workmen with regard to the properties of the company in winding up.[362]

As long as a debtor company does not go into winding up, the Corporation can use its unilateral power for realization of its dues, but no sooner an order of winding up is passed, the Corporation misplaced its independent authority to realize its debts by the sale of the properties mortgaged to it, and any realization of the dues, would only be with the permission of the liquidator on behalf of the workmen.[363]

So far as the income tax dues are concerned, some of them are on the basis of penalty and some are on the basis of normal demands made against the company. It is only those amounts which became due and payable and penalty which the company became responsible for paying on account of acts of omission and commission earlier to the date of the winding up order that the responsibility would happen. If the assessment order or the order of penalty was made within the given time instantly preceding the given date, it would be allowed to priority.[364]

The State has definite privileges, but it is also open to the State to give up any one of such privileges. The State is equally bound by the provisions of the Companies Act as any other citizen. The State, when passing such a provision and confining its preferential claim to taxes cesses, all revenues and the dues from the company to the Central or a State Government is believed to relinquish its precedence with respect to other claims which might be in the nature of loans etc. It is a sound argument that when privileged claims are précised, there is no longer any precedence linked to the unspecified claims of the Government. In these conditions, that precedence is not available to the Union of India with respect to its claims.[365]

The Hon'able Delhi High Court was pleased to hold that the present/ instant matter actually one in which the disagreement speaks about not to the amount of the debt, but to its inter-se precedence or preferential character with respect to other creditors of the company. In order to permit such a claim to be brought; the Court has to first provide permission under Section 446(1) of the Indian Companies Act, 1956. The appellant

[362] *A.P State Finance Corporation v Professional Grade Components* (AP) <http://indiankanoon.org/doc/> assessed 11 June 2011.
[363] *Re National Textile Corpn Ltd* (2004) 9 SCC 786 (SC).
[364] *Baroda Board & Paper Mills Ltd v Income Tax Officer* (1976) 102 ITR 153 (Guj), (1976) 37 STC 339 (Guj).
[365] *Union of India v J. Ray & Sons Ltd* (1962) AIR 520 (PH).

was allowed to move/ file petition under section 446(2) of the Companies Act, 1956, to have the amount of the debt in question taken as a privileged debt. The amount of the debt is not made doubtful/ disputed by either side and will be taken as being established and now the only query which will have to be determined in this way will be the preferential nature of the claim in case the appellant moves the Court. No question of limitation is probably involved for moving an application under Section 446(2), of the Companies Act, 1956, because in this case the dispute does not relate to the debt, but to the nature of debt. The consequence of this order subject to any application/ petition that may be submitted under Section 446(2) of the Companies Act, 1956, would be that the debt stands established as found by the liquidator which would be treated as an ordinary debt except found to be privileged debt by the Court when dealing with an petition under Section 446(2) of the Companies Act, 1956.[366]

A bank lent funds to a group company as security, on a "postponement letter" provided by the controllers of that corporate group which specifies that the various group companies in the group will give preferential rights to bank. The bank was entitled to priority over the rights of intra-group creditors.[367]

The Hon'able Madras High Court in terms of Section 531 A, of the Indian Companies Act, 1956, any transfer of property/ assets, movable or immovable, not being a transfer of the company's property/ assets or delivery of the property made in the normal course of its business of the company or in favour of a purchaser or encumbrance of the property against the credit in good faith and for valuable consideration of the property, shall be invalid against the liquidator, if such transfer of property/ assets, both movable and immovable, is made before the submitting of the application for winding up within a period of one year.[368]

In Board of Trustees case, the Hon'able Gujarat High Court was pleased to hold that under Section 446(2) of the Indian Companies Act, 1956, it is unquestionably the Company Court which will have the authority to consider and to dispose of a suit or any claim by or against the Company in winding up. The claim for enforcement and

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[366]*Sushil Prasad v Official Liquidator of Vinod* (1978) 48 CompCas 462 (Delh), 15 (1979) DLT 250 (Delh).
[367]*Re Banque Financière de la Cité v Parc (Battersea) Ltd* (1998) 1 All ER 737.
[368]*Administrator MCC Finance Ltd v Ramesh Gandhi* (2005) 127 CompCas 85 (Mad), (2005) 6 CompLJ 432 (Mad).

eviction enforcement of the right to re-enter the lease property in terms of the Lease Deed, consequently, would be case obviously within the competency and authority of this Court. There is no refutation of the default by the Company in winding up and subsequently, by the liquidator in the case of payment of the lease rent. The truth that the Company has been ordered to be wound up and currently is in the process of winding up is a case of record so is the pertinent Clause of the Lease Deed vesting in the favour of leaser as right to re-enter, in the occasion of the Company being wound up. Though, unlike the Civil court wherein a decree has to pursue upon a right being recognized, the Company Court in the use of its authority to direct a disclaimer, is duty bound to take into account numerous other aspects, all of which would be mainly associated with the concern of the Company in winding up and those of the Secured Creditors. A disclaimer have to be ordered by the Court only if it is basically in the significance of the Company being wound up. If custody of such property is required to efficiently carry out the winding up proceeding, no repudiation would be ordered.[369]

6.5 PAYMENTS THROUGH LIQUIDATOR

During the winding proceedings, the law provides for a suitably qualified and independent person as a liquidator in order to complete the winding up process, watch/ investigates the statement of affairs, check any mismanagement, and see any wrongful depletion of assets of the company and finally the distribution of payments to the creditors, contributories, members, directors and employees of the company. During the winding up, the director's powers ceases and liquidator manages the affairs of the company including the payments/ distribution of funds process.[370] In the following paragraphs research/ discussion has been made with regard to liquidator's role during winding up proceedings and detail role will be discussed in chapter No. 8.

During the winding up, the proceeds received from disposal of company's assets will be distributed by liquidator and finally, the realized funds/ proceeds are distributed on a pari passu basis as: taxes due to the central/ state government or any local authority,

[369] *Re Board of Trustees* (2003) 44 SCL 81 (Gau).
[370] Lee Shih, 'Closing down a Company' (*MLC*, 04 February 2016*)*
<https://themalaysianlawyer.com/2016/02/04/closing-down-a-company-winding-up-law-in-malaysia/comment-page-1/> assessed 23 October 2017.

employees' wages/ salaries, accrued holiday remuneration due to employees, amounts due in respect of contributions payable as an employer under the Employees' State Insurance Act 1948 or any other law, amounts due in respect of any compensation or liability for compensation under the (Indian) Workmen's Compensation Act (1923) due to the death or disablement of any employee, sums due to any employee from a provident fund or any fund for the welfare of employees, expenses of any investigation held in certain circumstances, claims of unsecured creditors, payments to shareholders, according to their rights.[371]

The taxes imposed before the winding up can only rank as ordinary debts in the absence of a statutory lien or charge, but taxes imposed after the beginning of the winding up ought to be paid in complete by the liquidator apart from the expenses of winding up of a company if the liquidator has continued in custody, and such custody has been a useful job. As to what comprises such profession by the liquidator as will construct a responsibility to pay taxes. The claims for arrears of salary and wages of the people's particular in the section enjoy a special advantage over other creditors. The person looking for the special advantage must not be in a sovereign position, e.g., an auditor or a solicitor who might do work for many companies. On this standard a managing director has been held disentitled to any special privilege. 'Other persons' must be 'of the servant and not of the executive or master class. A director is not a servant but a manager.[372]

The properties of the company under winding up in the hands of the liquidator are enough to cover approximately all the claims of the creditors and the contributories and the petitioners in this case are also likely to obtain some residue. In this environment the objection forwarded by the applicants to the payment of compensation to the workmen. It is obvious that the contributories as well as those who are liable to the winding up of the company will be benefited only if the workmen are paid less compensation.[373]

Therefore, upon the passing of a winding up order, Section 630 of the Indian Companies Act, 1956, instantly comes into operation. It presents that if any officer or

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[371]Karan Gandi, 'Preferential Payments on Winding Up of the Company' *(SA,* 07 January 2016) <http://www.mondaq.com/india/x/284708/Insolvency+Bankruptcy/Preferential+Payments+On+Winding+Up+Of+The+Company> assessed 23 October 2017.
[372]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 812, 814.
[373]*S. Anthony Raj v A. Shanmugam* (1994) 80 CompCas 531 (Mad), (1995) IILLJ 1208 (Mad).

employee of a company is considered that he is in possession of company's property/ assets wrongfully withhold it from the common use and advantage of the company, he would be accountable for action. It is trite to state that this Section applies uniformly to employees, past and present.[374] It is obvious that a closing of business as a consequence of a winding up order cannot be associated with economizing and does not draw compensation which can be scribed as "retrenchment compensation.[375]

6.6 DIRECTORS

Directors are generally, the head of the organization or company. The board of directors is a group of persons related to company who are appointed/ elected by the members/ shareholders of the company to make important policy decisions regarding the affairs of the company.[376] Most of the companies require a minimum of three directors on board of directors. The day to day operations of the company are to be handled by officers of the company not by directors of the company.[377]

The directors also perform as agents of the company, owe fiduciary obligations to company and perform the functions with a duty of care towards it. Their principal function is to safeguard the interests of the members, shareholders and investors. They will exercise the conferred powers with bona fide intention for the benefit of the company against their personal interest.[378] In the following paragraphs research/ discussion has been made with regard to directors of the company and their relationship/ duties with company during winding up proceedings.

The liquidator might not, by counterclaiming for damages against a director by means of contestation of the latter's claim against the company as a creditor, in consequence take misfeasance proceedings against him. A director might be responsible still though he may simply have been guilty of a mistake of law and not of any ethical

[374] *Re Electronics Ltd v Unknown* (2002) (64) DRJ 402.
[375] *Ram Hari De v Official Liquidator* (1965) AIR 552 (Cal), 69 CWN 317 (Cal), (1965) IILLJ 230 (Cal).
[376] Director (*Legal Dictionary*) <https://legal-dictionary.thefreedictionary.com/director> assessed on 25 October 2017.
[377] Director & Manger (*IVY EXEC*) <http://int.search.tb.ask.com/search/GGmain.jhtml?searchfor=managers.+In+some+cases%2C+a+director+&n=&p2=%5EDF&ptb=&qs=&si=&ss=sub&st=tab&trs=wtt&tpr=sbt&ts=1508906650017> assessed 25 October 2017.
[378] Company Director (*Business Dictionary*) <http://www.businessdictionary.com/definition/company-director.html> assessed 26 October 2017.
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misconduct. A bona fide deal with the company unworkable only on the reason of ultra vires will be set aside simply subject to the conditions that both parties are brought back to their original rights. If the act of misfeasance is neither ultra vires nor deceptive, nor fraudulent, it must be made known that the directors did not actually use their discretion or opinion as such.[379]

The Directors who intentionally or without the use of dividends of common caution, sanction the payment of a dividend in diminution of capital are jointly and severally responsible, but carelessness must be so gross as to amount to a breach of trust. Where, however, directors in announcing dividends in diminution of capital have acted honestly and have not been accountable of wild blindness or recklessness, they have been excused. Money taken by directors in payment of services remuneration where such payment is not authorized are taken in breach of trust and are recoverable. Where directors of a company had acquired money on the representation that the funds would be invested on mortgage, whereas they were in fact utilized to discharge pressing claims of the company's creditors, all the directors who stood by in state of affairs which should have provoked their doubts were held individually responsible on a misfeasance summons for the amount so misapplied/ misused, the sum being directed to be paid to the liquidator for repayment to the person defrauded.[380]

A director, member and any officer of a company will not be able to hide at the back of the corporate veil; that is, he will not be protected by this principle as the company is legally separate with regard to its legal and financial responsibilities and the company keep away from individual responsibility of a director, member and any officer of a company; where he has used for deceptive trading for its individual benefits.[381] A director might be justified in relying on the ability, sincerity, reliability and integrity of the officers of a company and is not bound to give constant attention to its dealings, but if there are justifications for suspecting the officer, he must be vigilant in insertion blind and absolute confidence and faith on that officer thereafter. If he fails to apply power over such officer even thereafter, then he must be supposed to be acting in entire disregard of his liability as a director.

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[379]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 833, 866.
[380]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 867, 868.
[381]Alan Dignam and John Lowry, *Company Law (4th end, Oxford University Press* 2008) 2.

The Hon'able Patna High Court held that Section 235 of the Indian Companies Act, 1913 did not, prima facie, prohibit nonfeasance. It might pertain to each and every act of a director, whether of commission or omission, which is an infringement of duty to the company in effect whereof loss results to the company. A director of a company not only did not use that amount of rational care which was anticipated of him as a director in determining the true state of affairs of the company but also deliberately shut his eyes to it until a very late stage, he was responsible of gross negligence which would be misfeasance within the meaning of Section 235 of the Companies Act, 1913. A director of a company not only use the amount with due care which was anticipated by him as a director in determining the true state of affairs of the company but not also deliberately shut his eyes from it. The directors of a company cannot relinquish their powers and functions and dissociate themselves for proper management of the company and are bound to watch over the conduct and performance of business of the company.[382]

6.7 STATEMENT OF AFFAIRS

The submission of statement of affairs of the company in court is very much important. The statement of affairs of the company is required to be submitted by the directors, members and liquidator of the company at different stages during winding up. In this regard, the Hon'able Indian High Court held that a reading of Section 454(2) of the Indian Companies Act, 1956, makes it very evident that the statement of affairs to be made by the liquidator under Section 454(1) of the Companies Act, 1956, is to be filed and confirmed by one or more of the persons related to a company who are at the pertinent date the directors of a company. Consequently, the pertinent date would be the date on which the court issued the winding up order and it is persons who are on that date directors and who are in charge of the company and its dealings who are expected to provide the details mentioned in 454(1) of the Companies Act, 1956, and if a person has finished to be a director on that pertinent date, there is no responsibility cast upon him to provide the abovementioned details considered under Section 454(1) of the Companies Act, 1956. Even if a person is not a Director on the abovementioned pertinent date in special cases the liquidator can call upon such

[382]*Official Liquidator v Ashok Kumar* (1976) 46 CompCas 572 (Pat).

person who has involved in the formation/ incorporation of such company at any time within given time earlier than the pertinent date to provide the details. Only if a default is committed in providing those details, the Director would be punishable under Section 454(5) of the Companies Act, 1956. Consequently, the intent of the legislature is very obvious.[383]

The Hon'able Kerala High Court held that on due deliberation of the whole evidence in this matter, it cannot be ordered that the prosecution has been successful in establishing that the failure to file the statements are considered under Section 454 of the Companies Act, 1956, was devoid of rational justification. It cannot also be held that the accused had no rational justification in this respect. The consequence is that the accused are entitled to the advantage of reasonable doubt.[384]

The Hon'able Court has made an observation that the company was ordered to be wound up and the liquidator took over later on and the accused could not perhaps submit the statement with reference to Section 454 of the Companies Act, 1956, as the assets had been sold as the same had already been taken over. There was a logical justification with the accused not to submit the statement of affairs of the company. Under the situation, no case is made out for awarding any punishment to them.[385]

Sub-section (3) carries on the basis that the responsibility to submit the statement happens on the pertinent time, which is so only so far as those persons state in the former part of Section 454(2) of the Companies Act, 1956 who are legally bound to file the statement still devoid of any as requested by the liquidator are concerned. Sub-section (3) would, consequently, administer only those whose responsibility to submit/ file the statement arises on the pertinent date, and not those who become bound to do so only on the liquidator necessitating, them to do so.[386]

The Statute placed the burden of proof of showing absence of reasonable excuse on the accused; so the onus is on the accused. If initial onus is on the prosecution, any insurmountable difficulties are shaped, that the objective of the statute would be defeated. It is no; doubt true as a general proposition of law that if a statute created an

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[383]*Official Liquidator v Shri B.K Mode* (2008) 141 CompCas 438 (All).
[384] *Official Liquidator v Smt. K. Indira (1981) (Ker)* <http://indiankanoon.org/doc/> assessed 15 June 2011.
[385]*Official Liquidator v Surjit Singh (1995) 110 PLR 447*.
[386]*Poomuli Manakkal Anujan v Official Liquidator* (1979) 49 CompCas 81 (Ker).

offence subject: to exception it is for the accused to bring himself within that exception if he desires to take benefit of it.[387]

The facts alleged do not constitute an offence under sub-section (5) of S. 454 of the Companies Act, 1956, as it is not alleged that the respondent committed default in fulfilling with the requirements of Section 454 of the Companies Act, 1956, without "reasonable excuse" and at any rate, nothing is shown to establish that he did not have rational justification for not filing/ submitting the statement when he has obviously declared in his reply to the notice of the liquidator that he ceased to be a Director eight years earlier to the pertinent date and he did not have any substance whatever to present the statement of affairs of the Company.[388]

In R.C. Abrol case, the Court held that accused should be openly examined because all that the report says is that she had been drawing a salary illegally: the way in which the company has been run and the accused was also paid are actually cases that needs clarification by a public examination.[389]

The Hon'able Gujarat High Court held that Section 454 (3) of the Companies Act, 1956, directs responsibility on the persons mentioned in Section 454 (2) of the Companies Act, 1956 to file a statement of affairs within given time. The liquidator has continued all throughout that the accused persons have committed default in filing/ submitting statement of affairs within given time from the date of winding up order.[390]

Whether the unregistered charge created by the mortgagor was kept alive or extinguished or replaced by an order of sale created by the decree; if upon a construction of the decree, the court found that the unregistered charge was kept alive, the provisions of Section 125 of the Companies Act, 1913, would apply and if, on the other hand, the decree extinguished the unregistered charge, the section would not apply. The Hon'able Court held that a judgment creditor will be allowed to relief from the Company Court accordingly.[391]

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[387] *Security & Finance Private Ltd v B.K Bedi* (1974) 44 CompCas 499 (Delh), 10 (1974) DLT 181 (Delh).

[388] *Official Liquidator v Koganti Krishna Kumar* (1993) (3) ALT 542 (AP), (1997) 89 CompCas 672 (AP).

[389] *R.C Abrol v Official Liquidator R.C Abrol* (1975) ILR 202 (Delh).

[390] *O.L Of Geeta Fabrics P Ltd v Premjibhai Jethabhai Patel* (Guj) <http://indiankanoon.org/doc/> assessed 16 June 2011.

[391] *Indian Bank v Official Liquidator* (SC) <http://indiankanoon.org/doc/> assessed 12 June 2011.

6.8 DISTRIBUTION OF THE COMPANY'S ASSETS

Distribution of the assets of the company among the legally entitled parties is one of the prime duties and functions of the liquidator during winding up of the company. In the following paragraphs research/ discussion has been made with regard distribution of company assets during winding up proceedings. After announcement of winding up, the assets of company went into the custody of liquidator. He is responsible for sale/ distribution of assets among the stakeholders as per their ranking and shares.

In this regard, if the liquidator remained in control of the assets after the start of the winding up with a view to get highest feasible price. The assets were clearly kept for the advantage of the company after the beginning of winding up. The creditors at the start of winding up stand on equal footing as between themselves subject to claim of priority under section 405 of the Companies Ordinance, 1984. But if after that period the company or the liquidator on its behalf remains in occupation/ control of the property, they must do so on the same terms of any other citizen of the land and the tax which has become payable shall be paid by him like any other citizen of the State. In case of default the relevant officer or the authority has the power to restrain invoking the provisions of the relevant law but this power would be invoked only after obtaining leave from the Court.[392]

In the case of Director Industries, Government of N.W.F.P, Peshawar, the Hon'able Peshawar High Court was pleased to hold that there is no contradicting the fact that the amount in question could have been recovered/ received as arrears of land revenue prior to issuing of the winding up order. Currently, the Company is not in existence for practical purposes and, so, the question of recovery of due amount as arrears of land revenue does not arise because the process as enumerated in the Land Revenue Act could not be followed. Just by issuance of notification that amount in question could have been recovered as arrears of land revenue does not enable the Provincial Government to claim that preferential treatment must be made by stating the amount in question as secured debt which cannot be done in view of the provisions as considered in section 405(i) (a) of the Companies Ordinance, 1984.[393]

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[392] *Northern Foundry & Engineering Works Ltd v Excise & Taxation Officer* (1987) 520 (Lah).
[393] *Director Industries Government of NWFP Peshawar v Nowshera Engineering Company Ltd* (Pesh).

The Hon'able Peshawar High Court held that the loan advanced/ sanctioned by the concerned Bank to the Company did not come/ fall within the definition of a secured loan as pledge is not included therein. Moreover, this charge was void because it had not been registered with the Registrar of Joint A Stock Companies as provided in section 121 of the Companies Ordinance, 1984. It was, therefore, an ordinary loan and had to be treated at par with all other loans of such nature. It could not at all be treated/ taken as a preferential payment under section 405 of the Companies Ordinance, 1984.[394]

The liquidator shall immediately recover/ get possession, from whoever is in possession, of the assets and properties covered by the said order of sale. The same must be resold after a fresh evaluation report thereof has been acquired, a reserve bid fixed and due advertisements published.[395]

6.9 THE PARI PASSU PRINCIPLE

During the winding up process the distribution of assets is based on principle of pari passu. The equal sharing between non-priority and unsecured creditors and in case there are insufficient funds to pay entire amount of liabilities/ debts, then the creditors will be paid proportionately. This principle does not cover secured creditors; or creditors for whom the company holds assets on trust because such assets do not belong to the company and suppliers of goods under agreements reserving title.[396]

Historically, this principle was first time introduced into English law through the Statute of Bankrupts in 1542. The same was later on highlighted by the House of Lords in National Westminster Bank Plc v Hales Owen Press works Ltd. Through this principle balance is created to make sure the distribution of assets on pari passu basis, in order to check an individual creditor from getting an unfair advantage over the general body of creditors, and at the same time to avoid the penalization of a creditor

[394]*United Bank Ltd v Ali Gul Packages Industries Ltd* (1989) CLC 1743 (Pesh).
[395]*Allahabad Bank v Bengal Paper Mills Co Ltd* (SC) <http://indiankanoon.org/doc/> assessed 20 June 2011.
[396]Pari Passu (*Insolvency Law*) <www.markedbyteachers.com/university-degree/law/pari-passu-the-parri-passu-principle-has-been-described-as-a-most-fundamental-principle-of-corporate-insolvency-law-which-holds-that-in-a-winding-up-creditors-shall-share-rateably-in-the-common-pool.html> assessed 24 October 2017.

for his quick response to safeguard its own benefits/ interests.[397] Some authors have taken this principle as a redundant principle due to availability of exceptions and creditors' rights in rem, due to which the equitable distribution of funds is, limited which are expected to be provided through this principle. [398]

The pari passu is a Latin phrase and by extension, without partiality, fairly, proportionally; at an equal pace; without preference. It literally means on equal footing or with an equal step. It is sometimes translated as hand-in-hand, with equal force, ranking equally or moving together[399] One of the most excellent recognized principles of insolvency law is the so-called pari passu or pro rata principle, whereby unsecured creditors are to be paid out of the residual disposal of assets/ properties of the company which are proportionately to the amount of the debt that is owed to them.[400]

As a result of winding up, the assets/ properties of the debtor company are available to be disposed of and sold out for its security interests, creditors, and other legal rights holders which are created proceeding to the winding up proceedings.[401] Moreover, in winding up process everybody related to a company; shall be paid pari passu, but that means everybody must be paid as per their share, however, the same could be done after the winding up process has been started.[402]

6.10 THE PRINCIPLE OF UNITY/ PLURALITY

Under the principle of unity the main elements include: a collective proceeding opened and monitored by the administrative or judicial authorities of a member state,

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[397]Practical Achievement of Pari Passu Principle (Business Law) <www.lawteacher.net/free-law-essays/business-law/practical-achievement-of-pari-passu-principle-business-law-essay.php> assessed 24 October 2017.

[398]Principle Pari Passu: Corporate Insolvency (*GVZH*, 06 March 2013) <www.gvzh.com.mt/malta-publications/principle-pari-passu-corporate-insolvency/> assessed 26 October 2017.

[399]Pari Passu <http://en.wikipedia.org/wiki preferential creditor, the free encyclopedia> assessed 10 December 2017.

[400]Roman Tomasic, 'Insolvency Law Principles and the Draft Bankruptcy Law of the People's Republic of China' (1998) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=143812> assessed 16 December 2017.

[401]Kenneth K Mwenda, ' Legal Aspects of Banking Regulation Common Law Perspective from Zambia' (2010) <https://download-plaza.com/download/book/Legal%20Aspects%20Of%20Banking%20Regulation:%20Common%20Law%20Perspectives%20From%20Zambia.html?aff.id=9325&aff.subid=6544> assessed 17 December 2017.

[402]Riz Mokal, 'A the Intersection of Property and Insolvency' (2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112309> assessed 18 December 2017.

with the aim of realizing assets under the supervision of those authorities. In this regard, the legally authorized authorities of the member state are empowered to proceed with the winding-up proceedings under the *principle of unity*. Under this principle "Equal treatment of creditors requires that the decisions are (member state) to be recognized in all the other member states.[403]

These are two opposing principles of vital importance. The principle of unity bestows powers on the courts of the state of the company's incorporation. If this principle is strictly applied it would give powers of winding up to a single authority and escape the problems of simultaneous liquidations. But it would expose local creditors in other states to the risk of losing property within their authority. But the courts are not willing to give up their authority over local creditors. The principle of plurality is accepted everywhere and acknowledges concurrent proceedings in different jurisdictions.[404]

In this chapter, the important elements have been discussed. The main factors/ characters with regard to company are creditors, contributories, shareholders, employees and directors of the company. These characters of the company will have to perform their legal role for the smooth completion of winding up proceedings to achieve their rights and other persons. Further, the significant areas such as statement of affairs of the company, distribution of company assets/ payments, pari passu and unity/ plurality principles have also to be kept in mind while the proceedings of cases. Without following up of these areas the true sense of law will not be implemented to safeguard the interests of company.

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[403]Directive on the Reorganization & Winding up of Credit Institutions <www.abi.org/abi-journal/directive-on-the-reorganization-and-winding-up-of-credit-institutions> assessed 24 December 2017.

[404]Kenneth K Mwenda, *Legal Aspects of Banking Regulation Common Law Perspective from Zambia* (2010) <https://download-plaza.com/download/book/Legal%20Aspects%20Of%20Banking%20Regulation:%20Common%20Law%20Perspectives%20From%20Zambia.html?aff.id=9325&aff.subid=6544> assessed 17 December 2017.

CHAPTER 7

COMMON PROCESS INCIDENTAL TO BOTH VOLUNTARY AND COMPULSORY WINDING UP

7.1 REALIZATION/ DISPOSAL OF ASSETS

In this chapter discussion will be held regarding some important topics which are being dealt and gone through during the winding up proceedings of the company. These important topics are realization/ disposal of company's assets, principle of universality, oppression / misappropriation against minority shareholders, carrying out an investigation regarding the affairs of the company, to enquire into the mismanagement, misappropriation and other illegal acts by the management and officers of the company, jurisdiction of courts with regard to cases of winding of companies. Further, some other significant areas like execution of decree debts, fraudulent preference given to different stake holders of the company, proceedings against officers of the company, disappearance of substratum of company, properties in foreign country, res judicata, winding up proceedings to recover debt, company capable of carrying on business although main object gone and circumstances in which a company can be wound up summarily. As mentioned in previous chapters, these topics will be discussed keeping in view, the law regarding winding of the companies and the important decisions of Hon'able Courts from different Law Jurisdictions, especially common law countries and the literature/ material researched regarding above mentioned topics.

The liquidator realizes the assets of the company, pays the debts of company and finally distributed the surplus among the contributories/ shareholders as per their rights as provided in the articles of company. After approval from the court, he adopts/ starts the process to wind up the company. [405] When the liquidator want to realize the assets, he got evaluated the price these assets. The noncurrent assets include buildings, land, equipment, debit cash and credit. The current assets include

[405]Winding up of Company an Overview (SCRIBD) <www.scribd.com/document/337170121/Print-winding-Up-of-Company-an-Overview-TaxGuru> assessed 11 December 2017.

trade receivable from the customers and inventory. The liquidator had to obtain the list of such assets from the members of the company. [406] In the following paragraphs this topic will be elaborated in the light of material collected with regard winding up of company.

On commencement of the winding up the company remains the owner of legal title to assets; however it cannot drive any economic advantage form the assets as the assets are held in trust against discharge of the company's liabilities.[407] In this regard, if a material part of the debt due to protected creditors is not disputed this was pointed out by petitioner in one of the case laws but has on the other hand been positively admitted even in the petition submitted under Sections 397 and 398 of the Companies ordinance, 1984. It is worth noting that the interest of the protected creditors is in the assets of the company not being disposed of except in accordance with law, that is to say, by a proper declaration of the shareholders of the Company and that it was not open to the Company Judge to direct independently, or by any other mode, sale of any portion of the assets of the Company. If we read the order given by the judge in this case we are unable to find any particular direction, directing the sale of any asset. The only observation bearing on this point seems to have been made in the terms as it would be in the interest of all concerned if the Company is allowed to effect sales in a proper and planned manner.[408]

In Rajratna Naranbhai Mills case, the Hon’able Court was pleased to hold that if the company was not ordered to be wound up it could not have a claim of shares or sale proceeds thereof, if it has submitted both to the ruling and the execution thereof. But a right may build up under law in favour of the company and the right may stands up on the happening of certain events which may not be available before the happening of that event. All those properties transferred in contravention of certain provisions of the Companies Act the company must get back all those properties on the happening of the event of order of winding up the company being made. If that right stands up

[406]Julie Davoren, ‘Accounting Entries Closing Company’ (16 April 2018) < http://smallbusiness.chron.com/accounting-entries-closing-company-24905.html> assessed 11 December 2017.

[407]Roman Tomasic, ‘Insolvency Law Principles and the Draft Bankruptcy Law of the People's Republic of China’ (1998) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=143812> assessed 16 December 2017.

[408]*Gokul Chand D Morarka v Company Law Board* (1974) 44 CompCas 173 (Delh), ILR (1972) 369 (Delh).

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after such an order is made, it is nonetheless a right of the company although to be exercised by the liquidator because of the winding up order. But, it cannot be denied that right is the right of the company. Therefore, the present action is maintainable and the application is in the name of and on behalf of the company and not as a representative of the creditors and contributories. It is immaterial and irrelevant that the benefit of the action may ultimately flow to the creditors and contributories. Section 458 A of the Companies Ordinance, 1984, therefore, would be attracted.[409]

In Official Liquidator of Piramal case, the Hon'able Gujrat High Court observed that the transactions entered on a particular date, when the amount was not due and payable by the company in winding up to the purchaser. Despite the fact that there was no legal threat or compulsion, the company subject to winding up willingly transferred the properties to the purchasers. It was further noted that the company subject to winding up has not acted in good faith and the transactions executed by the company in winding up with the purchasers amount to fraudulent preference as set out under Section 531 of the Companies Act, 1956, and interpreted by various judgments in this behalf. Due to this fact the flats in question are not deemed to be transferred to the purchasers as in the eye of the law, the transactions between the company subject to winding up and the purchasers is fraudulent. As the property mentioned in the case example which were flat are not considered by court as legitimate transfers to the purchasers, therefore, the property vests in the official liquidator and the transactions entered into by the company subject to winding up regarding the property respective purchasers are contrary to Section 531 of the Companies Act, 1956. The said transactions are unlawful, bad and required to be questioned. Ultimately, the flats were vested to the official liquidator.[410]

The Board for Industrial and Financial Reconstruction (BIFR) has the authority to sell the assets of the Company. The High Court can only vest such powers until a winding up order is issued. The Court would exercise its judicial powers in accordance with law.[411]

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[409] *Rajratna Naranbhai Mills Co Ltd v New Quality Bobbin Works* (1971) <http://indiankanoon.org/doc/> assessed 05 June 2011.
[410] *Official Liquidator of Piramal v Reserve Bank of India* (2004) 118 CompCas 27 (Guj).
[411] *Ngef Ltd v Chandra Developers Pvt Ltd* (2004) 5199 CA.

In one of the case laws advertisement was published on a given date with regards to the auction and it was held that day was the last date for receiving the bids and the next day the auction would be conducted. In this matter, there is no reason to interfere with the order of the company judge. It is also worth noting that an officer appeared before the court on the first returnable date, but no representation was made on behalf of Vijaya Bank till that day. Since both the secured creditors are in the public sector, there is little concern even in the absence of any opposition as such to the sale earlier proposed by the department in favour of the appellant.[412]

This suggestion was clearly made by the learned Court in order to test the authenticity of the petitioner but the petitioner did not accept the suggestion. If the petitioner was certain that the amount offered by the second respondent was unjustifiably low, we fail to see why the petitioner should have refused to take advantage of the suggestion made by the judge. For these reasons, we are of the view that if the orders were valid, the sale in favour of the second respondent should have been confirmed.[413]

When a company is wound up, the official liquidator takes possession of its assets. He realizes assets of the company and distributes them among creditors, workers and contributors resulting in the ultimate death of the company under section 481 of the Companies Act, 1956, being passed. Before final step of winding up is taken, the court has authority to revive the company. But the court must see that the interests of all stakeholders are protected and revival is not intended merely to doge and to skip the disposal of the assets of the company in winding up.[414]

The purpose of the revival is not to revive the activities of the wound up company, but to dispose of the assets of the company through private management, realize the assets and distribute the same in accordance with law.[415]

When a judgment-creditor has attached the properties/ assets of the company and afterward a winding up order is made without any further step being taken by such judgment creditor, he would indisputably be an unsecured creditor, like any other unsecured creditor, who had neither submitted a suit nor acquired a decree nor attached the property. Both would be at par and it is this treatment which would avoid

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[412]*R. J Paper Mills P. Ltd v OL Superior Sox Ltd* (2008) 142 CompCas 562 (Guj).
[413]*East India Co v Official Liquidator (1970) GLR* 457.
[414]*Meghal Homes Pvt Ltd v Shree Niwas Girni K.K.Samiti* (SC) <http://indiankanoon.org/doc/> assessed 18 June 2011.
[415]*ARC Holdings v Rishra Steels Ltd* (1989) CP 519.

rush for the assets of an insolvent company or deceitful distribution by those in charge of the company by giving deceptive preference to their near and dear ones. Provisions such as those contained in sections 531, 531 A, 536, 537, 511, 467 and 456(1) of the Companies Act, 1956, when read together disclose a fundamental scheme by which not only the scramble for the assets/ properties of an insolvent company could be entirely avoided but if any creditor has gained some unjust benefit to the exclusion of others similarly situated, the liquidator must step in and deny to him such an benefit, The standard behind evasion of fraudulent preference at the instance of the liquidator is the same. A payment impeached as fraudulent preference, is made when the company is a going concern by the directors within the competence of their authority and to a creditor to wipe out an existing enforceable debts. It would nonetheless be avoided and money paid could be reclaimed if the payment is made with intent to choose one or some leaving out many similarly situated. Such payment is inside the reach of the liquidator. The purpose behind such provision is to see that all the assets/ properties of the insolvent company are accessible to the liquidator for just and equitable distribution among the unsecured creditors, who are to be paid pari passu.[416]

Under Section 441(2) of the Companies Act, 1956, the winding up of a company by the court begins when a petition for winding up is presented. The payments were unquestionably towards a debt under a decree passed i.e., prior to the commencement of the winding up. Under Section 536(2) of the Companies Act, 1956, any disposition of the company property made after the commencement of the winding up shall be considered as void unless ordered by court. In similar applications, Company Applications in the same petition went into the question of validation of payments which was argued ornately and gave a decision that transactions that would be validated by the court were transactions which were bona fide entered into and completed in the ordinary course of the company's present trade.[417]

All transactions made by a company under winding up during the time between initiation of the petition for winding up and passing of the order for winding up by the court, cannot be declared null and void; otherwise company will not be able to deal with day to day affairs which could lead to disastrous situation.[418]

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[416] *Ananta Mills Ltd v City Deputy Collector* (1972) GLR 633.
[417] *Chittoor District Co-Operative v Vegetols Ltd* (1968) 38 CompCas 687 (AP).
[418] *Tulsidas Jasraj Parekh v Industrial Bank of Western India* (1931) AIR Bom 2 (Bom).

The office of the official liquidator is facing limitations and is in a hopeless situation and, consequently it is unable to efficiently undertake the serious task of winding up of the companies. Ample efforts are needed and immediate steps are required to be imperatively taken especially with regards to the valuable immovable properties which are material in value.[419] The tax payable amount which ranks as a debt with other unsecured debts due from the company should be considered under the provision of Section 446 of the Companies Act, 1956. An order passed by the judge does not call for any interference.[420] Every order which may rationally be considered to be a judicial order as separate from simply administrative order is appealable in terms of Section 483 of the Companies Act, 1956.[421]

In application of the principle to our case, it is clear that some of the rights that were in existence at the time of the survival of the company have ceased to exist after the winding up order is made. Those rights which concern the working of the company do not survive. Once a winding up order is made on the other hand rights which will ensure smooth transition during the winding up process survive and become enforceable after the winding up, as an example of rights which come in to play with a winding up order are the right to the preferential payment of cumulative dividends to preference shareholders being a right which becomes enforceable simply during the winding up.[422]

The whole scheme of the winding up, how to proceed with winding up and distribution of proceeds of winding up among the stake holders on the principle that its debts and liabilities shall, subject to preferential payments, if possible first be paid in full, or pari passu as the assets are sufficient and then distribution of the surplus assets among the shareholders of the company on a pari passu basis. However, it should be kept in mind that this does not necessarily lead to the distribution of all moneys payable to creditors as dividends, bearing in mind that the term “dividend " has a peculiar meaning in the legal context in which it is used. Section 555 of The

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[419] *Guest Keen Williams Ltd vs Josh India Ltd* (Delh) <http://indiankanoon.org/doc/> assessed 17 June 2011.

[420] *Commissioner of Income-Tax v Official Liquidator Golcha* (1974) 44 CompCas 445 (Raj), (1974) 95 ITR 488 (Raj).

[421] *Vijay Kumar Karwa v Official Liquidator Rohtas* (SC) <http://indiankanoon.org/doc/> assessed 20 June 2011.

[422] *Globe Motors Ltd v Globe United Engineering* (1975) 45 CompCas 429 ILR (Delh) (1975) 305 (Delh).

Companies Act, 1956, considers dividends as which were declared and which remained unpaid for six months after the date on which they were declared.[423]

Even under the Indian Companies Act it is probable that if deemed suitable the Liquidator can carry out the business of the company if it is considered necessary and in the best interest of all stake holders and is beneficial for winding up of the company and if this is done that the receipts collected and earned will be considered as of trading and revenue nature and not to be taken as of a capital receipt. That would, therefore, include the Liquidator's power to sell the assets of the company or to transfer.[424]

There are two categories of claims for rent/ profits that may be raised with respect to a company during winding up. Where the liquidator maintains custody of the leasehold property to ensure and facilitate a successful completion of the proceedings of winding up, the claim for profits/ rent would necessarily be considered as the nature of expenses of winding up and would, thus, have to be accordingly prioritized in matters of payment. The custody of the rentable property remains with the liquidator, however, it does not appear or is not shown that the property was used for the purpose of winding up, the claims against rent/ profits would be considered as of the nature of an ordinary debt with no priority being set with regards to the payment with regards to the category in which claims for rent/ profits fall, depends upon the facts and circumstances of each case. The duty to establish these facts lies upon the person claiming that the debt forms a part of expenses of winding up.[425]

The Income Tax Officer can assess or do reassessment proceedings in respect of a company subject to winding up ordered by the court, without obtaining leave of the court under Section 446(1) of the Companies Act, 1956. It has been further noted via the cases examples that it is the authority of court responsible for the winding up to assess how far, under the law.[426]

In Re Ktc Tyres (India) Ltd. the Hon'able Court noticed that the company was insolvent therefore the power can be invoked by the court and the court can direct the liquidator to pay the assessed tax by Income-tax Officer prior to the distribution of the

[423] *Motor Fin Pvt Ltd v Registrar of Companies* (1970) 40 CompCas 6 (AP).
[424] *Commissioner of Income Tax W.B v Chrestian Mining Co Ltd* (1968) AIR 359 (Cal).
[425] *S.P Jain v the Official Liquidator* (2007) 147 PLR 72 (Har), (2008) 81 SCL 297 (Har).
[426] Income Tax Officer *v* Official Liquidator of Golcha (1979) 49 CompCas 251 (Raj) (1979) 117 ITR 377 (Raj).

dividend. And the official liquidator will pay the balance amount due accordingly.[427] In Re Ktc Tyres (India) Ltd. the Hon'able Court noted that reports of the Official Liquidator stated that no income-tax is payable until the dues of the secured creditors and workmen are paid in full.[428]

After the winding up order a claim was made against the Company. Under these state of affairs, there is absolutely no reason to permit the petitioner to proceed with the arbitration proceedings. The arbitration proceedings could not have started without the leave of this Court. The proceedings referred to under sub-section (1) of Section 446 of the Companies Act, 1956, include the arbitration proceedings. The initiation and start of arbitration proceedings and reference of the same to the Arbitrator after the winding up proceedings, made without the consent of this Court, is considered entirely without the authority of law and it must be considered as invalid. Consequently, the question of allowing the applicant to continue the proceedings which has no grounds to stand would not arise for consideration and it cannot be permitted.[429]

In Indo Engineering (Kota) Pvt. Ltd. case, the Hon'able Court held that the case would have been submitted by the respondent-Board, but it is undisputedly not decreed. It cannot be proceeded with further without leave of the court in view of Section 446(1) of the Companies Act, 1956; the claim has to be filed before the official liquidator by the Board. After winding up of the company, whatever the dues are against the company in winding up, no person can claim thereof unless his claim is presented/ submitted before the official liquidator and it has been scrutinized and adjudicated upon and then only it becomes recoverable. The non-applicant even has not lodged the claim what to say to prove the same and it is not recoverable from the applicant. The application has not been contested by the respondent-Board and it has to be allowed.[430]

The rent of a premise accrued after the winding up order has been served cannot be treated as part of the "costs and expenses of the winding up". Consequently the landlord is not entitled to full rental payment. Hence rent amount due will be

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[427] *Income Tax Officer B Ward v Official Liquidator Swaraj* (1978) 111 ITR 77 (Ker).
[428] *Re Ktc Tyres India Ltd* (2002) 125 899 (Ker).
[429] *British India Corporation v Star Spin and Twist Machinery* (2001) 106 CompCas 467 (Kar), (2001) ILR 3808 (Kar).
[430] *Indo Engineering Kota Pvt Ltd v Maharashtra State Electricity* (2002) 112 CompCas 637 (Raj), (2003) 44 SCL 587 (Raj).

considered as debt which the landlord must prove in the winding up and he/ she will be settled on a paid pari passu basis along with the other creditors of the company.[431]

The workers become protected creditors from the winding up date by operation of law. The workers have a pari passu charge over the security which is held by the protected creditor under the contract. The cutoff date for considering the ratio at which the sale proceeds should be divided on a pari passu basis under Section 529 of the Companies Act, 1956, should be the date of the winding up order and not the date of sale. The workers are entitled to claim interest on the amount due from the date of the winding up order till the date of realization of security.[432] In one of the case example Income Tax department presented to the liquidator's authority to decide its claim in accordance with the provisions of the Companies Act. The liquidator has only exercised the power bestowed upon him by the Companies Act and the Rules and all that liquidator has done is to indicate that the company's funds in his hands are not available for meeting the department's demand under Section 220(2) of the Companies Act, 1956.[433]

The suggestion that the protected creditor was entitled to stay outside the winding up proceedings and realize its dues even in a case where a pari passu charge was found to exist, the security could not be taken away by any court in its efforts or anxiety to make an interpretation of such provisions that could benefit the workers. Reasonable conditions could be imposed at the same time with allowing the financial corporation to realize its dues by staying outside the winding up proceedings when the question of discharging the pari passu charge of the workers emerges for consideration. It is not our intention to say that the conditions could be imposed for the benefit of the workers, but our concern is to ensure that the dues of the workers which stand, by a legal fiction, on par with the charge of the protected creditor should be allowed to be ratably apportioned and paid. For the purpose of determining the ratable portion of the workers dues, even at the cost of repetition, we must sum up the factors to be taken into consideration for the purpose of arriving at such ratable distribution.[434]

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[431] *SS Chawla & Company v Globe Motors Ltd* (1987) 62 CompCas 815 (Delh).
[432] *A Shanmugham v Official Liquidator* (1992) 75 CompCas 181 (Mad).
[433] *Income Tax Officer v Official Liquidator* (1982) 134 ITR 136 (Ker).
[434] *Andhra Pradesh State Financial v Official Liquidator* (1995) 2 ALT 406 (AP), (1996) 86 CompCas 341 (AP).

Once a company is put in winding up process, the Official Liquidator becomes the custodian of all assets and properties of the Company in winding up. This authority of the official liquidator is held under Section 456(1) of the Companies Act, 1956, which approved such authority of the Official Liquidator as the custodian of all assets and properties of a Company. In addition to this such function and authority of the Official Liquidator is also recognized under the Company Court and the Companies Act (Court Rules, 1959). It is also true that the Section 446(2) of the Companies Act, 1956, yields to the overriding provisions of the 1993 Act but it is necessary to notice the scope of the Company Courts' Authority over all matters relating to a Company.[435]

As per the provisions of the Section 535, of the Companies Act, 1956, which specifically grant discretion to the Liquidator to seek the leave of the Court not to claim the property, provided it is burdened with tedious covenants. The first question consequently that would arise is, as to whether it would be open to any petitioner, to seek direction to the Liquidator from the Court that the Liquidator should disclaim the property. The answer has to be in the negative: as per the provisions of Section 535(1) of the Companies Act, 1956, which specifically state that the Liquidator can disclaim a property as directed by the court in writing via application signed by him to disclaim the property. This implies that the application has to be in writing, must be signed by the Liquidator and has to be for disclaimer of the property falling within the four classes of property, particularly described in the said section.[436]

There is clear error in the face of the order of the Division Bench which directed the Official Liquidator to pay to the petitioner required amount a month before it is established that there was any breach of the terms of tenancy at the instance of the company in winding up before it was wound up. The Division Bench did not record its satisfaction in the order due to the fact that all reasonable efforts were made with regards to tenancy in question and determined in accordance with law after giving an opportunity to the company before winding up or the Official Liquidator enabling the leaser to get back possession. Even the period of non-functioning mentioned in the application before the Competent Court did not indicate that there was continuous

[435] *Re US Calcutta High Court* <http://indiankanoon.org/doc/> assessed 09 June 2011.
[436] *Fakir Chand Ambaram Patel v Official Liquidator Amruta* (Guj) <http://indiankanoon.org/doc/ > assessed 05 June 2011.

non-functioning of the company before the order of winding up for more than six months in terms of the lease-deed.[437]

In ICICI Venture Funds Management case, the Hon'able Court noted that the company subject to winding up entered in to loan agreements prior to the presentation of winding up petition. After the winding up proceedings have commenced it is not the case of the official liquidator in order to overcome the right and trick the secured creditors, transacted with the petitioner. In addition in the case example it was further noted that there was no transaction in respect of the property and a mortgage deed was executed quite late much prior to the same, the company in winding up had entered into the agreements for repayment of the loan amounts. In the absence of negative intention on the part of the company subject to winding up in the transaction to trick the creditors, the transaction must be construed as authentic. As far as the petition is concerned, nothing is produced before this court to contend that it entered into the agreements, mortgage deed, etc., only with the knowledge that the company petition for winding up was pending. The fact that an amount was advanced by the petitioner to the company in winding up was only for its developmental activities. Such transaction cannot be considered as not to be authentic. On the facts of this case, the provisions of Sub-section (2) of Section 536 of the Companies Act, 1956, cannot be made appropriate and therefore the argument of the official liquidator that those judgments are applicable only to day-to-day transactions is not acceptable, as the judgments of the Supreme Court apply to all authentic transactions of the company and could not be limited only to the day-today transactions.[438]

The Hon'able Supreme of India held that the debt is to be enforced through a procedure set for its recovery regarding the debts and liabilities due from the company as provided in the Companies Act, 1956.[439] The Company Judge could, invoking the jurisdiction under. Section 536(2), Section 155 and Section 446 of the Companies Act, 1956, come to the conclusion that the-transaction was suitable, authentic and bona fide and could direct the Official Liquidator to make necessary changes in the registers. It is true that under Rule 154 and Form 35(1) of the Company Court Rules, 1959, the status of creditor is to be recognized as it existed on the date of winding up

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[437]*West Bengal Small Industries v Official Liquidator* (2006) 3 HC CALLT 466 (Cal), (2006) 133 CompCas 717 (Cal).

[438]*ICICI Venture Funds Management v Neptune Inflatables Ltd* (2005) 127 CompCas 1 (Mad), (2005) 6 CompLJ 420 (Mad).

[439]*Pankaj Mehra v State of Maharashtra* (2000) 2 ALD CRI 487 (SC), (2000) 100 CompCas 417 (SC).

order but by replacement of one creditor with the other creditor does not mean change in the status of the creditors as it existed on the date of winding up order. It is worth noting that there is no provision in the Companies Act by virtue of which the transfer of credits is declared as void. Therefore, the transfer of credits does not violate any provision of the law and could be considered by the Company Judge.[440]

The phrase "unless the court otherwise orders" mentioned in sub-section (2) of section 536 of the Companies Act, 1956, sheds a duty on the judge to examine as to whether the dealing in question was being entered with honest intention. The thought behind grant of judicial discretion on the company judge is to ensure that a company is not excessively in a weak position from carrying out transactions which are beneficial to the running of the company, and that no such permission should be granted if the transaction is projected to deceive the creditors. The verdict to transfer the business of the company is in the context of forming a subsidiary company which was found to be necessary for restructuring its business. That decision taken nearly two-and-a half years prior to filing of the winding up petition and nearly two years before the issuance of notice of demand to respondent could not be said to have been taken with a view to defeat the claim of the appellant or to defraud the creditors. Therefore, the company judge was right in holding that the planned transaction was not intended to deceive the creditors and that granting of permission under section 536(2) of the Companies Act, 1956, was warranted in this case.[441]

Provision to section 529 and introduction of section 529 A of the Companies Act, 1956, will be frustrated if all assets could be sold before the order of winding up is made. In the first instance section 536(2) or section 537(1)(a)(b) of the Companies Act, 1956, has made it clear that any sale/ transfer of the property of the Company made after the commencement of the winding up shall unless the Court otherwise orders be void. As pointed out earlier, the proceedings for winding up are deemed to commence under section 441(2) of the Companies Act, 1956, on the date of presentation of the petition. In other words the order for winding up relates back to the date when the petition is presented. The object of this is clear. A company on a petition for winding up being filed cannot strip the company of its assets, before the order of winding up is made/ issued or a provisional Liquidator appointed; on the

[440]*HL Seth v Wearwell Cycle Company India* (1992) BC 454, (1992) 46 DLT 599, (1992) 22 DRJ 354.
[441]*Bank of Tokyo-Mitsubishi Ltd v Essar Steel Ltd* (2001) 104 CompCas 361 (Guj).

contrary it attempts to guard the assets by providing for taking permission of the Court. If any other view is taken there would be no assets left before the Court in winding up, to distribute the same amongst the various creditors. Therefore, in order to prevent the assets being fraudulently disposed or to overcome an order of winding up section 536(2) or section 537(1)(b) of the Companies Act, 1956, provides that any sale or disposition of the property would be void unless the Court otherwise provides. Thus by a provision of law from the date when the petition is presented all persons dealing with the company are warned that in cases covered by sub-section (2) of section 536 or section 537(1) (b) of the Companies Act, 1956, any transaction falling within that section are subject to the scrutiny of the Court and unless the Court otherwise orders, be void. A power is therefore bestowed on the Court. This is so because there may be genuine transactions effected with the purpose of reviving or rehabilitating the Company. There may be other transaction done in the best interest of its business. A protected creditor may want to realize his dues without waiting for the winding up order to be made. Power is therefore bestowed on the Court to approve such transaction if authentic, and if so, they would not be void. The power under section 536(2) or section 537(1) (b) of the Companies Act, 1956, will also enable the Court to have a control on the assets so that in the event permission of the Court is sought before the order of winding up is made or provisional Liquidator is appointed the Court can always grant permission subject to conditions. The sale held by respondent in case law example was therefore subject to the approval of this Court. The very reason of the Court granting sanction or approval is that the Court can make such orders which are required in justice and equity to guard the interest of all the creditors starting with the secured creditors. By amendment Act of 1985 workers have a pari passu charge on the property/ assets secured by the secured creditors. If the protected creditors are allowed to sell the assets without considering the pari passu charge of the workers this once more would defeat the very purpose of the amendment.[442]

Section 536(2) of the Companies Act, 1956, operates during the time when winding up proceedings are pending, the legislative aim of using a different expression becomes clearer. 'Disposition' under Section 536(2) of the Companies Act, 1956,

[442]*Iflex Oild & Chemicals Pvt v Official Liquidator* (1999) 1 BomCR 259 (Bom), (1999) 96 CompCas 386 (Bom).

would cover a wider range of transactions than 'transfer' under Section 531 or Section 531 A of the Companies Act, 1956, would cover.[443]

The secured creditor who opts to stand outside the winding up proceedings and his claim is limited to section 529 A read with the clause (c) of provision to section 529(1), of the Companies Act, 1956. He does not lose his claim just due to the "workmen's portion".[444]

There are some particulars to be taken care of when a secured creditor is permitted to realize its dues by staying outside the winding up process. This detailed way in which the workmen's dues are required to be determined; it would not be inappropriate or unfair on the part of the Court to impose conditions concurrently with allowing the protected creditor to realize its dues by staying outside the winding up proceedings so that the requirements of law are judiciously complied with. The conditions imposed by the Court in the two orders with which we are concerned in these two appeals are to be viewed with the above perspective and it would render us an immediate cause for recording the satisfaction that such conditions are not outrageous in any manner, and not defying the canons of justice from any point of view.[445]

In Official Liquidator case, the Hon’able Delhi High Court observed that the Section 536(2) of the Companies Act, 1956, does not enable the Income-tax authorities to affect a sale or attachment unless leave is granted under Section 446(1) of the Companies Act, 1956. The view of the Federal Court is confirmed by the observations of the Supreme Court. It would, consequently, follow that in spite of the provisions of Section 537(2), of the Companies Act, 1956, the Income-tax authorities cannot claim against the assets/ properties of the company in the hands of the liquidator without the permission of this Court being granted under Section 446(1) of the Companies Act, 1956. Such leave cannot be given in the present case, because the debt in question, i.e. the arrears of income Tax unpaid is not allowed.[446]

As per the provision of the section 447, of the Companies Act, 1956, an order for the winding up should be in favour of all stakeholders such as creditors and all contributories of the company as if it had been made on the joint application of the creditors and/ or a contributory. After the winding up order no suit or other legal

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[443] *Re Prudential Capital Markets* (2008) 1 CompLJ 314 (Cal).
[444] *Allahabad Bank v Canara Bank* (SC) <http://indiankanoon.org/doc/> assessed 10 June 2011.
[445] *A.P State Financial Corpn v Official Liquidator* (1995) AIR 302 (AP).
[446] *Re National v Official Liquidator* (1974) 44 CompCas 219 (Delh), (1974) ILR 535 (Delh).

proceedings could be proceeded with against the company apart from by the permission of the court subject to such terms as this court may enforce under section 446 of the Companies Act, 1956. No proceedings could go on against the company after the disposal of the appeal and that any sale of the property affected without permission of the court shall be void under section 537 of the Companies Act, 1956. The provisions of section 537 of the Companies Act, 1956, are in absolute terms and do not admit of any exception and would relate back to the date of beginning of the proceedings for winding up. The expression contained in clause (b) of sub-section (1) of section 537 of the Companies Act, 1956, gives that after the start of winding up of the company, further transfer of the properties/ assets without permission of the court is void and liable to be cancelled.[447]

In Sporolac Laboratories (P) Ltd. case, the Hon'able court observed that the assets/ properties of the Company which were under the charge of the Financial Corporation have been disposed of. Now after the disposal It will not be probable to put the clock back for the liquidator to participate his role on behalf of the protected creditors beyond proceeding to realize, from the sale proceeds of the assets/ properties which are in the hands of the Financial Corporation, the claims of the workmen and proportionate share of the other secured creditors, in the instant/ present case the State Bank of Hyderabad. This can be achieved by keeping the sale proceeds available for the claims of the workmen and other secured creditors until the order in this behalf by the Court which has ordered the winding up. The liquidator shall proceed accordingly. The Financial Corporation shall keep the sale proceeds ready for such claims which, besides its claims, are pari passu.[448]

The Hon'able Andre Pradesh High Court held that the provision of Section 468 of Companies Act, 1956, requires that the stakeholders such as contributory and officials of the company should provide available records. But if the records have been destroyed because of natural causes such as fire or militant Labour and protesting workers the principle of *lex non coget ad impossibilia* will apply. A direction, therefore, cannot be issued to respondents to perform the impossible by producing

[447]*Greaves Fesesco Ltd v Ratlam Ispat Ltd* (1997) 88 CompCas 155 (Delh).
[448]*Andhra Pradesh State Financial v Electrothermic Pvt Ltd* (1996) 86 CompCas 402 (AP).

destroyed records and they cannot be made criminally liable under Section 538(1) (c) of Companies Act, 1956.[449]

In computing period of limitation the provisions of Section 458 A of Companies Act, 1956, stipulates exclusion of certain time in computing the periods of limitation. In one of the case example reference for which is cited below the claim under Sections 446 and 458 of the Companies Act, 1956, was filed on given date. The winding up order of the company was made. The amount was withdrawn, through cash voucher of the official liquidator debited by the Jaipur office to the Delhi office stating cash sent with messenger was neither traceable in the Delhi office books nor in the Bombay office books for the year. In view of these conditions, the claim filed by the official liquidator after excluding the time as provided under Section 458 A of the Companies Act, 1956, is within time.[450]

In C.B. Pardhanani case, the court was not anxious with regards to maintainability of the petition under section 398, of the Companies Act, 1956, wherein, the substantial prayer was to take action against the person who was in the control of the company's affairs in the past, and the relief sought there was against the existing management. The court was considering, broadly, the amplitude of the court's powers in a proceeding under section 398, of the Companies Act, 1956.[451]

It is on such a petition that the impugned order for the public examination of the counter-petitioners was passed. The effect of that order is that counter-petitioners who are accused of the various offences punishable under Sections 538, 539, 541 and 545 of the Companies Act, 1956, are compelled to be witnesses against themselves and to give evidence in support of the accusations against them. The protection granted by Clause (3) of Article 20 of the Constitution is against such compulsion. All the elements necessary to bring the matter within the mischief of this clause are present in this case and accordingly we hold that the impugned order is hit by Clause (3) of Article 20 of the Constitution.[452]

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[449]*Safe Pack Polymers Ltd v Sri G.VSN. Raju Bangalore* (2008) 143 CompCas 71 (AP).
[450]*Official Liquidator Golcha v PC Dhadda* (Raj) <http://indiankanoon.org/doc/> assessed 13 June 2011.
[451]*C.B Pardhanani v M.B Pardhanani* (1993) 78 CompCas 540 (Kar), (1990) ILR 2604 (Kar).
[452]*Madhava Naik v Popular Bank Ltd Alleppey* (1961) AIR 14 (Ker), (1960) 30 CompCas 501 (Ker), (1961) CriLJ 75 (Ker).

The facts, given together show that the ex-directors have not only committed financial irregularities, defaults, they have also withdrawn the money due to the creditors. The incident of fire was not investigated. The ex-directors did not renew the insurance of the pledged equipment and machinery. They did not submit statement of affairs and sold the property/ assets even after the company was wound up and was officially in the possession with the Official Liquidator and have paid the bank.[453]

The directors of a company who defraud the creditors and shareholders, and allowed the company to bleed can be proceeded against under section 542 of the Companies Act, 1956. They cannot hide behind protective shield of general law of limitation of liabilities. This general law of limitation protects them in decisions done in good faith, innocently or through honest error of judgment and not the decision made simply to enrich them.[454]

The company Judge/ Tribunal can provide a declaration and pass order either under Section 542 or under Section 543 of the Companies Act, 1956, or both only if an application is preferred by the official liquidator or stakeholder of the company such as any creditor or contributory of the company. Though the company Judge/ Tribunal may give appropriate declaration and pass order under Sections 542 and 543, of the Companies Act, 1956, but for penal order under Sub-section (3) of Section 542, of the Act it could only give permission to the official liquidator to prefer an application before the court of competent criminal jurisdiction, but no order of punishment with imprisonment or fine or both could be passed by the company Judge/ Tribunal under sub-section (3) of Section 542 of the Companies Act, 1956.[455]

It is relevant to point out that when the criminal cases were filed for non-payment; these respondents have smartly settled the complainants by making payment and made the situation quiet. While the assets of the two firms were really taken over by the company in winding up, the renewed deposit receipts were issued by the company in winding up. Thus, the company under winding up was made responsible when transfer of assets/ properties of the firms were made. The respondents despite the severe charges have not provided any information as to the status of the new

[453] *Re Danin Leathers P Ltd* (2008) 83 SCL 123 (All).
[454] *M. R Bhakshi v Fintra Systems Ltd* (Delh) <http://indiankanoon.org/doc/> assessed 08 June 2011.
[455] *P. Hema v M. Muthusamy* (Mad) <http://indiankanoon.org/doc/> assessed 17 June 2011.

companies, the transfer of assets/ properties from the firms to the company in winding up, the sources of funds and the assets and liabilities of the new companies.[456]

As per the provisions of section 542 of the Companies Act, 1956, it is the authority of the courts to declare if it finds sufficient and appropriate evidence. The person who is being made responsible was knowingly a party to the carrying on of the business for fraudulent purpose. Under the law, the particulars of fraud must be given in the application so as to afford an opportunity to that person to meet the allegation. The deceit is an essential constituent of fraudulent conduct of business. Hence, the pleadings must be specific with regard to the alleged criminal behavior of a director. There are some significant words inserted by the lawmakers "person who was knowingly a party to the carrying on of the business in the manner aforesaid' these words inserted by the legislature are very significant and the intention of the Law making body is very clear in inserting these words. Mere indistinct and general accusation is not enough to meet the requirement of this section, because the court has come to the conclusion that the business of the company was carried on with an intention to cheat the creditors and/ or for any fraudulent purpose. Further, that the person against whom the accusations are made was knowingly a party to the carrying on of such business. If the accusations are not specific and details of fraud are not given, then, the court cannot involve in fishing or nomadic enquiry. Thus, the enquiry, therefore, is to be confined to the purpose with which the business of the company had been carried on and about the persons who were knowingly parties to such carrying on of the business.

As per the provisions of the section 543 of the Companies Act, 1956, if the court finds that any doubtful conduct is attributed to the person then, the court has the authority to compel the person to repay and restore the money or property, or any part thereof to the company. In other words as per the provision of this section, the court has the authority to examine the conduct of an individual director or officer and to pass an order against him, if such a person is individually found to be responsible for misapplication, etc., of the money or property of the company or, otherwise, is guilty of any misfeasance or breach of trust in relation to the company. The principles with regard to the pleadings and proof are well-settled. There cannot be a general and roving enquiry into the conduct of a person sought to be made liable.

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[456] *B. Rajagopal v Official Liquidator (Mad)* <http://indiankanoon.org/doc/> assessed 20 June 2011.

In Official Liquidator case, the Hon'able Court held that misconduct allegations were general in nature without pinpointing a specific act of dishonesty and misappropriation on the part of the individual ex-directors. Therefore, on the basis of such general and sweeping accusations, the Court did not proceed against the respondents under Sections 542 and 543 of the Companies Act, 1956. As the report of the official liquidator is found deficient with regard to material facts and specific acts of commissions and omissions, which are shallow to proceed against the ex-directors under Sections 542 and 543 of the Companies Act, 1956.[457]

The base of liability in misfeasance proceedings is breach of fiduciary relationship or failure to perform duties defined by law. In these circumstances there is no reason to hold that these proceedings decline on the death of the criminal officer or officers concerned. The liquidator's right to proceed against the legal representatives of such persons survives subject to the restraint that the order for repayment or restoration that is ultimately made would be limited to the assets of the deceased criminal officer, this application for replacement of the legal representatives of a deceased director cannot be resisted.[458]

Official Liquidator or any creditor or contributory of the company can file an application under Section 543 of the Companies Act, 1956, which is, based on the alleged misconduct of a past or present director, managing agent etc., and, by the express wordings of the section, this right to present application does not vest in the Company. This has to be so because the purpose of the application is to ensure that any past or present director, or managing agent etc., having a controlling interest in the company may not be competent to escape his liability either by the weight of his influence in the affairs of the company or by pleading that under the law it is only the company which has the right to sue and no one else.[459]

While exercising its discretion for granting stay of winding up proceedings, the court would be guided by the following principles:

(a) The court would be satisfied that the petition is genuine and the principles are relevant to the facts of the case. Mere permission of the creditors for the stay or the

[457] *Official Liquidator v Gautham Dhiraj Mal Ranka* (2008) 141 CompCas 129 (Mad), (2008) 2 CompLJ 90 (Mad).
[458] *Official Liquidator v Sailendra Nath Sinha* (1973) 43 CompCas 107 (Cal).
[459] *Jaipur Vastra Vyopar Sangh Ltd v Shyam Sunder Lal Patodia* (1970) AIR 91 (Raj), (1969) WLN 223 (Raj).

offer to pay in full to the creditors for the stay or the offer to pay in full to the creditors is not enough.

(b) The court will judge the interest of commercial morality and refuse stay if there is evidence of misfeasance demanding investigation.

(c) The court will also see while granting stay of winding up proceedings that it is in the interest of creditors as well as of the public at large.

(d) The court will also further see that the former directors have furnished proper information of the affairs of the company.

The court must not provide stay merely to revive the company for providing employment to workers on the ground of socio-economic development of the State. Such statements are issued only to get favorable verdict from the court. If the conduct of ex- directors of the company is doubtful and illegal, the court would not grant stay of winding up proceedings.[460]

In case of imposition of a tax liability on a company in winding up arising out of actual or considered events after the beginning of the winding up, the liquidator, if he has adequate assets in the winding up and no question of priority as between the tax debt and other post-winding up debts of the company arises, has, no substitute but to discharge the tax debt out of those assets/ properties. The question of injustice to creditors of the company who establish in the winding up merely does not arise. It is not open to the Court to choose, as a matter of discretion, to direct the liquidator not to pay the tax that is due.[461]

The debts of the creditors in the process of winding up of a company remain as these are before. This process does not create new rights of creditors or obliterate the old ones. All debts of the creditors are to be paid in a rational manner. When the debts of the creditors are paid, the company ceases to exit. However, if an asset or property is discovered, the company is to be restored and the process of winding up will continue.[462]

The winding up of a company is a form of collective execution by all its creditors against all its present assets. The resolution or order for winding up deprives the

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[460]*M.P Agarwalla v A. Chattarsingh* <http://indiankanoon.org/doc/> assessed 14 June 2011.
[461]*Kahn v Smith Bernal Reporting Ltd* (2000) EC4A 2HD EWCA Civ 86.
[462]Roy Goode, *Charge-Backs & Legal Fictions, the Journal of Business Law Issue* (2008) 811-2.

company of the advantageous interest in its assets/ properties. They become a fund which the company afterward holds in trust to release its liabilities. It is a particular kind of trust because neither the creditors nor anyone else have a proprietary valuable interest in the fund.[463]

In case of surplus assets of a company in winding up or on dissolution, any excess assets which are more than adequate for the payment of the company's debts then the surplus become distributable among the members. The distribution to the members is to the one which are fully paid. The unpaid amount should be deposited and accounted for in the liquidation account of the company. In the statement the name of the contributory and the amount which has remained unpaid to him is specified. The amount in the liquidation account is held in the name or for the shareholder in the company however, the holding of this money is with Central Govt. The amount lying in the name of the contributory in the company's account does not constitute a creditor and debtor relationship. A company that has been wound up and regain a new life after shedding of its bankruptcy and regaining a new lease of life, does not become a creditor of the contributory so as to asset any right over his amount. The amount is held for the contributory and he has the right to receive it and to this extent he has a title to it unless some person can establish that he is entitled to the money lying in the companies liquidation account.[464]

In Colaba Land Mills Co. Ltd. case, the Hon'able Judge has rightly held that the money which goes to the contributories is on account of the surplus assets/ properties of the company in winding up or on distribution. The unclaimed money liquidator is required to deposit into the Companies Liquidation Account. A statement of account needs to be maintained with particulars such as the name of the shareholder and as well as the amount which has remained unpaid to him has to be specified. The amount thus belongs to the shareholder and there is no question of the company after reconstruction, to lay its claim on such amount on the plea that such amounts are the assets/ properties of the company. We fail to see how the company is permitted to such amount which is earned by the contributory and it is he who has the right to claim and receive the amount. The unclaimed surplus assets of the company which belong to the shareholder continue to remain as assets of the company after winding

[463]*Buchler v Talbot* (2004) UKHL 9.
[464]*Colaba Land and Mill Co Ltd v Union of India* (1985) 58 CompCas 513 (Bom).

up and as such permitted to claim the same, it would amount to defeating the very objective of the provisions of section 555 of the Companies Act, 1956, apart from the fact that such an interpretation is not warranted by the express wording of section 555 of the Companies Act, 1956.[465]

A per the provisions of Section 555 of the Companies Act, 1956, amounts of unpaid dividends which the liquidator is required to hold in Companies Liquidation Account, cannot be returned to the company even after passing of an order of de-liquidation. The amount of dividend is payable to the shareholders. Thus, the shareholders of the company only are permitted to the payment of the dividend. As per the provision of Sub-section (7) of Section 555 of the Companies Act, 1956, if any person desires to claim any amount which is held in the winding up account against which he is permitted he / she should apply to the court for an order for payment thereof and the court if satisfied that the person claiming is permitted. It is also worth noting that the claim under the surplus held under the liquidation account can only be lodged by the shareholder and not the management of the company and it is creditors to whom the amount of dividend is payable who have a right to file an application as aforesaid under the provisions of Section 555 of the Companies Act, 1956. The expression "any person" claiming to be entitled to any money paid into the Companies Liquidation, Account had a wide meaning and could not be confined to a creditor or member or a contributory of the company. The expression could also include the company itself which went out of liquidation and later regained its original status and position. Thus, it could be held that the company would fall within the expression "any person", but it was not the person entitled to the money lying in the Companies Liquidation Account as it was neither entitled under Section 555 of the Companies Act, 1956, to be paid the surplus assets of the contributories nor was the company entitled to the same under the sanctioned scheme. In the case example court further held that on the date when the scheme was sanctioned, the amount was not in the hands or under the control of the official liquidator and therefore, on the sanctioning of the scheme, he could not have handed over the amount to the company. The amount lying in the name of the shareholders in the Companies Liquidation Account is his money, though

[465] *Colaba Land Mills Co Ltd v Union of India* (1989) 66 CompCas 610 (Bom).

the relationship of a creditor and debtor is not created between the shareholder and the Central Government holding the money in the Companies Liquidation Account.[466]

The amount in the liquidation account represents the unclaimed dividends and other undistributed assets/ properties. This means the amounts previously declared payable to particular persons as dividends and amounts already became refundable as assets to particular contributories and not yet actually paid. If the amount represents the common fund of the company in winding up, distributable among several persons, on pro rata basis or in accordance with some scheme of preference, different considerations will come into play as all these claims against the company might have to be pooled and satisfied out of the common fund. In situations similar to this the court should consider that nobody is adversely affected In such a case, the satisfaction of the claim of one, without ascertaining what the other claims are, may adversely affect the persons having such other claims and, consequently, the authority sanctioning the payment must please itself that no other claim is pending. Though the position is completely different with regard to the claims against the amount in the companies liquidation account because each can be paid the amount due to him autonomously, without in any way affecting the right of others to receive the amounts due to them and the only precaution that has to be observed is that a person does not make a double claim, secondly as per the provisions of Section 555(7)(b) of the Companies Act, 1956, is that the person who made the petition for payment to the Central Government had not already made an application for the same cause to a court under Section 555(7)(a) of the Companies Act, 1956, and such petition was not pending.[467]

As per the provision of Section 557 of the Companies Act, 1956, the court has the power to direct meetings of the creditors or contributories to ascertain their wishes for winding of the company.[468]

In Sanghi Spinner Ltd. case, the Hon'able Andhra Pradesh High Court held that none of the six protected creditors and other unprotected creditors, have chosen to enter their appearance either to support or resist the company petition, nor have they submitted any affidavits or material to establish their claims, to enable the Court to

[466]*MC Golcha v Official Liquidator* (1990) 67 CompCas 302 (Raj).
[467]*N. Dharmalingam v Union of India UOI* (1979) 49 CompCas 567 (Mad), (1979) 119 ITR 171 (Mad).
[468]*Focus Advertising Private Ltd v Ahoora Blocks Pvt Ltd* (1975) 45 CompCas 534 (Bom).
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ascertain their desires, before proceeding to consider the petition for winding up of the applicant. In the event if none of the secured creditors and unsecured creditors of the applicant has come forward expressing their desires either supporting or opposing the company petition and have evinced no interest in the matter, it is not known how the applicant can uphold this application to call for meeting of the creditors or contributories to ascertain their wishes. To exercise power under Section 557 of the Companies Act, 1956, there should be desires of the creditors as proved before the Court by adequate evidence, and in the instant case, no wish is proved by the secured creditors or unsecured creditors, and there are no claims from any quarter, nor is there any material placed on record by any of the creditors to demonstrate that they have any interest in the matter. Had the protected creditors or unprotected creditors entered their emergence and proved their desires before this Court by placing adequate evidence, then the petition would have been justified in requesting the Court to call for a meeting of the creditors or shareholders to determine their desires, but there is no such wish expressed by any of the protected or unprotected creditors for them to consider in the meeting.[469]

In the winding up process after the company's creditors have been paid and the costs of the winding up have been fulfilled it is responsibility of the liquidator to divide the surplus (if any) of the assets/ properties among the shareholders or members of the company. Such distribution should be made among them according to their rights under the provisions of the letters patent and by-laws or memorandum and articles of association. In such situation the preferential treatment is given to Preference shares holders as they commonly carry a preferential right to the return of capital on a winding up, in which case the amounts paid in by the preference shareholders must be repaid to them because the common shareholders have residual interest in the affairs of the company. Where the preference shares do not confer such right or where the shareholders are all of one class, the surplus assets/ properties (unless there is some provision to the contrary in the governing documents) are dividable.[470] The deposit of title deed can attain a fixed equitable charge as it is less formal and can be achieved by the deposit of title deeds.[471]

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[469] *Re Sanghi Spinner Ltd* (2000) 120 (And).
[470] C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 834.
[471] Jennifer James, *Company Law* (4th edn, 2003-4) 207.

The directors of the company who are doing the business of the company, as per the provisions of Section 542 of the Companies Act, 1956, are individually accountable for all or any of the debts or other liabilities of the company as the court may direct, if they are involved in to defraud creditors of the company or any other person for any fraudulent reason.[472] The law maker never affirms that a cause of action must arise after the Act of 1956 when section 543, of the Act Schedule XI, was enacted. Further evidence is by use of the expression "past director" including even those who had taken part in the promotion or formation of the company.[473]

In Ram Swarup case, the Hon'able Court was pleased to observe that the amount withdrawn by director of the company came in hands of his heirs and legal representatives who were also retaining it, therefore the said legal representatives are responsible to refund the said amount to the Official Liquidator. Moreover, the heirs of the deceased Ex-director had filed a counter affidavit and had contested the claim of the Official Liquidator. They had, consequently, adequate opportunity to meet the case of the Official Liquidator. Moreover, they had been heard by the Court and it cannot be said that a declaration has been provided by the Court without hearing the heirs of the deceased director. Consequently, the conduct of the legal heirs of ex director would be answerable for refunding to the Official Liquidator the sum to the extent of the worth of the estate of the deceased which has come in the hands of the said heirs.[474]

The cited word, "misapplication", needs to be cautiously understood. It imports no mental element such as dishonesty or fraud, not even negligence. It simply means wrong or incorrect application, not necessarily a wrongful application, and there can be a perfectly innocent misapplication. It is a well stated and acknowledged fact in both the English and Indian common law that liability under Section 643 of the Companies Act, 1956, can be admissible only if there has been dishonesty or fraud or at least negligence, not ordinary negligence but gross and culpable negligence. Eminent judges have criticized the use of phrases such as gross negligence and have said that the addition of a malicious label to the word, "negligence" signifies nothing. But, equally eminent Judges have unblushingly continued to use such expressions,

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[472]*Re Popular Bank Ltd* (Ker) <http://indiankanoon.org/doc/161564/> assessed 21 June 2011.
[473]*Colaba Land & Mills Co Ltd v VSJ Pilani* (1971) 41 CompCas 1078 (Guj).
[474]*Official Liquidator v Ram Swarup* (1997) AIR 72 (All), (1997) 88 CompCas 569 (All).
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and it would be laboriousness to deny that the phrase does convey a definite meaning as importing an element of irresponsibility or willfulness negligence which is the equivalent of deception, or constructive or equitable fraud as it is sometimes called.

Whether the statutory basis for this is to be found in Section 543 of the Companies Act, 1956, itself which requires the court to examine into the conduct of the alleged delinquent before making an order against him and thereby implies that his conduct must be found to be blameworthy, or whether it is to be found in Section 633, of the Companies Act, 1956, although the way in which some decisions cast the burden on the alleged delinquent seems to suggest that the basis is the combined result of these two sections. If under Section 543 of the Companies Act, 1956, standing by itself, at least gross negligence has to be found before liability can be imposed. It is difficult to see how Section 638 of the Companies Act, 1956 can afford relief from such liability since, if a person has been grossly negligent, it can barely be said that he has acted rationally.[475]

When the company was solvent at the time of winding up, the liquidator of the company is competent to approach the court for issuance of order to restore the position of the company for the purpose of preference. However, the liquidator can ask to set aside the security in order to avail the option of preference at the time of disposal of assets of the company.[476]

The winding up of a floating charge created before the beginning of the winding up was treated by court as valid and legitimate where a company is being wound up a floating charge on the undertaking or property/ assets of the company created within twelve months of the start of winding up is invalid. In the cited and referenced case the company granted a debenture containing a floating charge to its managing director to secure its indebtedness to him. The company unsuccessful to pay its debt and so the managing director appointed himself as receiver, sold the relevant assets/ properties and then paid himself out of the proceeds. The company afterward went into winding up and the liquidator argued that the floating charge was created within twelve months of the beginning of winding up; that it was invalid; and that the managing director was gratified to return the proceeds of sale of the charged assets to him. The Court of Appeal held that section 322 of the companies Act, 1985, is confined to a

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[475]*Official Liquidator Palai v K. Joseph Augusti Kayalackakam* (1966) AIR 121 (Ker).
[476]Jennifer James, *Company Law* (4th edn, 2003-4) 239, 240.

winding up. The opening words of the section are 'where a company is being wound up. It was held by the court that the section thus has no application unless and until the company is being wound up. Transactions completed under the authority of a floating charge before the beginning of a winding up are not affected by section 322 of the Companies Act, 1985.[477]

A creditor presenting a winding up application with notice of an earlier one does so at own risk as to costs, and can recover costs afterward incurred only if he can show that the first application was submitted with a bad aim and collusively. Where the Court refuses to issue the order, shareholders or creditors supporting the application will not have their costs; as well as the opposing parties such as shareholders, directors or others opposing the petition will not have their costs unless personally attacked by a charge which is disproved; the company opposing the order will have their costs from the applicant. If assets are inadequate, costs incurred in winding up rank after petitioners costs and before liquidator's remuneration. But they rank after costs ordered to be paid by the liquidator or out of the assets. By permission an application might have been withdrawn after the winding up order had been marked but not entered.[478]

7.2 PRINCIPLE OF UNIVERSALITY

This principle states that only one winding up proceedings is started/ opened against the company. The jurisdiction depends upon where is the main center of concern is located. The court orders given in main jurisdiction/ case are also applicable in other member states. The secondary proceedings may be concerned with the assets of company in member states and under the law of that state. [479]

The proceedings of the winding up covers all assets of the company located locally or internationally under the principle of universality. But this depends on local laws and recognition by local courts. Majority of jurisdictions adopt principle of territoriality

[477]Vanessa Stott, *Company law* (2nd edn, BPP 1990) 221.
[478]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 721-3.
[479]Cross-Border Insolvency Law in the EU (21 February 2013) <www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130476/LDM_BRI(2013)130476_REV1_EN.pdf> assessed 11 December 2017.

by which the process of winding up is confined to assets within the applicable jurisdiction.[480]

The legal process or any suit started before winding up order had no effect on the winding up process. Therefore, during the winding proceedings the winding up order is required to be established under the principle of universality. However, the right to take part in winding up proceedings for collective enforcement of debts depends on the discretion of a creditor.[481] A company which was merged with another company cannot be wound up on the ground that the same was ceased to carry on business as a separate entity.[482]

The court has to form its own opinion about the fair nature of every case as the law requires. The law vests equity and jurisdiction in the court. The court may or may not pass a winding up order. The word "may" signifies that the court enjoys discretionary power, but this discretion should be used by the court not randomly, but in a thoughtful manner so that the rights of parties are not violated.[483]

The provisional winding up is an alternative to the official winding up. It is flexible and a substitute to official winding up. Applications for provisional winding up orders can be made by a creditor or a contributory: (a) the assets/ properties of the company from being dissipated or misused; (b) the oppression of minority shareholders; or (c) mismanagement or misconduct of the directors.[484]

It has been held in court judgments that the ordinary and preference shareholders had equal rights on the winding up of the company regarding the surplus assets/ properties of a company, unless this conjecture is rebutted by words indicating an inequality.[485]

The courts will decide that the preference shareholders are treated fairly and justifiably. If there is a proposal for reduction and this reduction involves disparity of

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[480]Kenneth K Mwenda,' Legal Aspects of Banking Regulation Common Law Perspective from Zambia'(2010) <https://download-plaza.com/download/book/Legal%20Aspects%20Of%20Banking%20Regulation:%20Common%20Law%20Perspectives%20From%20Zambia.html?aff.id=9325&aff.subid=6544> assessed 17 December 2017.

[481]*Wight Pilling and Mackey v Eckhardt Marine GMBH* (2003) CILR 211.

[482]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 215.

[483]*K. Mohan Babu v Heritage Foods India Ltd Hyd* (2001) 5 ALD 800 (AP).

[484]Tim Le Cornu & Mathew Clingerman, 'New Insolvency Rules in the Cayman Islands' (2009) < www.compasscayman.com/cfr/2009/07/07/New-Insolvency-Rules-in-the-Cayman-Islands---Part-2/, assessed 12 December 2017.

[485]David Milman, *National Corporate Law in a Globalized Market* (Edward Elgar Publishing 2009) 190.

the class rights of the relevant shareholders, the court will not treat this proposal as just and fair. The rights of the preference shareholders in winding up should compare with the rights proposed to them under the proposed protection. This approach has been much criticized, but it remains valid in class right cases.[486]

The winding up order passed by the Lahore High Court in respect of Taj Company Limited has been suspended does not affect the case of the petitioner either way because the present defendants are not the Taj Company Limited but it is Taj Printing and Packaging Limited. The applicant argument is that there has to be an independent winding up order against the present defendants and proceedings under section 290 of the Companies Ordinance, 1984. This dispute of the learned counsel has no substance in the present state of affairs of the case. The present Administrator has got the same status, so far as the provision of section 316 of the Companies Ordinance, 1984, is concerned as that of winding up order. The question whether the present defendant is covered by the order of appointment of the Administrator of Taj Company Limited has been resolved through the judgment wherein the learned Court in respect of another subsidiary company namely Bahawalpur Board Mills Limited had decided that no proceedings can take place against it unless consent is sought by the Company Judge under section 316 from the Company Court at Lahore and proceedings by Industrial Development Bank Of Pakistan against the Bahawalpur Board Mills Limited were stayed.[487]

7.3 OPPRESSION / MISAPPROPRIATION AGAINST MINORITY SHARE HOLDERS

The protection of minority shareholders is also the responsibility of the management of the company. In this regard, sections 290 to 294 in the Companies Ordinance, 1984, occur in the statute under the title prevention of Oppression and Mismanagement and award enormous and undefined powers on the Court dealing with the matters visualized by the provisions. Such powers, except the contrary is established/ proved, should contain, basically as interim but hardly as eventual measures, jurisdiction to prohibit proceedings against the Company, apart from with the permission of the Court. This would, ex facie, be essential to stop oppressive or

[486] Jennifer James, *Company Law* (4th edn, 2003-4) 196.
[487] *Habib Bank Ltd v Messrs Taj Printing & Packaging Industries Ltd* (2002) CLD 512 (Kar).

mismanaged behavior of the Company's affairs; for in any other case an ill-disposed management may conspire to suffer decrees in other jurisdiction efficiently and unilaterally applying checks to the kind exercise of the Court's functions.[488]

It is pertinent to point out that section 290 of the Companies Ordinance, 1984, cannot be raised by any party for settlement of disputes between the parties but the only purpose behind section 290 of the Companies Ordinance, 1984, emerges to be that the affairs of the company shall be performed in a lawful way and strictly in accordance with the Memorandum and Articles of Association of the Company.[489]

The Registrar of Companies filed statement of allegation against the Directors. These allegations were pertaining to misappropriation of fund to recover established liabilities and default pertaining to the statutory requirement under the Ordinance and for action against the Directors. As the allegations, pertain to violations of various other sections of the Companies Ordinance, 1984, and the order to impose penalty under the relevant provision of law was solicited. It was pointed out by the court that in the proceedings under section 290 of the companies Ordinance, 1984, only those allegations which fall within the purview of Sections 410 to 415 the Companies Ordinance, 1984, can be examined and determined, as provided under section 294 of the Companies Ordinance, 1984.[490]

Oppression has not been defined and it is left to the Court to choose on the facts and circumstances of each case whether there is such coercion as calls for action under this section 290 of the Companies Ordinance, 1984. It is not sufficient to show that there is just and reasonable cause for order under section 290 of the Companies Ordinance, 1984. Mere loss of confidence between groups of shareholders would not come within the misbehavior of 290 of the Companies Ordinance, 1984, until and unless it is shown that this lack of confidence resulted from a wish to coerce the minority. The applicant has failed to bring on record the material to form an opinion by this Court that the affairs of the respondent are being mishandled or there is coercion to the minority shareholders; therefore, the applications are dismissed.[491]

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[488] *National Bank of Pakistan v Banking Tribunal* <http://www.pakistanlawsite.com/LawOnline/law/statutesnext.asp> assessed 12 June 2011.
[489] *Muhammad Fikree v Fikree Development Corporation Ltd* (1992) MLD 668.
[490] *Registrar of Companies Pakistan v Taj Company Ltd* (1993) CLC 1413 (Lah).
[491] *Shaheen Foundation v Capital FM Pvt Ltd* (2002) CLD 188 (Kar).

The Registrar submitted petition/ statement of allegations under sections 412, 413 and other provisions of the Companies Ordinance, 1984, for resolution and enforcement of civil and criminal liability of some of the working Directors. The Court in the proceedings which are basically of summary nature could take/ get cognizance of offences falling within the purview of section 413, of the Companies Ordinance, 1984. Other offences alleged to have been committed by these Directors under the Companies Ordinance as well as under the Pakistan Penal Code of which this Court is not capable of taking cognizance, are the subject matter of complaints submitted/ filed by the Registrar of Companies to the Sessions Judge. These complaints necessitate to be pursued and prosecuted industriously so that the accused, if any, on proof thereof are punished correctly and sufficiently.[492]

The Court normally cannot give relief to the affectees until and unless it finds buyers of the properties/ assets owned by the Taj Company and its subsidiaries and relief will also have to be limited to the level of the amount available with it after sale of properties/ assets. Clearly pendency of these proceedings in no way places any limit whatsoever on the Government or it authorities to come out with any scheme of relief to the Taj Company affectees. Whatever legal proceedings could be taken by the Court against the ex-Management have been taken; their liability has been determined and on account of their collapse to clear/ pay this liability they have been ordered to be detained in civil prison. Keeping in view the facts, circumstances and the law all possible alternatives which the Government can resort to in accordance with law have been pointed out. It is now for the Government to decide as to how and in what way it considers best to help the affectees. Nonetheless if the Government is of the view that these proceedings in any way debar it to act, Registrar of Companies, a Government functionary, who instituted these proceedings, can be instructed to withdraw the same.[493]

In the matter of Taj Company, the Hon'able Lahore Court held that there is breakdown of the Government agencies to check the fraud being planned since last three decades at least. The concerned/ relevant authorities in the State Bank as well as Corporate Law Authority must have taken notice of the enticement to the public to make deposit at profit rate which no financial institution can probably pay. This

[492]*Re Taj Company* (1994) CLC 403 (Lah).
[493]*Re Taj Company* (1994) CLC 403 (Lah).

feature was adequate to invite thorough checking and inspection of the affairs as well as the accounts of the Company. Even now the concerned agencies will be well advised to plan efficient monitoring system of public companies dealing with deposits in one form or the other so that any embezzlement/ misappropriation of the public money by the companies, its Directors or officers must be prevented, checked and stopped in time. Had the Authorities previously started the inspections into the affairs of the Taj Company, the Directors would not have been capable to produce the complete record of the public deposits and the authentic records of how they have been used and the unfortunate state of affairs of the Company and loot and plunder being pampered into by the Managing Directors and the Directors would have come to light. The Directors who were concerned in the scam merit to be proceeded against under penal law as well as for other provisions of the Ordinance for those defaults of which could not be taken under sections 412 and 413 of the of the Companies Ordinance, 1984.[494]

In circumstances where the main aim of the company has not been satisfied or the company has diverged from its stated objective, the discussion regarding the coercion of the minority by the majority is of no benefit in an action for winding up. That is a question relating to internal management of the Company and it is a settled principle that it is the right of the majority to conduct the management of the company. The simple fact that difference have arisen between one group of directors and the other by itself is not enough to lead the court to the conclusion that a situation similar to that of deadlock has arisen in the affairs of the company.[495]

7.4 INVESTIGATION INTO THE MIS-MANAGEMENT AND MISAPPROPRIATION

During the winding up proceedings, the court may order for the criminal investigation into the allegations regarding the mismanagement and misappropriation of company funds and illegal disposal/ sale of assets. As result of this investigation, the separate trial in criminal court can be held or the company court may award sentences to the culprits as per provisions of company law in case the allegations established against them. In this regard, if the application submitted for winding up is not maintainable,

[494] *Re Taj Company* (1993) CLC 1413 (Lah).
[495] Sh. Shaukat Mahmood, *Company Law*, (Galaxy Press 1982 edn) 395.

and the court does not have the authority to *suo motu* wind up the company, the only action which this Court can take, to make certain that ends of justice are met and the several thousand depositors are not left to the mercy of dishonest persons in the management of the applicant company, is to exercise its inherent powers under Rule 9 of the Company Court Rules and declare, under Section 237(a)(ii) of the Companies Act, 1913 that the affairs of the applicant company be investigated/ probed by an Inspector to be appointed by the Central Government. It is well to remember that the High Court is not invested with powers of investigation. All that it can do is to exercise jurisdiction under Section 237(a) (ii) of the Companies Act, 1913 and direct the Central Government, to conduct an investigation, to enquire into the misappropriation, mismanagement and other illegal acts indulged in by persons in management of the applicant/ petitioner company. After an investigation is conducted, and the report is submitted/ filed to the Central Government, the Central Government shall take proper action in accordance with law.[496]

There are many offences which might be committed by past or present officers of the company, promoters, persons in accordance with those instructions the directors have given them to act, or members, of which the liquidator may take evidence. It is liquidator duty to take/ initiate the suitable steps in the matter. If he obtains evidence of the commission of criminal offences, he must report the particulars to the Court when appointed in a compulsory or a supervised winding up. While acting in a voluntary winding up, he must report the matter to the Director of Public Prosecutions (S 334 of the Companies Act 1985).[497]

The applicant is one of the Directors of the Company and it is stated in the memo of the application that Company had collected over 3/1-2 cores of rupees from their 606 partners/ shareholders for expansion of business and due to definite actions taken by State Bank of Pakistan against the business of Company and registration of criminal cases against the Directors and their arrest, the Company was forced to close down their business. It is stated in the application that the Company is incapable of paying its dues to the partners, shareholders and investors and it has closed down its business and the Government agencies have taken over their properties/ assets. It is also stated in the application that Director-General FIA has seized various Bank Accounts of the

[496]*Peoples Insurance Co Ltd v Sardul Singh Caveeshar* (1961) AIR 87 (PH).
[497]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 403.

Company. In the state of affairs it has been sought that the Company be wound up. Official Assignee, who is now the only Provisional Liquidator, has informed that all the formalities have been complied with and notice has also been published in the newspaper. No objection has been received from any quarter against the application. As the company has stopped to function and it emerges that the company will not be capable of paying its debts, a case for winding up of the company is made out.[498]

The rule of estoppel is found on equity and good conscience, viz., that it would be unjust and unfair to a person that if another by a representation submitted, or by conduct amounting to representation, has persuaded him to act as he would not otherwise have done, the person who submitted the representation must be permitted to deny/ reject the effect of his former statement, to the loss and injury of the person who acted on it. The learned Company Judge has discussed the issue properly and this Court observes no ground/ cause to meddle in the impugned judgment of the company court.[499]

7.5 JURISDICTION OF COURTS

It is an important aspect that before start of the matter/ process, the jurisdiction of the court required to be taken into consideration. The winding up matter must be taken to company court for adjudication. In this regard, in the matter of Company Petition No. 3 of 2007, dated 18-12-2007, the Hon'able Court held that the only question that remains to be answered is the desirability of taking such steps. On behalf of the respondents it has been urged, that hearing of cases at Chandigarh is inconvenient to the parties and burdens them with needless expense. This objection does not appear to have been present to the respondents earlier to this application/ petition. Large sums are involved and there are serious allegations made against the ex-Directors and other contributories not only as to gross mismanagement but also as to deception and misappropriation etc. Various steps under the Indian Companies Act of 1913 have been taken by this Court and various proceedings are going on. It will not be in the interest of justice and convenience/ ease that the proceedings which have been pending in this Court for the last two years must now be transferred to the Court of

[498] *Muhammad Saleem Anwar v Patley International Pvt Ltd* (1991) CLC 1854 (Kar).
[499] *LP Prabhu v Official Liquidator* (Ker) <http://indiankanoon.org/doc/> assessed 09 June 2011.

the District Judge, Delhi.[500] The law has clearly defined the jurisdiction of the court; therefore, the court has to decide the matter within its jurisdiction. Any departure by the court while deciding the substance would result in injustice.[501]

An official liquidator can sell the assets/ properties of the company including its immovable properties in foreign territories and where such sales have the sanction/ approval of the Court and conform to the requirements of the *lex situs* their validity cannot be called in question on the view of lack of authority in the official liquidator to make them. His power to sell even the foreign properties arises since he takes the place of the Board of Directors and could use all their powers and not because there is any vesting of the properties/ assets of the company in him. Hence the question whether in view of the rules of private international law under which the foreign properties/ assets of a bankrupt cannot vest in the official receiver such properties/ assets can vest in the official liquidator in a winding up is totally immaterial to the consideration whether the official liquidator has the authority to sell those properties.[502]

7.6 EXECUTION OF DECREE

Sometimes in civil proceedings, the parties obtained decree against the company, under winding up. The permission of the company's court is required for the execution of such decree. In this respect, if once leave to prosecute the suit is obtained under section 446 of the Companies Act, 1956, no further permission is essential to be obtained to execute the decree obtained in such a suit. If that is so, Section 537 of the Companies Act, 1956, must essentially have a petition/ application where execution is sought to be levied after the order to winding up of a decree acquired before the order of winding up is passed. Section 537 of the Companies Act, 1956, would come into play only in the latter case, viz., in case where a decree has been obtained/ acquired against the said company earlier to its winding up and the decree is sought to be executed after the winding up of the company. Section 537 of the Act is not to be read to signify that if permission to prosecute the suit is obtained by the petitioner under s. 446, of the Companies Act, 1956, he must again obtain permission under s. 537 of the

[500] *Re Galway and Salthill Tramways Co* (2007).
[501] *Bakemans Industries Pvt Ltd v New Cawnpore Flour Mills* (2008) (SC).
[502] Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 629.

Companies Act, 1956, of executions of the decree. The placing of the two sections by the legislature has also to be considered in this respect. Section 446 of the Act is placed in Chapter I of Part VII under the sub-heading "Consequences of winding-up order", while Section 537 of the Companies Act, 1956, is placed in Chapter V of Part VII under the sub-heading" Effect of winding-up on antecedent and other transactions". It is to the antecedent transaction of getting of the decree earlier to winding up and execution levied after winding up Section 537 would apply. Consequently, even on this basis, once permission of the court is obtained by the plaintiff under Section 446 of the Companies Act, 1956, to start a suit after winding up or to prosecute a suit already started earlier to winding up, no further permission is essential for executing the decree. Consequently, it is an error to say that the landlords, M/s. Janata Industries, must have obtained further permission of the court to execute the decree and that the landlords not having obtained the permission of the court to execute the decree, the execution levied by them and the subsequent possession taken by them of the four galas is void.[503]

7.7 DEBTS

The debts of the company are liabilities of the company. The debts of the company are paid from the disposal of company's assets. After passing of resolution for winding up company, the debts are to be paid within 12 months. The company is unable to pay its debts when company has not paid sum of money for certain period. The secured creditor is also entitled of taking of interest; if the security is materialize within six months of winding up. [504]

In this respect, the Hon'able Calcutta High Court held that unless exempted by orders of the court debts up to the date of winding up or in other words, up to the date on which the liquidator assumes charge, would have to be proved. The risk otherwise is that the liquidator might be flooded with fabricated, overstated, collusive claims. When proceedings are initiated in a Court of law, all claims, whether the claims arose before or after the date of winding up of the company would have to be proved. For

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[503] *Janata Works P Ltd v Janata Works P Ltd* (1984) 56 CompCas 229 (Bom).
[504] *Corporate Insolvency: About Liquidation and Winding up (MLAW)* < www.mlaw.gov.sg/content/io/en/corporate-insolvency/about-liquidation-or-winding-up.html> assessed 11 December 2017.

example, if a civil suit were to be filed for recovery of dues that accrued either before or after the order of winding up, the claim would have to be proved. The liquidator may dispute a claim. In such a case, even the post winding up claim would have to be proved in appropriate proceedings commenced in a Court of law. When a claim is disputed on grounds of provision of goods and services to the entity, which are below specification or services not having been rendered or on the ground of claims having been inflated, there can be no question of any order of Court in summary proceedings directing the liquidator to make payment of the amount claimed. The claim would have to be proved in appropriate proceedings, may be by initiation of a civil suit with leave of Court.[505]

A winding up application is a legitimate method of enforcing payment of a just and fair debt. A creditor who is incapable of getting the payment of his debt has a right *ex-debitor justitae* to a winding up order. Consequently where the simple purpose of the creditor is to recover his debt out of assets/ properties available and he has no other matters and the company is not in a place to pay the debt, the creditor is prima facie permitted to an order of winding up, and the incapability of the company of paying a particular debt can also be of an advantage to its other creditors also.[506]

The due cause is to be calculated by reference to the real, considerable, honest interests of the winding up, and to the reason for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due reason is the significant and real interest of the winding up.[507]

7.8 FRAUDULENT PREFERENCE

During the winding up proceedings, the claims/ debts are to be paid according to the preference of the parties/ creditors. No person is allowed to get any preference in illegal or fraudulent manner. Therefore, any delivery of property, mortgage or charge on property, delivery of goods, payment of money, obligation incurred, or execution or other legal process affecting property done or suffered by a company which was insolvent at the time and within six months before the commencement of its winding up is voidable if it can be proved by the liquidator that it was done with the intention

[505] *Steel Emporium v Official Liquidator* (Cal) <http://indiankanoon.org/doc/> assessed 06 June 2011.
[506] Sh. Shaukat Mahmood, *Company Law*, (Galaxy Press 1982) 395.
[507] *Rangaswami Achari v Mandhai Viswa Brahmana Sarvajana* (1967) 37 CompCas 730 (Mad).

of preferring a creditor, or a or guarantor of the debt, including in the calls of ' sureties' any person interested in property who has allowed it to be mortgaged or charged as security for a loan to the company, even though that person has made not actual promise to pay the debt if the company fails to do so (S 320 (1) of the Companies Act 1985).[508]

If a company is being wound up the remedy against a criminal director whether for fraud, negligence or misfeasance is under section 412 of the Companies Act, 1956. Where such proceedings have been taken against a director following a suit against him for compensation for deception or misfeasance is incompetent on the principle of res judicata. The liquidator has the whole period of limitation within which to move the Court under section 412 of the Companies Act, 1956, and therefore the fact that he delayed the application/ petition until the last date of the period of limitation is legally and technically no defense to the proceedings under the section. If on the last day of the prescribed period/ time of limitation for a petition under section 412 of the Companies Act, 1956, the court is closed, it being a Sunday, the petitioner is entitled by virtue of section 10 of the General Clauses Act to file the petition on the following working day. However the court has no discretion to consider a petition filed after the end of the period of limitation.[509]

A winding up order will only be made/ issued on this reason if the company has no aim to conduct business. Since the conduct of the majority was not irrational or something of which minority had a right to complain, the desires of majority were not to be disregarded. It would have been dissimilar if business could not have been carried on or there was an aim to abandon the undertaking.[510]

A person being examined under these provisions is not allowed to remain silent: the privilege against self-incrimination is impliedly abrogated by the statute in the interests of allowing the office holder more efficiently to carry out his investigative functions. Though the court is less inclined to make/ issue an order where proceedings have been started and followed against the proposed examinee or where he is suspected of wrongdoing. It was recognized that the privacy of a private examination

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[508]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 398.
[509]Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 764-5.
[510]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 516.

is significant for the proficient functioning of the investigation, encouraging speedy, voluntary disclosure to the office holders.[511]

It is unfair and an abuse of the process of the court for the shareholders to make use of a winding up application for the reason of seeking to make easy the accomplishment of a purely sectional and irrelevant purpose which has no significance to the interests of the members as such.[512]

In this chapter, some important topics have been discussed in detail by mentioning relevant provisions of Company Ordinance and related case laws. The references have also been quoted from the different books on this subject. The realization and disposal of company's assets is the prime duty of liquidator with assistance of the shareholders. The principle of universality is being exercised in member's states to avoid multiple proceedings against the company. The control/ observance of any oppression/ misappropriation against minority shareholders is the duty of officers and liquidator of the company. The court may order to carry out an investigation by the agencies like NAB and FIA to enquire into the mismanagement, misappropriation and other illegal acts done by the management and officers of the company. Further, some other significant areas like execution of decree for debts and fraudulent preference given to different stake holders of the company have also been studied and elaborated their importance.

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[511]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 538.
[512]LS Sealy, *Cases and Materials in Company Law* (7th edn, Lexisnexis 2001) 529.

PART IV

CHAPTER 8

THE EFFECT OF WINDING UP ON CERTAIN TRANSACTIONS

8.1 JUST AND EQUITABLE

In this chapter discussion will also be held regarding some other important topics which are also being dealt and gone through during the winding up proceedings of the company. These important topics are just and equitable circumstances available/ given for the winding up of the company, misfeasance proceedings and winding up, public examination, disqualification, proceedings against fraudulent officers and court powers in winding up. Further, some other significant areas provided in law like wrongful trading and fraudulent trading, payments against criminal offences other than winding up, disposal/ sale of assets to third parties, attachment of assets of company, inspection and production of documents, public examination of officers, change of name of company in liquidation, attachment before judgment, the guarantee of the liabilities of a subsidiary company, set-off and ultra vires transactions by directors. As mentioned in previous chapters, these matters/ issues will be deliberated keeping in view, perusal of laws regarding these topics and the important decisions of Hon'able Courts given in these subjects from different countries Law Jurisdictions (Pakistan, Indian and other common law countries) and the literature/ material researched.

For the purpose of defining the words 'just and equitable' no broad rule has been laid down as to the nature of the state of affairs that determine that the winding up is just and equitable.[513]

There is no clear cut and unambiguous meanings of the term "just and equitable". The Hon'able Sindh High Court held that if a company is incapable of paying its debts and there is no objection to its winding up, it is just and equitable to wind up the company. If a company is incapable of paying its debts and no objection has been raised against its winding up. The court held that it will be just and equitable to wind up the company. The Official Liquidator has taken charge of all the properties/ assets and

[513] *Jose J Kadavil and KT Mathew v Malabar Industrial Co Ltd* (1986) 59 CompCas 969 (Ker).

belongings of the company. The Hon'able Court in this case has further held that the applicants who have desecrated the stipulations of the Sale Agreement and the Memorandum of Understanding and the Joint Venture arrangement and have endeavored to do things not directly which were not permitted for them to do directly. The Directors having made enormous investments and the fact that the suit for specific performance of the contract is pending before the original side of this court, it would not be just and equitable if the respondents are ordered to be wound up, more predominantly when the justifications for such winding up are also not obviously available to the applicants.[514]

The "just and equitable" provision does not enable one to pay disregard the responsibility he assume by entering a company. It does allow the Court to subject the use of legal rights to equitable consideration.[515]

In Additional Registrar of Companies, Karachi case, the Hon'able Sindh High Court has held that for winding up of a company, the Court might have to regard as the following grounds:--(a) whether the substratum of the company is considered to be gone (b) the purpose for which it was incorporated, had satisfied; (c) whether it is impracticable to conduct the business of the company apart from a loss; (d) there is no reasonable optimism that the aim of the trading at profit can be achieved, or (e) accessible or possible assets/ properties are deficient to meet the existing liabilities. Prior to final order of winding up, Court remains under responsibility to form a view under clause (h) of section 305 of the Companies Ordinance, 1984, whether it is just and equitable that company should be wound up. The words just and equitable' are words of the widest consequence and do not limit the authority of the Court to any case. It is a question of fact that each case shall depend on its own state of affairs.[516]

If the company was stopped and was not in running state, the Court was right in reaching the conclusion that it was just and suitable that the company be wound up. In this very judgment it has also been observed that "a company may be rich, yet it may be commercially insolvent. The real standard is whether it could meet up its liabilities". "If a company is not commercially solvent nor is there any rational possibility of its doing business in the near future at a profit then it is just and

[514]*Nesar Ahmed Siddiqui v Micro Engineering's (Pvt.) Ltd, Karachi* (2010) C L D 713 (Kar).
[515]E.R. Hardy Ivamy, *Topham and Ivamy's Company Law* (15th edn, Butter Worth 1974) 349.
[516]*Additional Registrar of Companies Karachi v Tri Star Power Ltd Karachi* (2010) C L D 1115 (Kar).

equitable to wind up the company". Applying this check on the case in hand; the Court concluded that, subject to all just exceptions, petitioner Company may be having assets/ properties more than the liabilities which is due to the respondent-Bank but reality remains that it is not in a operational state nor is commercially feasible because it could not demonstrate profit for the reason of discharging its debts/ loans acquired/ received by it from the bank.[517]

The Hon'able Supreme Court of Pakistan was pleased to hold that there was not a huge investment in the Company after its privatization nor has any material document been placed on record. Particulars and state of affairs of the case, joined with independent Auditor's Report, obviously be inclined to hold up the observation of the respondent-Bank that the Company has totally gone its substratum and is neither feasible nor commercially solvent to discharge its enormous liabilities. Certainly there is nothing on record except plain statement of the learned counsel in an appeal on behalf of an unauthorized person to suggest that winding up order endured from any irregularity or factual and legal infirmity. The learned Company Judge was entirely justified in, arriving at the conclusion that it was just and equitable to order the winding up of the Company.[518] The 'just and equitable' provision does not, as the respondents propose, permit one party to ignore the duty he assumed by entering a company.[519]

The company is not a commercially solvent concern despite the fact that currently it is in a operational state but as per up-to-date reports of auditor it is operational in a loss/ deficit and its liabilities are increasing day by day, consequently, it is not a situation to clear/ adjust its liabilities which it owes to different institutions who have given financial accommodation to it from time to time because the financial support acquired from department is entirely covered under pertinent provision of law, consequently, its facility cannot be termed against the public policy. In these state of affairs the view formed by learned Company Judge vide impugned judgment that it is just and equitable to wind up appellant company acknowledges no intervention in appeal by this Court.[520]

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[517]*Central Cotton Mills Ltd v Habib Bank Ltd* (2004) SCMR 1443 (SC).
[518]*Rauf B. Kadri v State Bank of Pakistan* (2002) PLD 1111(SC).
[519]*Ebrahimi v Westbourne Galleries* (1973) AC 360.
[520]*Hala Spinning Mills Ltd v International Finance Corporation* (2002) CLD 1487 (SC).

There' is no doubt the Court has discretion under section 314 subsection (2) of the Companies Ordinance, 1984, to decline to construct an order for winding up of the Company if the application is submitted on the reason that it is just and equitable that the company must be wound up.[521]

If a material part of the sub-stratum of the company is gone then the Court will look at all the other state of affairs in order to observe whether it is just and equitable to wind the company up. The company was deceptive from its inception/ incorporation and that a winding up order was the finest means of permitting deceived shareholders to recover/ get back their money.[522]

Where debenture holders were doing the business of the company, while no receiver had been appointed, an order was issued in favour of applicant judgment creditors on the reason that it was just and equitable to wind up the company even presumptuous that the assets/ properties were inadequate for the debenture holders.[523]

The Richard Clark, in his book title the Dispute Resolution of Review has discussed that the judgment was issued on an application/ petition to strike out a member's application for the appointment of liquidators. The applicant was a shareholder in a mutual fund that had made considerable redemptions, which the claimant measured detrimental to its interests. The proceeding was not an abuse of process, despite the existence of a previous proceeding by which the claimant required relief for unjust discrimination. The previous proceeding had been struck out, but after the winding up proceeding had been started. On the question whether the petition was bound to fail, The Hon'able Court issued findings, principally (1) that there was a rational hope of achievement on the just and equitable ground (mainly loss of substratum) based on statements by the company that its life had come to an end and it had no rational anticipation of meeting its objects as a mutual fund, and that it would allocate its remaining assets/ properties to its members; and (2) that contentions that the company might have claims against its directors that required to be probed was not a basis for a winding up order.[524]

The just and equitable winding up process will be open for the court where the company is unable to function as anticipated. The obvious objective of the parties was

[521]*Ali Woolen Mills Ltd v Industrial Development Bank of Pakistan* (1990) PLD 763 (SC).
[522]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 701.
[523]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 717.
[524]Richard Clark, *The Dispute Resolution of Review* (2nd edn, 2010) 107.

that all would contribute in operations and dismissal of one director from his post destined that the fundamental suppositions upon which the company was established were damaged and winding up is essential.[525] An effort to keep out from administration a director who had the lawful anticipation that he would carry on to be involved in management was unjust discrimination.[526]

The Court regarded as a petition to wind up on the just and equitable ground/ view. The applicant maintained that his association with the other majority shareholder was one of common faith and assurance and this was established to be the case. The applicant had shown good reason for the company to be wound up. The company was though solvent. However, a compulsory sale of assets of the company would not be as judicious as the use of substitute remedy.[527]

It is just and fair by the Official Liquidator to do so, as the victorious shareholders or group(s), as the case may be, would be allowed to have his/ its share and other claims accustomed towards the value of the same. It is also pointless to affirm that such claims would comprise claims arising from acts/ lapses, equaling nonfeasance and malfeasance of any of the other shareholders of the company. [528]

The Hon'able Karnataka High Court of India held that the point that the substratum of the Company has not gone in the logic that the reason for which it was formed/ incorporated can thus far be attained, despite its current uncomfortable financial dilemma may be an debatable one. The state of affairs that are present as on the date of submission of the winding up application must usually direct the substance, and that, having regard to the state of affairs/ matters getting in 1980 the question whether the substratum of the Company had gone may bear assessment. The affairs of the Company could, conceivably, have been badly administered or mishandled. The rightness of the finding of the Court on the "just and equitable" reason may bear further examination. The order of winding up is obviously manageable under Clause (e) of Section 433 of the Companies Act, 1956. We do not desire to be comprehended as having recorded a finding against the Bank under the ground available in Section 433(f) of the Companies Act, 1956.[529]

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[525] Jennifer James, *Company Law* (4th edn, 2003-4) 60.
[526] Jennifer James, *Company Law* (4th edn, 2003-4) 61.
[527] Vanessa Stott, *Company law* (2nd edn, BPP 1990) 226.
[528] *Unichem Corporation Pvt Ltd v Khursheed Ismail* (2000) SCMR 456 (SC).
[529] *Hegde and Golay Limited v State Bank of India* (1987) ILR 2673 (KAR).

The Hon'able Supreme Court of India held that the reason for winding up of Company under clause (f) of Section 433 of the Companies Act, 1956, did not exist. It would not be suitable to articulate any view one way or the other since the High Court was not mistaken in permitting the company to argue that point before the learned Company Judge as that point did not arise before him previously. We may not be understood to have recorded a finding that the petition presented by the company is maintainable. When the issue will be taken up by the learned Company Judge, it will be open to the Company to raise a contention that no such application as presented is maintainable in the capacity as a Creditor.[530]

The Hon'able Calcutta High Court held that the subject matter of the company as revealed is gone, the purpose for which the company was incorporated/ established had considerably failed and it is no longer feasible to carry on the business. The substratum of the company is, therefore, gone which accordingly gives it just and equitable to wind up the company. The Registrar must not be allowed to displace the business carried on erstwhile by the company and create unemployment thereby against social interest, it is to be observed that the company had indulged in ultra vires business during this long time thereby dissipating away the cash of the company, admittedly to a significant and major extent even if its statement of recovery is believed. Further, the company has not produced before this court, in spite of requisition, the balance-sheets and profit and loss accounts over all these years for which there can be no defense. The court accordingly is deprived of a chance to appraise the financial position of the company and even on equitable and in social interest, there could be no justifying state of affairs to exercise the discretion in favour of the company if it was probable to do so. In this state of affairs there is clearly no scope for exercise of any discretion in favour of the company.[531] Section 433 of the Companies Act, 1956, deals with the powers of the court hearing the petition for winding up.[532]

The Hon'able Calcutta High Court held that the petitioners have expressed that it is just and equitable to wind up the company, however even as seeking directions under section 397 of the Companies Act, 1956, they were required to state/ explain that they

[530]*Severn Trent Water Purification v Chloro Controls India* (2008) CA 1351 (SC).
[531]*Kumarapuram Gopal Krishnan v Burdwan Cutwa Railway Co Ltd* (1978) 48 CompCas 611 (Cal), 82 CWN 774 (Cal).
[532]*Sudarsan Chits India Ltd v Sukumaran Pillai (1985)* 57 CompCas 85 (Ker).

would be unjustly prejudiced if the winding up order is issued, yet they have affirmed precisely to the opposite by explaining that such winding up would not unjustly prejudice the petitioners and minority shareholders and this gives an evidence which express that a prayer for a winding up order of relief under section 397 of the Companies Act, 1956, cannot be shared in one application. Where contradictory reliefs are sought, such a state of affairs is bound to arise. It would be untrue from such circumstances to fall back and say that conflicting reliefs cannot be combined in an application. It also emerges from the scheme of section 397(1) of the Companies Act, 1956 that for maintaining an application under section 397(1) of the Act the applicants must contend that the applicants are requisite number of members as required by section 399 of the Companies Act, 1956 and they complain by making averments of appropriate particulars that the dealings of the company are being performed in a way detrimental to the public interest or in a way unfair to those member or members. These averments are enough to invoke the court's authority under section 397(1) of the Companies Act, 1956 for entertaining an application. However, for granting/ providing relief, the court would not only be satisfied that the dealings of the company are being carried out in a way injurious to the public interest or in a way unfair to that member or members but must further be satisfied that the fact would rationalize issuing of a winding up order. It is when the court arrived at such a conclusion that the substitute relief under section 397 of the Act can be granted.[533]

The prima facie that the company has ceased to conduct business, its substratum is gone, it has carried on ultra vires business and that the said business has been carried on by meddlers and that it will be just and equitable that the company must be wound up. A petition must be summarily dismissed with no further inquiry into the allegations. It must be admitted. The subject is fit to be inquired into. At the phase of admission usually only arguments of a beginning character must to be considered.[534]

The winding up of the company on the ground of just and equitable would prejudice the rights of the members of the company who are aggrieved by the order of the court and are the petitioners before the court and if the order is not rationalized, the making/

[533] *Navnitlal M. Shah v Atul Drug House Ltd* (1971) <http://indiankanoon.org/doc/> assessed 07 June 2011.
[534] *Rajan Naginds Doshi v British Burma Petroleum Co Ltd* (1972) 42 CompCas 197 (Bom).

issuing of a winding up order on this ground might be justified as just and equitable winding up of the company.[535]

A private company, allowed the presentation of the winding up application but stressed that at the same time as the 'just and equitable" provision did not enable a party to ignore the responsibilities which he assumed/ taken by entering a company, it permitted the court to subject the use of legal rights to reasonable considerations of a personal character arising between individuals which may compose it unjust to insist on legal rights or to use them in a particular way.[536]

If the business is being carried out at an obvious loss, and it is entirely unfeasible to make/ receive any profit, it can hardly be said that this court will believe it just and equitable that the company must be permitted to carry on when people who have embarked property/ asset a significant amount in it do not desire it to go on. It is relatively separate from saying that it is an insolvent company, or that it cannot pay its debts, because the persons running it will take care to have all the debts paid by making calls to meet them.[537]

Whenever proceedings under section 305 of the Companies Ordinance, 1984, are instituted against a company same are usually defended on the excuse that there is a bona fide disagreement with regard to debts outstanding against it. Consequently, winding up order cannot be made against it. The only reply open to the company is to how that the debt claimed is bona fide, in which case a winding up application is not proper method of enforcing it. Where the debt is certain, it is useless for the company to say, we are capable of paying our debts, but we do not desire to pay this particular debt. Where the debt is undeniable, but the company has an indisputable cross-claim against the petitioning creditor, it is a matter for the discretion of the Court whether a winding up order must be to dismiss the application or stand it over until the cross-claim has been heard. If the company asserts that it is not accountable to a creditor and can satisfy the Court that it has significant and rational defense to plead, the Court will hold that it is not in default and would decline to issue a winding up order.[538]

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[535]*Hanuman Prasad Bagri v Bagress Cereals Pvt Ltd* (SC) <http://indiankanoon.org/doc/> assessed 18 June 2011.
[536]*Re CVC Opportunity Equity Partners Ltd (1999) CILR 378*.
[537]Alfred F. Topham, *Principles of Company Law* (4th edn, Butterworth 1914) 237.
[538]*Hala Spinning Mills Ltd v International Finance Corporation* (2002) CLD 1487 (SC).

If managerial remuneration had not been lawfully stopped, even then the applicant must have filed a suit. The principles of Section 443(2) of the Companies Act, 1956, relate with equal force, to cases and decisions under Section 397, of the Companies Act, 1956, when the deciding authority chooses whether the company is to be wound up on just and equitable reasons as those doctrines apply to an application for winding up on the just and equitable ground reasonable and suitable.[539]

As per the decision of the Hon'able court it is necessary to consider the earlier background regarding the incorporation of the company, the relationship of the parties, their involvement and participation in the business since commencement and onwards so as to adjust an opinion about just and equitable relief which the state of affairs required on a holistic approach.[540]

The Hon'able Kerala High Court was pleased to hold that the petitioners have useful substitute remedy/ relief under Sections 397 and 398 of the Companies Act, 1956, and the materials on record evidently point out that they are acting irrationally in looking for to have the company wound up instead of following that other remedy. The applicants can also submit a suit in this regard against the company. These applications are, consequently, responsible to be dismissed under Section 443(2) of the Companies Act, 1956.[541]

Section 433 of the companies Act, 1956, deals with several conditions in which company might be wound up by the Court and the opening words of the provision "A company may be wound up by the Court" obviously shows that the provision itself is discretionary; discretionary in the sense that it should be judicious discretion only. Section 433(f) of the Companies Act, 1956, states that company should be wound up if the court considers that it is just and equitable to do so.[542]

Where a company has neither maintained appropriate and true accounts nor statutory Annual General Meetings were held, conclusion could have been drawn that the substratum of company had disappeared and the affairs of the company were not being run in accordance with law. If the substratum of the company is gone and there is no rational probability of the company starting business again it is just and

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[539] *Bagree Cereals P Ltd v Hanuman Prasad Bagri* (2001) 105 CompCas 465 (Cal), (2001) 2 CompLJ 397 (Cal).
[540] *Trackparts of India Limited v K.N. Bhargava (2000)* CriLJ 310.
[541] *Jose J Kadavil and K.T Mathew v Malabar Industrial Co Ltd* (1986) 59 CompCas 969 (Ker).
[542] *K. Mohan Babu v Heritage Foods India Ltd Hyd* (2001) 5 ALD 800 (AP).

expedient that the company should be wound up, even when a majority of the shareholders whishes/ desires that the company may not be wound up. This is mainly so when the majority is a misleading one and where in view of heavy financial liabilities, substratum of the company appears to have disappeared.[543]

8.2 MISFEASANCE PROCEEDINGS AND WINDING UP

Misfeasance has been defined so as to comprise of a violation of duty by an officer, the direct effect of which has been misapplication of its assets/ properties resulting in financial loss to the company for which he could be made liable by an action at law or in equity. The supposition of intent to defraud creditors arising from the transaction taking place within three months of the winding up is rebuttable.[544]

Where the transferee recognizes that the debtor is incapable of meeting his duties the provision as to protection does not relate. The principle of the Winding up Act is that all claims which are able of being adequately dealt with in the winding up must be so disposed of, and a shareholder will not be allowed to bring an action against the directors and officers for misfeasance.[545]

The company is guilty of misfeasance in relation to two items of the claim of the official liquidator, the value of the stock of paper and the value of the materials forming part of the structures removed by respondent, with interest thereon at the rate of six per cent per annum. The official liquidator will also obtain the costs of this proceeding from the company.[546]

There is no divergence between section 138 of the Negotiable Instruments Act and section 536(2) read with section 441(2) of the Companies Act, 1956. The two function in separate fields. The offence is complete after receipt of the notice by virtue of nonpayment and if during that time there was no viodness then a subsequent order of winding up has no effect on the offence which has previously been committed. This is also clear from the fact that if the winding up petitions were dismissed or withdrawn then it would be very clear that an offence under section 138 would have been committed. The law can in no way be that on a winding up there is

[543]Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 543.
[544]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 866, 837.
[545]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 838, 865.
[546]*Official Liquidator v Ashok Kumar* (1976) 46 CompCas 572 (Pat).

no offence but on a dismissal of application an offence is believed to have been committed. The commission of the offence is not reliant upon the winding up of the company but is dependent upon dishonor and nonpayment of the amount within of the receipt of the notice. It is at this phase that the offence gets completed.[547]

Sub-section (1)450 of the Companies Act, 1956, provides, that where an order has been made for the winding up of a banking company. Sub-section (2) provides that if on a consideration of the report submitted under Sub-section (1) the Court so thinks fit, it can direct the public assessment of the person concerned as to matters mentioned in it. It would appear from the underlined portion of Sub-section (1) that the person considered in it can contain an accusation of fraud committed by a person stated in it if the liquidator is of view that such fraud was committed.[548]

The Hon’able Kerala High Court held that the impugned order for the public examination of the counter petitioners was passed. The result of that order is that counter petitioners who are accused of the different offences punishable under Sections 538, 539, 541 and 545 of the Companies Act, 1956, are required to be witnesses against themselves and to provide evidence in support of the accusations against them. The protection granted by Clause (3) of Article 20 of the Constitution is against such compulsion. The entire elements essential to bring the matter within the mischief of this clause are present in this case and accordingly the impugned order is hit by Clause (3) of Article 20 of the Constitution. The objection based on Article 20 (3) of the Constitution was over ruled by the learned Single Judge by observing that the counter petitioners ordered to face a public examination are not persons accused of an offence even if it be that the allegations against them divulge a criminal offence.[549]

In Official Liquidator case, the Learned Judge was dealing only with deception relating to promotion and formation of the company and not with the clause in Section 8 relating to fraud committed "by any officer of the company in relation to the company since the formation thereof". It is enough if it is in relation to the company since its formation. It is argued that "in relation to the company" would only mean

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[547]*Orkay Industries Ltd v State Of Maharashtra* (2000) (5) BomCR 14 (Bom).
[548]*Official Liquidator Popular v K. Madhava Naik* (1965) AIR 654 (SC), (1965) 35 CompCas 174 (SC).

[549]*Madhava Naik v Popular Bank Ltd Alleppey* (1961) AIR 14 (Ker), (1960) 30 CompCas 501 (Ker), (1961) CriLJ 75 (Ker).

fraud by the officer in relation to the company but not as regards outsiders. It is hard to believe this contention, for, so far as the officer is concerned, by engaging in illegal activities as in the case of obtaining money on false pretenses for the company, the officer is committing a fraud in relation to the company. The phrase "in relation to" would mean the way in which one thing is connected with another.[550]

The misfeasance proceedings started by the official liquidator under section 543 of the Companies Act, 1956, are on behalf of the company under winding up and that they are in the name of that company only. The present petition filed by the official liquidator under sub-section (1) of section 543 is made in the name of and on behalf of the company. It is to be observed that section 458 A of the Companies Act, 1956, which was introduced by Act 65 of 1960, starts with a non obstante clause and, consequently, has an overriding effect. It relates to all petitions submitted in the name and on behalf of the company for which the period of limitation is fixed elsewhere. In as much as a petition of the official liquidator under section 543(1) of the Companies Act, 1956, is also a petition in the name of, and on behalf of, the company, and the provisions of section 458 A of the Act are attracted to such a petition.[551]

Once misapplication is established, the burden of proving that he acted sincerely and rationally lies on the supposed delinquent. The materials placed by the official liquidator, namely, his report, auditor's report and statement of P.C. Varghese supported by a number of documents which establish the role done by respondents in the relationships of the company in winding up. The simple declaration that they did not recognize what was going on or mere denial is no defense. The company had lost money under various accounts and respondents are responsible to make good the loss. They are jointly and severally liable to pay the official liquidator. The materials placed by the official liquidator clearly demonstrate that respondents have misapplied or kept or became responsible or answerable for the money and property of the company or are responsible for misfeasance and breach of trust and that a reasonable amount was lost to the company; accordingly respondents are legally responsible for contributing to the assets of the company by way of compensation. They are liable to

[550]*Official Liquidator v CVS Raman* (1966) 36 CompCas 701 (Mad).
[551]*Official Liquidator v T.J Swamy* (1991) 2 ALT 113 (AP), (1992) 73 CompCas 583 (AP).

be proceeded against under Sections 542 and 542 of the Companies Act, 1956. They are also liable to be prosecuted under Section 545 of the Companies Act, 1956.[552]

Section 583 of the companies Act, 1956, does not confer any authority upon the court to direct substitution in a proceeding initiated under Section 543 of the Companies Act, 1956. In directing substitution in such a proceeding the court issues the order which is beyond its authority and thus such an order is a "judgment" within the meaning of Clause 15 of the Letters Patent. The question concerned in the appeal is a jurisdictional question and the order under appeal is, consequently, appealable. The power under Section 543 of the Companies Act, 1956, is a statutory power and should be used within the four corners of the law. If the power is used in a way which is not authorized by the section, the use of power happens to be appealable.[553]

The basis of liability in misfeasance proceedings is breach of fiduciary relationship or stoppage to carry out tasks prescribed by law. In these circumstances the proceedings stop on the death of the delinquent officer or officers concerned. The liquidator's right to proceed against the legal representatives of such persons survives subject to the limitation that the order for repayment or restoration that is eventually issued would be limited to the assets/ properties of the deceased delinquent officer, this petition for substitution of the legal representatives of a deceased director cannot be opposed.[554]

The liability/ responsibility of a member to pay for the unpaid value of a share could be imposed under Section 426 of the Companies Act, 1956, and the failure of a member to make such a payment would not attract the provisions of Sections 542 and 543 of the Companies Act, 1956, even if he happened to be a director of the company. The liability to pay such an amount can neither be believed as a deceitful act nor equivalent to misapplication or retention of money or property of the company nor be explained as an act of misfeasance or breach of trust in relation to the company. It amounts to a failure to discharge legal obligation as a member which can be imposed in accordance with law.[555]

A person, who has neither been appointed a director nor acted as a director, but on whose directions and instructions other directors of the company used to act, will be

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[552]*Official Liquidator v T Sudarsan* (2003) 116 CompCas 88 Mad (2004) 49 SCL 694 (Mad).
[553]*Parthasarathi Sinha v Official Liquidator* (1976) 46 CompCas 555 (Cal), 79 CWN 972 (Cal).
[554]*Official Liquidator v Sailendra Nath Sinha* (1973) 43 CompCas 107 (Cal).
[555]*Official Liquidator Milan Chit v Joginder Singh Kohli* (1978) 48 CompCas 357 (Delh).

considered as a director. But if he has been issuing directions and instructions in a professional way, he will be considered a shadow director.[556]

The company's share capital comprised 100 voting shares with a preference as to dividend and capital, and 25,000 equity shares carrying the right to vote only in a winding up with the right to participate in remaining profits and assets.[557] The winding up application was irrational particularly in view of the proposal to purchase/ acquire the parents' shares. In relation to the petition under section 168 A, of the Companies Act, 1985, as the parents aim was in fact to get financial recompense, they must have followed their contractual claim for recompense or accepted the proposal to buy their shares. An order under section 168 A, of the UK Companies Act, 1985, was refused.[558]

The Privy Council passed a winding up order in respect of a company whose capital was divided evenly between four shareholders who were also directors. Some of the characteristics of a partnership subsisted between the directors. But these were inadequate to show that the directors were under a duty to desist from exercising their authority to remove each other from office as director. There was, on the other hand, further information that the applicant was assured an appointment as chairman of the board when he joined the company, that he had added additional capital, that he had guaranteed the company's debts and that he had loaned large sums to his fellow shareholders, all pointed out that he should be permitted to contribute to the management of the company. Consequently, it was just and equitable that the company must be wound up.[559]

At the time of winding up, the assets/ properties were not adequate to leave anything for the ordinary shareholders. The matter was decided in favour of preference shareholders and creditors voted for it; but the ordinary shareholders voted against it. Held, as the ordinary shareholders had no concern in the assets/ properties, their opposition did not matter.[560]

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[556]Jennifer James, *Company Law* (4th edn, 2003-4) 266.
[557]Vanessa Stott, *Company law* (2nd edn, BPP 1990) 209, 210.
[558]Vanessa Stott, *Company law* (2nd edn, BPP 1990) 209, 210.
[559]Vanessa Stott, *Company law* (2nd edn, BPP 1990) 226.
[560]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 233.

8.3 PUBLIC EXAMINATION DISQUALIFICATION / PROCEEDINGS AGAINST FRAUDULENT OFFICERS

During the winding up proceedings, the court may order for proceedings against the officers involved in fraud. In this regard, the allegations made by the objectors in their objections against the petitioner/ applicant and his wife, it may be observed that the objectors may start legal proceedings against the petitioner/ applicant and his wife, be that of civil or criminal nature if the same is permitted to them by the law. On company/ respondent being ordered to be wound up in terms of section 328 of the Companies Ordinance, 1984, a statement as to the affairs of the respondent/ company verified by an affidavit will be required to be submitted by its Directors to the Official Liquidator, who, in turn under section 329 of, the Companies Ordinance, 1984, file his introductory report to the Court bring to the notice of the Court inter alia all factors which have resulted in the failure of the respondent/ company. On considering such preliminary report or reports of the Official Liquidator, the Court can issue a proper order.[561]

The petitioner/ applicant has failed to establish how and in what way the conduct of prosecution under section 138 of the Companies Act, before the relevant courts is probable to influence unfavorably the undertaking or are possible to influence the winding up process or conduct of affairs of the company in common as relief responsibility so as to necessitate the prudence to be implemented in favour of the petitioner/ applicant for staying the criminal proceedings which are required to be quickly decided to fulfill the reason of statute and not to gather dust of time.[562]

The expression legal proceedings or other legal proceedings for the purpose of section 442 and 446 of the Companies Act, 1956, must be read ejusdem generis with the expression "suit" and can signify only civil proceedings which have bearing in so far as the winding up is concerned namely realization of the assets and discharge of liabilities of the Company.[563]

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[561] *Muhammad Nasir Ghazi v GM Printo Pack Pvt Ltd Karachi* (2009) CLD 307.
[562] *Gal (India) Limited v Bayer Abs Ltd* <http://indiankanoon.org/doc/> assessed 06 June 2011.
[563] *Re Winding Up Order* (1999) 1 BomCR 84 (Bom).

The authority to run the company devolves on the liquidator. He can sue a director if he violates his duties. A director is supposed to perform his duties in a reasonable and rational manner.[564]

It is not only the director who are liable to be sued if they act in a deceitful manner, but any other person, who acts in a fraudulent way can be sued and disqualified. A director if found guilty can be disqualified for two years from corporate management.[565]

The liquidator acquired a court order for the examination/ statement of a controlling shareholder. The liquidator maintained that the company sustained to trade when it should have been clear to the directors that it was insolvent; that the liquidator's information of the company's affairs was imperfect; and that there were definite features of the link between the company and other companies controlled by shareholder which remained unclear. The liquidator has to show a reason to examine the shareholder. The court should not permit an examination/ statement where this would be unfair, vexatious or unreasonable. Moreover, this common principle must be applied on the basis that persons who have been concerned in the affairs of an insolvent company have a public duty to help the liquidator to examine the affairs of the company in the benefit of its creditors. As the liquidator comes to his duty devoid of any information of the company's affairs, he will regularly require the support of those who were concerned in its affairs.[566]

8.4 COURT POWERS IN WINDING UP

The power of the Court to empower the liquidator to perform duties in the name of the company and to resolve pending proceedings is a discretionary power. The liquidator is not obliged in the interest of the company to discuss the matter with the creditors of the company before submitting an application to Court. These summary powers cannot be used against a person who is not an agent, banker, contributory, receiver, trustee, or officer of the company.[567] The sale of the property at its market value after filing of the petition for winding of the company is regarded as a post winding up

[564]Jennifer James, *Company Law* (4th edn, 2003-4) 238.
[565]Jennifer James, *Company Law* (4th edn, 2003-4) 266.
[566]Vanessa Stott, *Company law (*2nd edn, *BPP 1990)* 228.
[567]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920).

transaction.[568] The Learned Kerala High Court was pleased to hold that the proof submitted by the petitioning creditor and the respondent company are not regarded as valid to advance any finding by the court to revoke the winding up order.[569]

8.5 WRONGFUL TRADING AND FRAUDULENT TRADING

If on the petition of the liquidator, director of the company has been found guilty of deceitful trading, the court may hold him accountable to compensate for the company's assets as it deems appropriate.[570]

A.J. Dignam and J.P. Lowry, in their book on Corporate Finance and Management Issues on Company Law discussed that the liquidator ought to establish that the director in question permitted the company to carry on to trade, at some time before the start of its winding up. The knowledge that creditors are applying stress for payment or refusing to make further deliveries will be enough. The company's winding up/ liquidation was inevitable was the latest probable date on which the annual accounts for that year must have to deliver. The fact that the directors had not seen them was immaterial and in any case they had acquiesced in the delay of their delivery. Where the company has reserved insufficient records, the court at its discretion may decide the period of wrongful trading. It is now established that a liquidator who suggests carrying on proceedings for wrongful trading against directors has no automatic right to have the costs paid as a liquidation expense.[571]

If it emerges in the process of winding up that an officer or director of the company acted in a deceitful manner and was guilty of misfeasance or breach of any fiduciary obligation and caused loss to the company, the court may on the petition of the liquidator, creditor or official receiver force him to re-imburse money, asset/ property for compensation as the court deems just and proper.[572]

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[568]*Re Gray's Inn Construction Co Ltd* (1980) 1 WLR 711, 718–19.
[569]*Airwings Private Ltd v Viktoria Air Cargo Gmbh* (1995) 82 CompCas 447 (Kar).
[570]Jennifer James, *Company Law* (4th edn, 2003-4) 24.
[571]Alan Dignam and John Lowry, *Company Law (4th edn, Oxford University Press* 2008) 25-27.
[572]Alan Dignam and John Lowry, *Company Law (4th edn, Oxford University Press* 2008) 28-29.

8.6 PAYMENTS AGAINST CRIMINAL OFFENCES OTHER THAN WINDING UP

The Hon' able Lahore High Court Lahore in criminal matter held that Zarco company is a separate/ distinct legal entity and it can only be proceeded against under the Companies Ordinance, 1984, and any action by this Court as against the company and its assets/ properties including the security lying with the State Bank may amount to its liquidation/ winding up. The authority of this Court has also been objected/ challenged to on the reason that Zarco Company is a company incorporated/ formed under the Companies Ordinance, 1984, which cannot be proceeded against and its assets/ properties cannot be disbursed otherwise than by proceedings under the Companies Ordinance, 1984. No doubt winding up of the company can be carried out under the Companies Ordinance, 1984, but at the same time the company is responsible to make good any loss or injury caused/ incurred by it while doing some criminal acts or omissions.[573]

8.7 DISPOSAL/ SALE OF ASSETS TO THIRD PARTIES

The burden always remains on the liquidator to establish absence of good faith in the deal. In law, such submission may be correct, but, in the instant case, the matter has not been decided on the basis as to whether onus has been discharged or not, but on the discussion of materials on record. In view of the numerous doubtful circumstances, the learned single Judge had come to the conclusion that the transaction cannot be protected. In our opinion, even applying the standard relevant to Section 531-A of the Companies Act, 1956, the current transaction cannot be sustained. So far as the legitimacy of the transaction is concerned, it is factual that no proper application had been filed by the Liquidator to avoid the transaction. Apart from the question as to whether such formal request was necessary, in the present case, the appellant itself has sought for such a declaration and the matter has been judged accordingly. Therefore, it is useless to contend that in the absence of any

[573] *State v Director General, FIA* (2010) PLD 23 (Lah).

formal request by the liquidator; the transaction must be upheld bereft of the bona fides of the transaction.[574]

The Hon'able Bombay High Court held that the scheme of sections 528 to 530 of the Companies Act, 1956, is that all creditors should establish their claims in the winding up of the company and subsequently all creditors of the same class should be paid pari passu. This can scarcely be given consequence to if to-day the first respondents were allowed to execute their decree. There are no particular or exceptional circumstances present in this case as would persuade the court to leave from its common practice. In fact all the conditions are such as would, on the contrary, persuade the court to stay the proceedings. The Civil Court suit was submitted/ filed and the attachment before judgment obtained at a time when the company was in insolvent state of affairs, was attempting to dispose of its properties/ assets and there was no any accountability of person in charge of the company and criminal proceedings were pending against some of its directors. In these state of affairs, it would have been evident to anybody that a winding up application was about to happen. The decree attained by the first respondents is an ex parte decree. The company could not even submit an emergence as there was nobody in charge of the company. This is a matter for the official liquidator to look into, if the company is ordered to be wound up, at the phase of verification of debts.[575]

It will be a replication of the law that has been stated by the Supreme Court, even a third party action can be impugned on behalf of the company under winding up or in respect of the benefit of the company under winding up as also with respect to any question of priorities or any other question whatsoever, whether of law or fact, which may relate or arise in the course of the winding up of the company.[576]

The term "burdensome covenant" would only relate/ connect to any land of any tenure held by the Company. Clauses (b) and (c) relate to other assets/ properties, in the form of stocks and shares and any other property. Under Clause (c) a disclaimer application would lie to get rid of any property/ asset possessed by the Company which is

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[574] *Archean Granites Pvt Ltd v RPS Benefit Fund Ltd* (2005) 4850 <http://indiankanoon.org/doc/> assessed 12 June 2011.
[575] *Re Ovation v Adverts Pvt Ltd* (1969) 39 CompCas 595 (Bom).
[576] *Radhakrishna v PR Ramakrishnan* <http://indiankanoon.org/doc/161564/> assessed 24 June 2011.

burdened with the performance of any arduous act or to the payment of any sum of money.[577]

In a sale by tender, though, no such chance is available to the tenderer. Once he presents his offer that is ultimate and cannot be raised, whereas in public auction each and every bidder knows the bid of the other person. In the form of sale by calling for offers or tenders, none of the persons or tenderers recognizes the price offered by the other. In regard to the tenders, an advertisement that good or services are to be bought or said by tender is not, prima facie, an offer to sell to the person making the highest tender. It is, consequently, clear that by sale by tender or by calling for offers, the highest bid need not be accepted.[578]

8.8 ATTACHMENT OF ASSETS OF COMPANY

The court, while winding up the company has powers under section 446 of the Companies Act, 1956 to dispose of any claim against the company or any of its branches in India. The grammatical construction of the expression "claim against the company" would include a claim that can be realized by proceeding against the property of the company. The attaching creditor would treat the attachment as an event of the claim which was being realized. Such a claim could and should be investigated/ probed by the court winding up the company. Consequently, this court should find out now whether there is any unclear legally subsisting on the property/ asset of the company. The attachment, if allowed to exist, might raise some blur over the clean title of the assets/ properties of the company. If that cloud can be legally continued, the court should provide effect to it. If it cannot be continued, this court has authority being used by this court. In fact, for a long time argument was advanced and was critically considered that an attachment itself may make some equity in favour of the attaching creditor. Such an attachment might have been levied prior to the beginning of the winding up process or between the presentation of the application and the making up of the winding up order. If an argument that an attachment may make some equity in favour of the attaching creditor was to be considered as of some substance, the Parliament never wanted such an argument to be presented and

[577] *Hongkong & Shanghai Banking v Official Liquidator* (2008) AIR 35 (Cal) (2008) 1 CALLT 150 HC (Cal).
[578] *Vishwa Nath Agrawal v State Of U.P* (2004) 4 AWC 3604 (UP), (2005) 128 CompCas 452 All (UP).

accepted in respect of an attachment since the date of the beginning of the winding up order. In other words, section 537 of the Companies Act, 1956, might indicate that the court might consider about the effect of an attachment levied prior to the beginning of the winding up proceedings. But, nothing was left for the interpretation of the court in respect of an attachment levied after the start of the winding up, which was stated to be void.[579]

A winding up differs from bankruptcy, that in bankruptcy the entire assets, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding up the legal estate still remains in the company. But, the advantageous interest is obviously taken out of the company. From the time of the winding up order all the powers of the directors of the company to carry on the trade or to deal with the assets/ properties of the company shall be entirely determined, and nobody shall have any power to deal with them apart from the official liquidator, and he is to deal with them for the reason of collecting the assets and dividing them amongst the creditors. It appears that does, in firmness, constitute a trust for the advantage of all the creditors and, as far as this Court has authority, no one creditor can be permitted to have a larger share of the assets/ property than any other creditor.[580]

8.9 INSPECTION AND PRODUCTION OF DOCUMENTS

The order so far as it directs the appellant to produce the general ledger of Real Property and Building Society Ltd. must not to be released at this stage. This company is now in winding up and the order was made in the proceedings for its winding up. The appellant was for some time its director. The appellant states that he is not in possession of the general ledger. He must bring this fact to the notice of the Court when he attends the Court pursuant/ response to the summons issued to him. If, as he says, the document is not in his charge or power he has a lawful justification for not producing it. But the order for its production cannot be said to be unfair and that part of the order ought not to be discharged at the stage.[581]

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[579] *Ananta Mills Ltd v City Deputy Collector* (1972) GLR 633.
[580] *Re Oriental Inland Steam Company* (1874) LR 9 Ch App 55.
[581] *Satish Churan Law v R Goho Official Liquidator* (1962) AIR 23 (Cal).

The Hon'able Indian Punjab High Court held that the court has the powers to summon any officer of the company under section 477 of the Companies Act, 1956, after issuing of winding up order or appointment of official liquidator of the company. Thus, under the powers conferred upon him by different provisions of the Companies Act, 1956, the court had authority to decide the matter for granting of relief to the concerned parties. It is important to mention here that the court issues a winding up order to appoint a provisional liquidator when the company is incapable of paying its debts to its creditors. It is also for advantage of those who have some claims against the company. The further purpose is that the entire property/ assets of the company must be realized/ collected by the liquidator for its equitable distribution among the creditors of the company.[582]

Section 477 of the Companies Act, 1956 states that the court may, at any time after the appointment of a provisional liquidator or the making of a winding up order, summon before it any officer of the company or person known or suspected to be indebted to the company.[583]

The order which is made ex parte is not absolute; it is constantly open to a person noticed to request for vacating or modifying the order on the argument that it has been obtained devoid of placing all the necessary materials/ evidences before the court or by misstatement of particulars or on other sufficient grounds, and the court has authority in appropriate cases, i.e. where it is pleased that the order is vexatious, or repressive, or where other sufficient grounds be present, to discharge the same. This authority may be used where the order for examination is per se unfair or vexatious, or where the order is sought to assist the progress of an action filed/ submitted by the official liquidator against the petitioners, or the order is sought in aid of some collateral purpose - a purpose other than efficient progress of the winding up in the interest of the company. Such action may be by way of a misfeasance summons. If the order has been attained exclusively for the reason of assisting the progress of the misfeasance summons taken out against a director that will be a sufficient ground on which the order must to be revoked.[584]

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[582]*State of Jammu & Kashmir v Hindustan Forests Company* (1997) 88 CompCas 21 (PH).
[583]*Official Liquidator of Amfort v Chhittar Luhar* (2003) 46 SCL 31 (Raj).
[584]*Official Liquidator Nagpur v DP Ogale* (1971) 73 BOMLR 333 (Bom), (1971) 41 CompCas 524 (Bom).

An order directing the examination of any officer of the company would be entirely incompetent, it would guide to no optimistic consequence and would be simple information in the hands of the Official Liquidator such information could at mainly lead the Official Liquidator to institute/ file other proceedings against the company for the recovery/ receipt of the alleged debt. But, those proceedings can be instituted/ filed still without this information. The Official Liquidator is already in possession of information showing that the company is indebted to the company in winding up that information is in the form of entries in the books of account of the company being wound up. The information could have been applied by the Official Liquidator to institute apt proceedings against the company by way of suit or petition under Section 446 of the Companies Act, 956. There is, consequently, no cause at all for the Official Liquidator to seek any further information or seek to examine/ interview any officer or director or other official of such an examination would be devoid of advantage either to the petitioner or to any other person.[585]

The discharge of the order of public examination has not in any way restrained the right of the Official Liquidator to ask for public examination/ interview of the respondents when the report is considered/ taken by the court in the presence of the respondents and after taking into consideration any submissions that may be made on their behalf. That being so, there no reason why the court should recall or set aside the order or rehear the petition on which the said order was made/ issued.[586]

The Learned Company Judge rejected an application by a petitioner for inspection and production of certain documents on the ground the petitioning creditor must first prove certain facts. Since the appeal under Section 483 of the Companies Act, 1956, is not against the judgment/ test whether the order decides the rights and liabilities of the parties is not to be relevant, but the limited test to be applied is whether the order influences any rights or liabilities of the parties.[587]

8.10 PUBLIC EXAMINATION OF OFFICERS

It is most important that section 477 of the Companies Act, 1956, which deals with private examinations does not contain any provision similar to sub-section (5) of

[585] *Official Liquidator Vinod v Hindustan Lever Ltd* 11 (1975) DLT 297.
[586] *Re Lohar Valley Tea Co Ltd v Unknown* (1965) AIR 372 (Cal), 68 CWN 938 (Cal).
[587] *Horst Kurves Gmbh v Essar Oils Ltd* (2003) 115 CompCas 801 (Guj), (2002) 2 GLR 1314 (Guj).

section 478 of the Companies Act, 1956, which relates to public examinations under that Act with the consequence that there is no provision in section 477 of the Companies Act, 1956, which can be said to override the provisions of section 132 of the Evidence Act. The provisions of section 478(5) of the Companies Act, 1956, supersede the provision of section 132 of the evidence Act and that answers given/ provided by the officer who is being so examined which might tend to implicate him can be used in criminal as well as civil proceedings that might ensue. No question of granting him protection under the proviso to section 132 of the Indian Evidence Act arises at all in regard to such answers even though he may be required to provide the same by cause of the provisions of section 478(5) of the Companies Act, 1956.[588]

Without examination of the person concerned, the court could exonerate him, after the court had prima facie contented itself and issued a direction for public examination. The petition for pardon under Section 478(7) (a) of the Companies Act, 1956, does not discontinue the process of the order directing the public examination. All that a person gains by moving an petition under Sub-section (7) of Section 478 of the Companies Act, 1956, is that after the public examination the court will go further and will have to choose whether the person concerned should be exculpated. If the court thus exculpates him it allows the person concerned to be paid costs. This is a benefit which he gets for moving for pardon. But it does not mean that public examination must be kept in abeyance. Moving a petition is not an automatic stay of the process of the order of the public examination.[589]

8.11 CHANGE OF NAME OF COMPANY IN LIQUIDATION

The company has happen to non-operational and what leftovers before the Company Court are only one or two title suits in respect of certain assets/ properties of the company. The probabilities of restoration are only a hypothetical probability and that order of dissolution is unavoidable. The respondent company is reasonable in seeking removal of its trade name from the name of a company in winding up. The appellant was not competent to encourage of any serious legal unfairness which may be occasioned to the company in winding up by the deletion of the name company from

[588]*Official v Haridas Mundhra* (Bom) <http://indiankanoon.org/doc/161564/> assessed 24 June 2011.
[589]*Shiv Dayal v Liberty Finance P Ltd* (1980) 50 CompCas 529 (Delh), 18 (1980) DLT 51 (Delh).

its present name. True, the Registrar of companies had raised a contention that allowing deletion applied for currently will unfairness the ongoing litigations initiated by the Official Liquidator but significantly such a contention is not shared by the official liquidator who figures as plaintiff in these litigations. The Court was convinced on the materials available that the word& quot; Toshiba & quot; is the trade name and trade mark of the respondent/ company and they are reasonable in be firmed that their name should not carry on in the name of a company which is on the edge of dissolution.[590]

8.12 ATTACHMENT BEFORE JUDGMENT

The expression "attachment, distress or execution put in force" does not contain an attachment before judgment. The purpose essential section 537(1) of the Companies Act, 1956, is to avert the property/ asset of the company being taken away by a creditor without permission of the court once a winding up application has been submitted. Section 537(1) of the Companies Act, 1956, thus makes certain that an executing creditors does not get priority over other creditors, This is made sufficiently obvious by the use of the words "distress or execution" in juxtaposition with the word "attachment" as also by the second sub-section which exempts proceedings by the Government for recovery of any tax or impost or any dues payable to it. This shows that the word "attachment" in clause (a) of section 537(1) of the Companies Act, 1956, means an attachment the reasons of which is to realize the decretal claim, i.e., an attachment in execution, and does not contain an attachment before judgment, for the object of an attachment before judgment, as pointed out previous, is dissimilar from the purpose of an attachment in execution. The scheme of sections 528 to 530 of the Companies Act, 1956, is that all creditors must establish their claims in the winding up of the company and thereafter all creditors of the same class shall be paid pari passu. This can hardly be given effect to if to-day the first respondents were allowed to execute their decree. There are no special or exceptional circumstances present in this case as would persuade the court to depart from its usual practice. In fact all the conditions are such as would, on the contrary, induce the court to stay the proceedings. The Civil Court suit was filed and the attachment before judgment

[590]*Federal Bank Limited v Sri CP Augustine* SNDP (Ker) <http://indiankanoon.org/doc/> assessed 26 June 2011.

acquired at a time when the company was in insolvent state of affairs, was attempting to dispose of its properties and there was no responsible person in charge of the company and criminal proceedings were pending against some of its directors. In these state of affairs, it would have been obvious to anybody that a winding up application was imminent. The decree gained by the first respondents is an ex parte decree. The company could not still submit a look as there was nobody in charge of the company. This is a matter for the official liquidator to look into, if the company is ordered to be wound up, at the stage of proof of debts.[591]

8.13 THE GUARANTEE OF THE LIABILITIES OF A SUBSIDIARY COMPANY

It is reasonably familiar for a parent company to guarantee the liabilities of its subsidiary company in order that it can be audited on a going concern basis. It appears that in the state of affairs of this case the responsibility that has been offered must be treated in this way. If the parent company is prepared to underwrite the debts due but also to the applicant/ petitioner the Company's debts will be settled as they fall due. The insolvency has been demonstrated or that in order to protect company's position a winding up order is necessary.[592]

8.14 SET-OFF

In compulsory winding up, the rules necessitate that all creditors must properly prove their debts by means of affidavits known as 'evidence' unless the judge order the admission of any creditors or calls of creditors without evidence. In voluntary winding up, this is not necessary. The liquidator may acknowledge any claims of whose authority he is pleased/ contented by examination of the company's books or otherwise, requiring evidence only in those cases where the proof for the claim is inadequate. [593]

[591] *Re Ovation v Adverts (Pvt Ltd* (1969) 39 CompCas 595 (Bom).
[592] *Re Jackin Total Fulfillment Services Ltd Companies* (2006) 628.
[593] H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 407.

8.15 ULTRA VIRES TRANSACTIONS BY DIRECTORS

An ultra vires transaction on the part of directors is of itself not adequate cause for a winding up order since other remedies are accessible to the aggrieved share holder. There is no just and equitable ground/ cause to wind up the company just because, in the past, they had carried on unauthorized business when that business had only resulted in profit to the company. It is well that business had only resulted in profit to the company. It is well established that an ultra vires transaction on the part of the directors is of itself no ground/ cause for a winding up order. It follows that an ultra vires transaction which was to the advantage of the company and its shareholders would still less be enough reason for a winding up order.[594] The lack of self-assurance must spring not from displeasure at being outvoted on the business affairs or on what is called the domestic policy of the company.[595]

[594] Sh. Shaukat Mahmood, *Company Law* (Galaxy Press 1982 edn) 429.
[595]LS Sealy, *Cases and Materials in Company Law* (7th edn, Lexisnexis 2001) 521.

CHAPTER 9

LIQUIDATORS

A person who is appointed to carry out or conduct the winding up of a company is called liquidator. If the winding up is through or under the supervision of Court, the expression applied for such person is official liquidator. The duty and responsibility of liquidator includes getting and realizing the properties/ assets of the company, to pay its debts, and to distribute the surplus (if any) among the members. The official liquidator acts/ performs under the supervision of the Court, through a recognized reporting.[596]

Liquidators must constantly observe matters through objective lenses. When apprehensions are raised/ pointed out and liquidators are challenged on a matter concerning an existing or possible disagreement, they must pause and carefully review their place analytically. They must look for, if essential, advice from completely independent legal advisor or their peers in the same profession. They must have to be observed appropriately wearing the mantle of objective impartiality unblemished by any particular interests, as well as their own fee considerations. In the course/ way of these 150 years or so, the principles governing liquidator's responsibilities and powers were thoroughly developed, and these ethics are now broadly acknowledged by all the common law jurisdictions.[597]

As with the commencement of winding up proceedings, the directors cease to function and the liquidator takes over the charge of the company. The winding up begins with the filing of petition for winding up or with the date of passing of resolution in case of voluntary winding up. The directors are deprived of their powers and the liquidator carries on the business of the company. He initiates steps to wind up the company, leading to its ultimate dissolution. The liquidator controls the

[596]Guide on Winding up: Dissolution of Companies (*SECP Guide*) < www.secp.gov.pk/document/winding-up-dissolution-of-companies-guide/?wpdmdl=13879&ind=DQoNCg0KDQoNCg0KDQoNCg0KDQoNCiAgICAgICAgICAgICBXaW5kaW5nIHVwIERpc3NvbHV0aW9uIG9mIENvbXBhbmllcyBHdWlkZS5wZGY> assessed 17 December 2017.

[597]Andrew Chan, 'Global and Regional Practices in Financial Restructuring and Bankruptcy Laws: Lessons to Be Learned from Singapore' <https://link.springer.com/chapter/10.1007/978-1-137-56175-6_6> assessed 05 November 2017.

company with a vision to gathering all its assets/ properties. He is called liquidation practitioner.[598]

The purpose of appointing a liquidator is to initiate steps to wind up the company. The purpose can be attained by the liquidator by exercising the powers of the directors. The legislature anticipated that the liquidator must succeed the directors in the wisdom of supposing or sustaining the office of directors. The directors upon an order of winding up of the company deprived of all powers to perform on behalf of the company.[599] After the commencement of winding up proceedings, the company is required to appoint one or more liquidators in its general meeting by ordinary resolution to complete the process of winding up in a transparent manner.[600]

At the start of process of winding up or commencement of the winding up proceedings of the company, the liquidator controls at the place of the directors of the company to gather all the properties/ assets of the company. The filing of petition for winding up of the company regarded as usually to start of winding up process. However, in case the resolution for voluntary winding up has been passed by the directors of the company, the date of the resolution will be the pertinent date for the start of winding up process.[601]

The office of the liquidator has in fact a dual characteristic, on the one hand he exercises the powers of the company, and on the other hand he is the representative for some reasons of the creditors and contributories. He is an officer of the Court and like other officers might be ordered to reimburse money paid to him under mistake of law. To a limited point the liquidator seems to be in the place of a trustee. But his factual situation is that of agent for the company; he is not, firmly speaking, a trustee for either the creditors or contributories. Consequently, in the lack of deception, malafide or personal delinquency, an action for damages will not lie against him at the suit either of a creditor or contributory for delay in paying the creditor's debts or in handing over to the contributory his percentage of the excess assets[602].

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[598]Janet Dine & Marios Koutsias, *Company Law* (6th edn, Palgrave Macmillan 2007) 316.
[599]*National Development Finance Corporation Karachi v Sindh Glass Industries Pvt Ltd* (1994) PLD 186 (Kar).
[600]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 481, 482.
[601]Janet Dine & Marios Koutsias, *Company Law* (6th edn, Palgrave Macmillan 2007) 316.
[602]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 758, 759.

In winding up the liquidator acts/ performs not only for creditors but also for contributories and for the company. The liquidator does not act upon more for the creditors than he does for the company. A liquidator is much more in the place of an ordinary receiver or even of a mortgagor who has executed a bill of sale than of an execution creditor. The liquidator is not an essential, or appropriate party to an action against the company brought prior to the winding up to set aside as deceptive mortgage made to the company and persistent against the company in winding up.[603]

A liquidator is trustee of the company's assets/ property. He should safeguard interests of creditors, shareholders and contributories. He should not act in a deceitful manner to advance his personal interest and not get undisclosed profits.[604]

The liquidator does not perform more for the creditor than he does for the company. A liquidator is much more in the place of an ordinary receiver or even of a mortgagor, who has executed a bill of sale than of an execution creditor. The liquidator stands for the company, the creditors and the general body of contributories.[605]

9.1 APPOINTMENT OF LIQUIDATOR

The provisions of the Companies Ordinance, 1984, provide the process and procedure of appointment of liquidator. The Court has discretion and is not just to register the effect of the determination of the creditors and contributories and it may decline to admit their nominee. An appeal might be considered against the appointment, the Court of Appeal will not obstruct with the discretion of the court in the appointment of a liquidator. Liquidators must be unbiased persons, and neither creditors nor shareholders must be appointed. Where a voluntary winding up is superseded by an essential order the voluntary liquidator is generally continued. When the company was put into winding up then the management and control of the property by the director was finished.[606]

The court normally refuses to issue an order that permit the liquidator of one company to get an appointment as member of the same group against which there is litigation

[603]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 759, 764.
[604]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 390.
[605]W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 445.
[606]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 751, 752, 755.

going on and this appointment will affect the interests of the company under liquidation.[607]

The Hon'able Sindh High Court has observed about the appointment of provisional manager and held that under subsection (1) of section 325 of the Companies Ordinance, 1956, the Company Judge (special Court) may be appointed a provisional manager of a Company in respect whereof a winding up application has been filed before him awaiting order of winding up of that Company and appointment of official liquidator. Though, the authority to appoint provisional manager in winding up cases/ matters cannot be exercised lightly, as the provisional manager appointed by the Court under this provision has the same powers as an official liquidator appointed by the Court resulting upon an order of winding up of the Company, except the Court at the time of appointment of provisional manager states the scope of the powers of provisional manager. As the appointment of "provisional manager" is burdened with grave and radical consequences for a running Company, the Legislature as a protection has provided in section 325(2) of the Companies Ordinance, 1984, that prior to employing the provisional manager, the Court must listen and give an opportunity to the Company to make/ submit its application against such appointment. In cases of acute exigency and in unusual state of affairs where Court is of the view that by issuing the notice to the opponent party, the purpose of appointment of provisional manager will be beaten, it can give out with such notice but in that case the Court shall record/ narrate its grounds for this unusual measure in the order.[608]

In Re. Dry Docks Corporation of London case, the Hon'able Court has held that still if the causes as provided by section 325 of the Companies Ordinance, 1984, for providing with the prerequisite of notice have not been evidenced by the Court, or else there are state of affairs to rationalize issuing of such an order, then the same might not call for review of the order. If the business is being carried on by the respondents illegitimately and deceitfully and that the assets/ properties of the respondents are being exhausted and unlawfully disposed of so as to defeat the rights of the creditors, no other substance emerges to have been placed/ brought before the Court in support of the assertions. Subsection (2) of section 325 of the Companies Ordinance, 1984, is an enabling provision and the Court, as pointed out before, can

[607]Rupert Connell, 'Office Holders conflicts' < www.r3.org.uk/media/documents/publications/recovery/Winter08.pdf> assessed 12 December 17.
[608]*Central Cotton Mills Ltd v Gulzar Ahmed* (1992) PLD 29 (Kar).

dispense with the requirement of giving notice to the respondents before issuing an order for appointment of a provisional manager/ liquidator, but there must be conditions to rationalize the acceptance of such process by the Court.[609] During the winding up proceedings the court could not simply overlook the appointment of the official liquidator as the provisional official liquidator of the company has been appointed earlier and there is no further requirement of a regular official liquidator to complete the winding up process.[610]

In the occasion of appointment of a provisional liquidator the company neither drops its lawful entity nor is the company separated from of its assets in spite of pendency of the winding up application and the appointment of the provisional liquidator. The assets are not vested in the liquidator which would necessitate divesting at future time except the company is lastly wound up. All provisions of the Companies Act per se do not happen to be relevant to the appointment of the provisional liquidator and the court can all the time limit and control the powers exercised by a provisional liquidator.[611]

The rights of the official liquidator are constantly controlled/ administered by the instrument which appoints him and he is associated for technical reasons with the official liquidator. His office is not an equation/ parallel to that of an official liquidator but he is an officer of court who has to receive directions of court in the case of use of his powers connected to his office and he cannot presume the position of an official liquidator and raise the provisions of the Companies Act and the Rules made there under and claim that he is a receiver and in physical, juridical and sole charge and manager of the assets of the company and that no one can obstruct with such assumed control of his and create instruments such as mortgages to his injustice and to the prejudice of the company.[612]

Sometimes the continuance of business by the Company is disadvantageous to the general public and consequently persistence of business by the Company is not only harmful to the interest of general public but also the depositors who have deposited money with the Company. The purpose of appointing provisional liquidator is equitable, just, fair and necessary regarding division of the properties of the Company

[609] *National Development Finance Corporation v Rawal Papers Pvt Ltd* (1991) MLD 1456 (Kar).
[610] *Re Dry Docks Corporation of London* (1888) 39 (CD) 88.
[611] *Bharti Telecom Ltd v Altos India Ltd* (1998) 94 CompCas 929 (PH).
[612] *Sri Chamundi Theatre Mysore v S Chandrasekara Rao* (1975) 45 CompCas 60 (Mad).

and the properties of the Company may not be wasted in this behalf and in view of public interest.[613] It was very important for the court, in exercising its prudence, to appoint only persons in whom it had a high level of assurance since the obligations of a liquidator, as an officer of the court, are so significant. In exercising this discretion due regard had to the required to deal reasonably with the standing of the nominee. While there was no requirement to demonstrate a precise act of delinquency to rationalize a denial to appoint a liquidator, conduct on earlier appointments was pertinent, although not definite, to choosing whether additional appointments should be made.[614]

The petitioner shall be limited to the matters provided in an application; the matter none the less is probable to be very intricate. Although the issue of indebtedness claimed can and shall be treated within the background of the application, the factual character of the connection between the applicant and the company will be pertinent to the defense.[615]

Some space must be there between the Liquidator and the party proposing him vis-a-vis the benefits of the other stakeholders not mere to repose confidence but to be seen to be obvious and open from any stain of pressure from any parties. By no means is the Court signifying that any of the Liquidators anticipated would be surrendered to any unwanted pressure for that substance, any parties would be using any unwanted pressure on any of the Liquidators anticipated. The Liquidator is anticipated to be seen to be as sovereign as doable though every Liquidator understood to be and acknowledged as an independent professional with honesty until established otherwise.[616]

9.2 LIQUIDATOR POWERS

The Hon'able Supreme Court of Pakistan has discussed the Section 333 of the Company Ordinance, 1984, and held that in the process of winding up the liquidator of the company should exercise its powers with the approval of the Court or the

[613] *Reserve Bank of India v Piramal Financial Services Ltd* (2000) 4 GLR 700.
[614] *Re Pegasus Insurance Company* (2004) CILR 57.
[615] *Banco Economico SA v Allied Leasing and Finance Corporation* (1998) CILR 92.
[616] *Hew Kiang Hoe v Shencourt Properties SDN BHD* (2002) 245996 T.

committee of inspection to complete the winding up process and safeguard the interest of the company.[617]

The Official Liquidator is officer of the court having explicit powers granted upon him under the Companies Ordinance, 1984. The official Liquidator representing a company is in so diverse position from anybody besides against whom an alien or third party makes a claim. His just task is to think and if he thinks fit as a permissible claim to acknowledge and if he thinks it precluded claim to decline it. The official liquidator has got plenty powers to get steps for the proficient winding up of the company so as to make an equilibrium among the concern of the parties according to law and the rules. In a winding up, the liquidator performs not only for creditor but also for contributories and for the company.[618]

Any proceedings essential for the safety of the assets are taken by the liquidator in the name of the company, until and unless the Court has prepared a vesting order, in which matter he can sue in his official name with regard of assets vested in him by the order. Under section 179, of the Indian Companies Act, he can institute/ file or defend any suit with the sanction/ approval of the Court and he can adopt any other legal proceedings, civil or criminal, also with such sanction.[619]

If the suit was pending before the court in which the company was the party; the liquidator did not obtain consent of the Court under Section 333 of the Companies Ordinance, 1984, to defend the same himself in its place of earlier administration and having knowledge of the pendency of the said suit it could not sustain setting aside of the decree just on account of flaw in the service of notice. This characteristic of the case has been taken into account because Official Liquidator in his report filed before this Court acknowledged that the said suit was pending. Since neither the ex-management nor the Official Liquidator had raised any protest against the verification of claim of Bank based on the decree, therefore, the protest raised by the objector being one of the creditors is not maintainable. Separately from this it may be mentioned here that even if Bank not filed a suit, it could straightly submit claim before the Official Liquidator as one of the creditors which under the law was to be processed and confirmed. The winding up shall be seemed to have also been filed by

[617] *United Bank Ltd v Pakistan Industrial Credit& Investment Corporation Ltd* (2002) PLD 1100 (SC).
[618] *Habib Bank Ltd v Schon Textile Ltd* (2010) CLD 1819 (Kar).
[619] *Discount Bank of India Ltd Delhi v Triloki Nath* (1953) AIR 45 (Pun).

Bank jointly with the petitioner by virtue of Section 318 of the Companies Ordinance, 1984. The case of such a creditor who had attained a decree by establishing/ proving his claim before the Court of law could not be considered inferior to that creditor who without attaining such decree can move toward the Official Liquidator and file his claim.[620]

The principal object of winding up of a company is to realize its property and its liabilities are discharged in accordance with law. The official liquidator who is an officer of the Court is appointed by the Company Judge who looks after and supervises the interests of all the parties concerned in a winding up of a company. He is a trustee not only for the creditor but for the company under winding up proceedings. He has to safeguard the interests of all the parties for the efficient performance of his duties. He is to take possession of movable and immovable properties of the company. Section 333 of the Ordinance, 1984, has given wide powers to the official liquidator which is exercised by him under the supervision of Company Judge who has been authorized to issue such directions.[621]

The Hon'able Supreme Court of Pakistan has held that the statement of the Official Liquidator to the consequence that the petitioner had not possessed the certificate of payment as authentic and had affirmed it as fake must not have been accepted by the Court. He further urged/ requested that the direct stand taken by the petitioner in their written statement filed against the application submitted by the petitioner, did not verify the position taken by the Official Liquidator. The Hon'able Court has not been able to find any error of law or any principle with respect to appreciation of the material placed before the Court regarding the findings of fact which basically shaped the subject matter of the impugned order.[622]

9.3 DISPOSAL/ SALE OF ASSETS BY LIQUIDATOR

The liquidator is an officer of the court having explicit powers granted upon him under the Companies Ordinance, 1984. Liquidator has the powers under section 333(1) (f) of the Companies Ordinance, 1984 to sell the movable and immovable property of the company by public auction or private contract. Under the said section,

[620] *Agha Bashir Ahmad v Nippon Bobins Pvt Ltd* (1997) CLC 1205 (Lah).
[621] *United Bank Ltd v Pakistan Industrial Credit& Investment Corporation Ltd* (2002) PLD 1100 (SC).
[622] *Ashraf Engineering Works Ltd v M.A.S Steel Mills Ltd* (1990) SCMR 391 (SC).

the Court has been vested with whole discretion to authorize the sale or not. Such discretion must be applied prudently having regard to the interests of the company and its creditors.[623]

The Hon'able Supreme Court of Pakistan has held that the impugned orders were set aside and the case was remanded to the High Court with direction that the assets/ properties of the company be put to resale through auction. The Company Bench shall keep the market value in view and the same, in the given attending conditions, shall be fixed as reserve price. It shall of course, be at liberty to make such arrangements/ preparations and take such measures for management and administration etc. of the company during interregnum as it may deem proper for the best interest of the company and the creditors. Sanctity to judicial sale of property is to be maintained as far as possible. However, the Courts have also a responsibility to make sure that such sales must be seen to have been made in the most reasonable, transparent, sensible, judicious method and above any doubt so that the concerns of all the stake holders are appropriately secured.[624]

The Hon'able Supreme Court of Pakistan observed that producing series of litigation is not the intention of the legislature and mandate of law. Since the bank guarantee was got executed for the advantage of the company under winding up by the petitioner, as such the same cannot be aggravated by putting up technicalities so as to frustrate the proficient performance of the liquidator. What is permitted for the Courts of general jurisdiction in the interest of impartiality, fair play and fairness when there is no statutory bar is also allowable for the Company Judge so as to spare the parties from the suffering of rushing from one forum to another for the readdressed of their grievances, it has been held time and again that all legal rules and regulations are to protect the supreme interest of Justice. In the present case pushing the creditor for the encashment of bank guarantee through a civil suit would merely be producing range of litigation which is not the mandate of law.[625]

Official Liquidator with the sanction/ approval of the Court has the authority, by virtue of section 333(f) of the Companies Ordinance, 1984, to sell movable and immovable property/ assets either through public auction or through a private

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[623] *Mohib Textile Mills Ltd v National Bank of Pakistan Karachi* (2005) SCMR 1237 (SC).
[624] *Mohib Textile Mills Ltd v National Bank of Pakistan Karachi* (2005) SCMR 1237 (SC).
[625] *United Bank Ltd v Pakistan Industrial Credit & Investment Corporation Ltd* (2002) PLD 1100 (SC).

contract. While carrying out the sale through public auction, the terms and conditions for the sale are under Rule 237 of the Companies (Court) Rules, 1997.[626]

The Hon'able Lahore High Court was pleased to hold that under Section 333 of the Companies Ordinance, 1984, the Liquidator has the authority to institute or defend any suit, action, and start prosecution of civil or criminal proceedings against the wrong doers on behalf of the company. The objection if any against the continuance of proceedings in the said suit/ matter filed by the Bank could be raise either by the earlier management or the Official Liquidator and not one of the creditors like the objector in this case. The decree in such suit still devoid of implement of the Official Liquidator was not invalid and the same at the most could be held to be voidable at the instance of the Official Liquidator. Had Official Liquidator approached the Court which passed the decree in favour of the bank seeking its cancellation or for setting it aside under Order 9, Rule 13, CPC it would have appeared with the objection that in spite of having information that the said suit was pending in which the company was the defendant he did not get leave of the Court under Section 333 of the Companies Ordinance, 1984, to defend the same himself instead of earlier management and having information of the pendency of the said suit it could not claim setting aside of the decree simply on account of defect in the service of notice. The winding up must be believed to have also been filed by the company jointly with the applicant by virtue of Section 318 of the Companies Ordinance, 1984. The case of such a creditor who had acquired a decree by ascertaining his claim before the Court of law could not be considered inferior to that creditor who without attaining such decree can approach the Official Liquidator and file his claim.[627]

The Joint Official Liquidator shall under section 330 of the Companies Ordinance, 1984, take into their charge or under their control the properties of the Company, and also the deposits held by or handed over to it. They shall also use, with the sanction and approval of this Court, all the powers as envisaged/ provided under section 333 of the said Ordinance read with section 52 and other facilitating provisions of the Banking Companies Ordinance, 1962.[628]

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[626]*Pakistan Industrial Leasing Corporation Ltd v Sunrise Textiles Ltd* (2006) CLD 1347 (Lah).
[627]*Agha Bashir Ahmad v Nippon Bobins Pvt Ltd* (1997) CLC1205 (Lah).
[628]*State Bank of Pakistan v Indus Bank Ltd* (2001) CLC 1833 (Pesh).

The Hon'able Sindh High Court held that when the property/ assets was advertised for sale, the offers/ bids received, pursuant to the advertisement, should not have been accepted; one way or the other, although such objections were pending. This involves two complexities obviously. Firstly a property which was sold subject to pending objections could scarcely fetch its real worth in a competitive market and secondly, the sale, if any, confirmed while the objections were pending, could scarcely stand, if the objections came to be upheld. The company in winding up was, actually, dealing with investments by the public and many orphans and widows must have undergone at such hands. It, therefore, should have been the effort of the Court to gain as high a price of the assets and properties of the company in winding up as could lawfully be obtained. This is exactly what emerged on the original side. The present buy price may not be twice as much as given by the appellant but it is nearly as much and that characteristic cannot be ignored.[629]

In M/s. Sarbaz Cement Ltd. case, the Hon'able Supreme Court of Pakistan has held that section 333 of the Companies Ordinance, 1984, defines/ provides powers of the official liquidator. The powers of the official liquidator are subject to the sanction/ approval either of the Court or of the Committee of inspection, as is further pointed out by the said section. The offer/ tender of the appellant was the maximum among the seven offers originally received by the official liquidators but admittedly the offers were subject to approval by the Court as was obviously specified in the terms and conditions published in different newspapers whereby offers for sale of the assets etc. had been invited. Since the offer of the appellant was yet to be accepted, no right can be said to have vested in the appellant to implement the sale in his favour. Further, in the present case, as indicated by section 333 (1) of the Companies Ordinance, 1984, the powers vesting in the official liquidator could not be exercised by him independently without sanction by the Court under the said section the Court has been vested with entire discretion to sanction approve the sale or not. Such discretion must be exercised prudently and wisely having regard to the interest of the Company and its creditors.[630]

In Habib Credit and Exchange Bank Ltd. case, the Hon'able Lahore High Court has held that as per provisions contained in sub-clause (f) of subsection (1) of section 333

[629]*Muhammad Amin Qazi v Official Liquidator* (1997) PLD 447 (Kar).
[630]*Sarbaz Cement Ltd v Bankers Equity Ltd* (1996) SCMR 88 (SC).

of the Companies Ordinance, 1984, a conveyance is required to be executed by the Official Liquidator in favour of the purchaser subject to way out either of the Court or of the committee of inspection. It emerges from the scheme of the Ordinance itself that the company which is ordered to be wound up remains alive and operative for all intention and reasons till it is dissolved by the order of the Court. The only exception being that the management of the company remains no more in field and instead Official Liquidator takes over the affairs of the company. The Legislature in, its understanding did not depart it there for it intended that every asset/ property of the company should be sold by the Official Liquidator who would not only execute document in this regard thereto but also can use the seal of the company for the said purpose. As far the machinery fitted in the mill, the same shall be sold by the Official Liquidator under the acknowledgment duly executed under the law.[631]

After taking the charge, when the official liquidator finds that there are no resources to carry out winding up proceedings, he must approach the court and seek its directions. The court shall issue notice to petitioners who applied for winding up order and secured creditors if any and find out their desires in the matter. After hearing them, the court may direct any of them to pay a reasonable amount to the official liquidator to meet the winding up expenses.[632]

In Pakistan Industrial Credit and Investment Corporation case, the Hon'able Lahore High Court has held that it is issue of record and even otherwise acknowledged by the parties that the alleged security was that of cotton pledged with the bank and the same has been sold under the order of the Court. The bank having entered the winding up proceedings is to line up with the other creditors to stay and get its share from the winding up proceedings. The above said feature separately it is too unbelievable to uphold that the amount realized from the sale of the said cotton had been deposited by the official liquidator. Again a bare perusal of subsection (2) of section 47 would show that it requires to be stated the evidence of the price of the security and the value thereof as assessed. Both the elements afore noted are missing in the instant case for it is not the cotton but the cash deposit, which cannot at all be termed as security. Perhaps the phase of objecting had already passed for the cotton having been sold it is

[631] *Habib Credit & Exchange Bank Ltd v Himalaya Textile Mills Pvt Ltd* 2000 PLD 391 (Lah).
[632] *Re Industrial & Commercial Finance Ltd* (1989) PLD 24 (Lah).

no more possible for the bank to evaluate the same. The cash deposited by the liquidator cannot by any stretch of imagination be treated to be as security.[633]

In the following paragraphs some more important cases; decided by the Hon'able Courts are being discussed regarding disposal of assets of the company under winding up. The petitioner in the case in hand is not an usual Pawnee but is the holder of a duly executed blank transfer deed of the shares by the pawnor, the consequence of which, firstly, is that the latter has waived his right to be given a notice under section 176 of the Contract Act by the applicant Pawnee and secondly he has given further unfettered right to the Pawnee to own or transfer the ownership of shares to anyone. Likewise Bank Guarantee might be as good as cash but it is not cash. The pledged shares attached with transfer deed and Bank Guarantees in favour of the Company are assets/ property of the Company.[634]

During the winding proceedings the secured creditor without the permission of the court can stay outside winding up proceedings and realize his security. However, if he files a suit or starts other legal proceedings, he is bound by law under section 231 of the Companies Act to seek the permission of the court and the court would permit him for the realization of his security.[635]

Sometimes the mortgagee sells, with or without the accord of the liquidator, in use of an authority of sale vested in him by the mortgage. It is not necessary to get autonomy to use the power of sale, although orders giving such autonomy have sometimes been made/ issued.[636] Where liquidators acquire the interest of a dissentient shareholder they have no authority to discharge him from his responsibility to the creditors of the company. The Court has no power to coerce the liquidator to compromise with a creditor or with a contributory.[637]

Simon Goulding, in his book on "Company Law" has discussed the powers of liquidator during the process of winding up. The power to pay any class of creditor in full; (b) the power to make compromise or arrangement with creditors; and (c) the

[633]*Pakistan Industrial Credit & Investment Corporation v United Textile Mills Ltd* (2001) CLC 307 (Lah).
[634]*PICIC v Fazal Corporation Pvt Ltd* (1993) PLD 671 (Kar).
[635]Controller v Cork 1923 AC 647.
[636]*Palmer's Company Precedents* (Vol II) 415.
[637]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 771.

power to compromise on such terms as may be agreed against all calls, debts, liabilities and claims between the company and contributory.[638]

A company had been incorporated with an objects clause that allowed the company to carry on business as makers of ladies' clothes, hats and shoes. The company later decided to manufacture veneered panels. In furtherance of this business, the company contracted with a builder to make a factory. All three remained unpaid when the company went into winding up and the liquidator discarded their evidence in the winding up on the reason the contracts were to further an ultra vires activity and therefore void.[639]

The liquidator of a company requires taking steps in determining the reality about a company's affairs as expeditiously and efficiently as possible. It is incumbent upon the court to help the liquidator in conducting his duties, while make sure that the order was not unfair, vexatious or an abuse of the process. In some cases it is suitable for the liquidator to present written questions before making a petition, but there is no prerequisite to accept this practice and each case ought to depend on its own individual state of affairs, with the court having a free discretion to construct such an order. On the information the court held that as this was not an appropriate case to use written questions; the Official Receiver had not acted unfairly or unjustly. There had been no abuse of process.[640]

In Kong Long Huat Chemicals case, the Hon'able court in order to address the controversy regarding the protection of assets of the company decided that the receiver right is superior to liquidator. Further the party failed to establish any need of appointment of provisional liquidator to protect the assets of the company.[641]

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[638]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 392.
[639]Kenneth K Mwenda,' Legal Aspects of Banking Regulation Common Law Perspective from Zambia'(2010) <https://download-plaza.com/download/book/Legal%20Aspects%20Of%20Banking%20Regulation:%20Common%20Law%20Perspectives%20From%20Zambia.html?aff.id=9325&aff.subid=6544> assessed 17 December 2017.
[640]Vanessa Stott, *Company law* (2nd edn, BPP 1990) 227-8.
[641]*Kong Long Huat Chemicals Sdn Bhd v Raylee Industries Sdn Bhd* (1998) 6 MLJ 330.

9.4 LIQUIDATOR DUTIES

The Official Liquidator is official of the court having specific powers bestowed upon him under the Companies Ordinance, 1984. The Official Liquidator on behalf of a company is in so different position from anyone else against whom a stranger or third party makes a claim. His only duty is to believe and if he believes fit as a permissible claim to acknowledge and if he thinks it unacceptable claim to reject it. Any proceedings essential for the safety of the property/ assets are taken by the liquidator in the name of the company, unless the court has made a vesting order, in which case he can sue in his official name in respect of property vested in him by the order. He can institute or defend any suit with the sanction/ approval of the court and he can take any other legal proceedings, civil or criminal, also with such sanction.[642]

The liquidator of a company in winding up cannot start proceedings against the debtors of that company without the prior permission of the Court or on notice to creditors, contributories, shareholders or members as the Court prescribes, and it is not enough to ask for that permission in the case of proceedings by now commenced against the debtors of the company. Where a liquidator wishes to reimburse himself out of the assets/ properties in respect of litigation here, the winding up and the assets being in the power of the Court where the order was made, the Court which has control of the assets/ property only can make the order.[643]

Unless the liquidators are allowed to conduct the business of the company, their duty is only to wind it up, and they are bound to allocate the assets according to the responsibilities as they exist at the date of the stoppage. They have no authority to change those liabilities by making a fresh contract. The liquidator cannot without the permission of the Court admit less than payment in complete.[644] All sorts of things are binding on liquidators and assignees: rights of set-off, rights of rescission of a contract, conditions qualifying the right of enforcement of the company in winding up.[645]

The liquidator neglectfully omitted to pay one of the creditors of the company. The company was wound up and ceased to exist. The liquidator was still under his

[642]*Re Pima Foods Ltd* (2010) CLD 1565 (Kar).
[643]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 765, 767.
[644]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 768, 773.
[645]Roy Goode, *Charge-Backs & Legal Fictions, the Journal of Business Law Issue* (2008) 813.

statutory responsibility to pay the debts, and shall pay the plaintiff out of his own pocket. Following are the duties of the liquidator while the company is being wound up. (1) To sell the property of the company. (2) To execute and seal documents and deeds on behalf of the company. (3) To prove in the bankruptcy of any contributory. (4) To draw bills of exchange, etc. (5) to raise money on the security of the assets. (6) To take out letters of administration to any deceased contributory. (7) To do all things necessary for the winding up of the company and distributing the assets.[646]

The liquidator is an officer of the Court and shall act in a completely neutral manner. It is his duty to make him carefully familiar with the affairs of the company; to suppress nothing and to hide nothing which has come to his awareness in the course of his investigation which is matter to determining the correct truth in every case before the Court.[647]

A liquidator appointed by the courts in case of a foreign company usually asks the creditors to file their claims within a reasonable time limit before division of assets of the foreign company.[648] He conducts business of the company, realizes and divides assets among the shareholders and creditors under the statutory scheme.[649]

The Hon'able Lahore High Court held that the language of section 387(5) of the Companies Ordinance, 1984, is very obvious and does not require any scholarly interpretation. It presents that extension can be given for one month at a time, in all for a period of six months and that too for the reason, that any proceedings for or against the company, are pending in a Court. The word, "shall" is mentioned in section 387(5), of the Companies Ordinance, 1984, which makes the direction mandatory and disobedience involves grave effects amounting to the invalidity of the act done in defiance to the provisions of law. The period, agreed for carrying out the winding up of the company, can be extended for one month at one time, and such extension cannot exceed from six months in all. The consent for extension of time is sought on the reasons, which fall outside the purview of section 387(5) of the

[646] Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 230, 238.
[647] W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909) 374.
[648] Cross-Border Insolvency Arrangements between Singapore and Malaysia< https://wenku.baidu.com/view/9529be7a1711cc7931b71647.html> assessed 10 October 2017.
[649] Riz Mokal, 'A the Intersection of Property and Insolvency' (2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112309> assessed 18 December 2017.

Ordinance, 1984.[650]

The Hon'able Calcutta High Court held that every proceeding before the Income-tax Officer is a legal proceeding within the meaning of Section 446(1) of the Companies Act, 1956, in this case the Court was concerned with the question whether the proceeding before an Income-tax Officer under Section 37 of the Indian Income-tax Act, -1922 (No. XI of 1922) could be said to be a proceeding in any Court within the meaning of Section 195 (1) (b) of the Code of Criminal Procedure and the Court by a majority held that Section 37 (4) of the said Act made the said proceedings before the Income-lax Officer, judicial proceedings under Section 193, IPC and the judicial proceedings shall be treated as proceedings in any Court for the reason of Section 195 (1) (b), Criminal Procedure Code.[651]

The incorporation of such terms is possibly considered to defend the concern of the general body of creditors, contributories and workmen influenced by winding up proceedings. The incorporation of the terms (a) to (e) as suggested by the official liquidator in his report can by no stretch of imagination be interpreted to be in any way affecting/ influencing the concern of the petitioner, in the sense of the same causing unfairness to his cause and that apart, the official liquidator acting as an officer of the court, had just done his duty in requesting the court to incorporate all those terms in the interests of all persons affected by liquidation and, consequently, it is that all those terms warrant to be incorporated in the order allowing leave.[652]

If the liquidator approaches the court later on for sanction/ approval of a sale in favour of any party, then he will issue notice to the respondent on whose application the company was ordered to be wound up before any instructions are required from the judge for sanctioning or confirming the sale. The official liquidator was directed to invest the amount deemed to have been deposited by company with a nationalized bank at least till date of sanction/ approval of the sale by the court taking company matters.[653]

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[650] *Re Auto Oils Pvt Ltd* (2005) CLD 1657 (Lah).
[651] *Official Liquidator v Commissioner of Income Tax West* (1970) AIR 349 (Cal), (1971) 41 CompCas 477 (Cal).
[652] *Canara Bank v Official Liquidator* (1991) 70 CompCas 295 (Mad).
[653] *Amba Tannin and Pharmaceuticals v Official Liquidator* (1975) 45 CompCas 457 (Bom).

The Hon'able Calcutta High Court held that during the winding proceedings the creditor of the company is not legally authorized to make any disclosure about the facts of the proceedings, but in very special cases.[654]

In the interest/ concern of the company and particularly in the interest of the secured creditors and the workmen, the official liquidator must follow the proceedings initiated by the company before the Debt-Recovery Tribunal for the allocation of the sale consideration to the secured creditors, workers and the shareholders of the company.[655]

It is the duty of the official liquidator, as also of the court, to see that the interests of the body of creditors and the shareholders of the company have to be protected in full/ complete and as this is the most important sine qua non for the court to acknowledge the application of the official liquidator for a repudiation of an onerous contract. The contract in question is definitely burdensome and arduous and to decline to permit the repudiation would obviously obstruct the course of the winding up and consequently leave should be allowed to the petitioner to disown the same.[656]

The special statutory powers given under the Companies Law were never anticipated to be used just to give liquidators with a considered benefit above persons against whom they might request to sue or settle about disputed claims. Those sections are quite anticipated and designed to guard the benefits of creditors of a company in insolvent winding up by the court's being competent to coerce persons who have information about the company's dealings to reveal it. It would consequently be an outstanding exercise of the court's powers to permit liquidators of a solvent company, positioned upon its own petition into winding up, to necessitate persons not concerned in the dealings of a company but against whom doubtful claims may be prosecuted to provide what would be equivalent to compulsory early detection of information. [657]

The liquidators are not permitted merely to sit back and decline to be content as to the bona fides of any claim. The applicants' claims are fabricated, which is to say

[654]*Commercial Art Engravers Pvt v Indian & Eastern Newspapers* (1978) 48 CompCas 36 (Bom).
[655]*VSK Seshasayee v Official Liquidator* (2005) 6 CompLJ 463 (Mad), (2006) 66 SCL 414 (Mad).
[656]*Official Liquidator v Raka Chemicals & Food Products* (Mad) <www.indiankanoon.org/doc/> assessed 15 June 2011.
[657]*Re Basis Yield Alpha Fund* (2008) CILR 50.

deceitful, it is up to the respondents to contend and establish that case. It is not up to the petitioners to convince the respondents that their claims are genuine.[658]

The claim became time barred on the date of the passing/ issuing of the winding up order, although it was within time on the date of the filing of the petition for winding up of the Company. The material date for determining/ deciding whether claim is within limitation is the date of the order of the winding up and not the date of the filing of the petition for winding up. The claim is, consequently, declined on the ground that it was time barred.[659]

9.5 ROLE OF LIQUIDATOR

Simon Goulding, in his book on Company Law has pointed out the role of liquidator and narrated that once the creditors have established their debts in the winding up, the liquidator shall distribute/ divide the available/ accessible and left over properties of the company to those allowed by the relevant provisions of law.[660] During compulsory or voluntary winding up, a statutory scheme for dealing with the assets/ properties of the company is strictly followed.[661]

The Hon'able High Court held that the secured creditors of the Company have correctly contested acceptance of the offer on the view of insufficiency of consideration. The highest offer is declined and direction is issued to official liquidator to issue a fresh sale notice inviting fresh offers for sale of all the items. It is, however, desirable that in the next sale notice the Official Liquidator should point out the reserve price of each of the items which may be fixed after notice and discussion of the secured creditors of the Company. The money deposited by the potential purchasers with the Official Liquidator in the shape of pay orders alongwith the offer may be returned to the parties.[662]

The principles which should administer confirmation of sales are well recognized. Where the acceptance of the offer by the Commissioner is subject to confirmation of

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[658] *Bhatti & Sons Incorporated & LIBPAK Incorporated v Wight Pilling & Mackey Ltd* (2003) CILR 160.
[659] *Lahore Enamelling and Stamping v A.K. Bhalla* (1958) AIR 341 (PH).
[660] Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999.
[661] Riz Mokal, 'A the Intersection of Property and Insolvency' (2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112309> assessed 18 December 2017.
[662] *Specialty Traders v Firdous Textile Mills Ltd* (1987) CLC 2109 (Kar).

the Court the offer does not by simple acceptance acquire any vested right in the property/ assets so that he might demand automatic confirmation of his offer. The stipulation of affirmation by the Court operates as a protection against the property being sold at insufficient price whether or not it is a result of any wrongdoing or deception in the accomplishment of the sale. In each and every case it is the foremost duty of the Court to satisfy itself that having regarded the market value of the property/ asset the price offered is irrational. Until and unless the Court is pleased with the sufficiency of the price the act of affirmation of the sale would not be an opposite exercise of judicial discretion.[663]

In HS Kamlani case, the Hon'able Court was pleased to hold that it will be expedient at the start to find out what are the rights, duties and powers of the Liquidator are with regard to such debts claimable by any company under winding up. Section 448 of the Companies Act, 1956, considers appointment of Official Liquidator when order for winding up of the Company is made under Section 447 of the Act. Section 451(1) sheds responsibility on him to perform the proceedings in winding up the Company and carry out such duties in reference thereto as the Court may require. Sub-section (2) allows payment of such fees to the Official Liquidator, out of the assets/ properties of the Company, as might be given. Rule 291 does prescribe such fees for certain of his acts. Section 456 of the Act necessitates and allows the liquidator to take into his charge and under his power all the properties/ assets, effects and actionable claims to which the Company is or emerges to be allowed. Section 457 of the Act gives for enforcement of release of properties to him in cases, where the property of the Company is in control of the third person. Section 457(1) (a) of the Act allows him to institute/ file and defend any suit "in the name of and on behalf of the Company." Section 467 of the Act necessitates the Court, amongst others to cause assets/ properties of the Company to be gathered and used in discharge of its liabilities and also direct delivery of the property to the Liquidator. Section 529 of the Act makes the Insolvency Rules relevant to the winding up of the insolvent Companies.[664] Where the order to inspect is made at the request of a contributory, the latter may not take advantage of the section for the reason of implementing own rights against the person examined, and thereby gain a means of discovery better than the law affords.

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[663]*Navalkha and Son v Ramanya Das* (1970) AIR 2037 (SC).
[664]*H. S Kamlani v Mazgaon Dock Ltd* (1982) 84 BOMLR 100 (Bom).

9.6 LIQUIDATOR REMUNERATION

The remuneration of the liquidators must not to be fixed at the time of their appointment but the Court adopted the proposals of the meetings as to the proportions in which the several liquidators should share the amount to be allowed. Charge can be made by liquidator for time used up in procuring his own appointment or opposing his discharge. The remuneration of the liquidator ranks after the rights of mortgagees and debenture-holders, but in priority to unsecured creditors.[665]

A Liquidator was appointed in result of the proceedings. The Liquidator after appropriate inquiry established that the company had no assets/ property or liability. The Liquidator obviously had to be remunerated for the hard work made by him in probing into the affairs/ matters of the company. The simple fact that the rules do no point out as to who has to pay the payment of the Liquidator cannot direct the conclusion that no remuneration is to be paid to him. On the other hand, since the proceedings were started at the request of the appellants, it is only fair and proper that the appellants be bound for paying the remuneration of the Liquidator.[666]

No doubt the order was set aside by the Hon'able Supreme Court but the same was only cited to demonstrate that the demand of the bidder is not bona fide and since he is unsuccessful to deposit the balance sale consideration within the time permitted he is not allowed to refund of the bid amount.[667]

The general rule is that the liquidator is allowed to all the costs of all proceedings be taken properly until and unless he has done something to make himself in person answerable. Where there are encumbrances and the mortgaged property/ asset is realized in the winding up, the liquidator's costs of realization are a first charge, the encumbrances next and the general costs of winding up are put off for the surplus. The petitioners' costs are the first charge on the estate even if priority to those of official liquidator. But if a company is in voluntary winding up the costs of voluntary liquidator are paid in priority to those of petitioner.[668] The liquidator is allowed to be paid out of the assets his costs of all proceedings appropriately taken or defended by

[665] C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 762, 775, 776.
[666] *State Bank of Pakistan v MZ Khalil Official Liquidator* (1986) CLC 2826 (Lah).
[667] *Muhammad Laeeq v Sindh Alkalies Ltd* (2009) CLD 104 (Lah).
[668] C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 724.

him. The costs inappropriately acquired by the liquidator may be precluded and he may be ordered to pay them in person.[669]

9.7 RESIGNATION/ DISCHARGE / REMOVAL OF LIQUIDATOR AND OTHER ASPECTS

An application to remove a liquidator and appoint others was granted upon the grounds: (1) that the majority of creditors requested the change. (2) That the anticipated liquidators would act without remuneration. (3) That the business connection of one of the anticipated liquidators would be of worth to the company. Removal may be directed if the liquidator has contradictory benefits or if he is responsible for misbehavior. The Court has declined to get rid of a liquidator on the only ground that he was an employee of one of the inspectors.[670]

Where the liquidators of the company sold the material to a new company, in which they took shares, it was noticed that they shall be detached from their office. When the liquidator to an insurance company applied for his discharge as liquidator, and it emerged that he had appropriated to himself from the funds received, an amount exceeding the remuneration fixed by the Court and the proof did not reveal the exact amount in which he was indebted to the estate, the Court refused to grant his discharge without fixing any amount to be paid by him as a stipulation of attaining his discharge.[671]

The change in the affairs of the company has no force upon its advantageous ownership of its assets/ properties. The authority to deal with an asset and matters of ownership or title are not the same concepts.[672] If a creditor finances employment of the liquidator, the liquidator shall not be declared as independent and impartial in his appointment.[673]

The Hon'able Indian Calcutta High Court was pleased to hold that the applicant in the state of affairs could not work as the liquidator as he has not been handed over the

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[669] W. R. Percival Parker & George M. Clark, *The Law and Practice Connected with the Organisation, Management and Winding up of Companies* (CLBC 1909 edn) 414.
[670] C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 756.
[671] C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 759, 779.
[672] Sarah C Derrington, 'The Interaction between Admiralty and Insolvency Law' <www.austlii.edu.au/au/journals/ANZMarLawJl/2009/4.pdf > assessed 15 December 2017.
[673] John Warde and Matthew McLennan, 'Independence and Remuneration of External Administrators' (2006) <www.allens.com.au/pubs/pdf/insol/pap2aug06.pdf> assessed 09 December 2017.

pertinent documents, nor was he assisted by the ex-managing directors, in the matter/ case of winding up of the company. The petitioner met with unanticipated catastrophes like the death of his father and his wife's insanity. The petitioner being a young man with young children and an insane wife cannot be expected to keep his balance of mind and fulfill his duties as a normal sensible person can do. consequently, in the state of affairs of this case, it cannot be said that he has not acted truthfully or rationally and, as a result, taking into account all the pertinent conditions it emerges that he was just a creature, of the situations over which he had no control. It was anticipated of him, as a chartered accountant, to be more vigorous and meticulous in discharge of his duties as a liquidator but, unluckily for him, he could not do so for the state of affairs out of his control and which could not be anticipated by him under any situation. Further, it emerges that he has not been handed over the books, papers and documents of the company by the respondents, the ex-directors of the company and, consequently, he could not act in the issue swiftly as he could have done. In these state of affairs, it emerges that there are high-quality reasons for him to be relieved of the consequences of his default, carelessness and infringe of duty as a liquidator but having regard to the fact that this court has no authority under Section 633(1) of the Companies Act, 1956, to ease him of the said consequences of the default as previously criminal cases have been filed by the Registrar before the court, the applicant has his remedy in the said proceedings where he is expected to accept appropriate consideration having regard to all the conditions.[674]

The court has the powers to remove a liquidator and appoint another if he in his petition gives convincing causes and reasons for his removal. He is not supposed to explain in his petition his personal conduct or unsuitability. It is enough that he failed in his duty to maintain current assets of the company and could not secure favorable terms for disposal of the assets of the company in the process of winding of the company.[675]

The court may also ponder on the fact that a creditor has questioned impartiality of the liquidator on the basis of his earlier association with the company or some

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[674] *Bhawani Shankar Sahay v Registrar of Companies* (1979) 49 CompCas 639 (Cal), 1980 CriLJ 23 (Cal).

[675] Role and Responsibilities of Liquidator (*Insolvency Guardian*) <https://insolvencyguardian.com.au/liquidators-role/> assessed 10 December 2017.

creditors and shareholders or he has been a member of the team which earlier investigated affairs of the company.[676]

The person, who earlier attached with the firm which has investigated the affairs of the company before the start of winding up proceedings of the company, will not be appointed as the liquidator of the company. It is apprehended that he might get benefit of his understanding about the affairs of the company.[677]

It is the duty of liquidator to hand over all of the books and documents of the company to a notary public nominated by the Court for preservation for a period of ten years following the winding up. Naturally relevant tax offices are also informed of the winding up and company's tax registration is also erased from tax database[678].

The Courts normally remove the liquidators for these reasons: (a) their disregard/ ignorance for the wishes of 90% of the admitted creditors, particularly with respect to the commercial viability (b) their obvious recognition with, and support for the views of, former management; (c) the fact that they were the auditors of TW, which is insolvent; (d) their incapability or reluctance to believe investigations of former management; (e) their incapability or reluctance to consider a global approach to the winding up of all related entities; and (f) their inflexibility and lack of impartiality generally.[679]

The Hon'able the Delhi High Court held that in spite of stern handicaps he has been carrying a really hard job. He had to face opposition, hostility and obstinate confrontation at the hands of those whom he believed to be accountable for mishandling the affairs of the company. If in the chase of his aim of bringing the offenders to book and at the same time realizing the assets/ properties of the company, he was forced to get on a career of litigation, the liability for that cannot be placed on him only and may equally be apportioned to the situation under which he was working. In the discharge of his duties he may have made some mistakes; in fact, he did make some mistakes; but it cannot be held that he was activated by malice or self-interest alone and had surrendered the real, considerable and honest interest of

[676] John Warde and Matthew McLennan, 'Independence and Remuneration of External Administrators' (2006) <www.allens.com.au/pubs/pdf/insol/pap2aug06.pdf> assessed 09 December 2017.
[677] John Warde and Matthew McLennan, 'Independence and Remuneration of External Administrators' (2006) <www.allens.com.au/pubs/pdf/insol/pap2aug06.pdf> assessed 09 December 2017.
[678] Ayca Bayburan, 'Liquidation of Capital Companies' (*Mondaq*, 01 July 2010) <www.mondaq.com/article.asp?articleid=104332> assessed 11 December 2017.
[679] *Allied Investment Fund Limited v Johnson & Jenkinson* (1999) CILR 237.

winding up. On the other hand it is equally true to say that he has allowed the winding up proceedings to drag on for all these years without making any considerable development. Neither the creditors nor the contributories have so far been paid anything. Whatever money has been realized has been used up by him on litigation, office, entertainment and conveyance. This cannot by any means be considered to be a completely acceptable state of affairs. He has definitely made some errors. It is also obvious that the accounts kept by him are not up to the standard required of him, but in spite of this it is too much to say that he is either unfit or that the interest of winding up is likely to suffer if he is permitted to carry on in office. At the same time he cannot be permitted to go on in his own way and to change the business of winding up into a lifelong job for himself.[680]

As an officer of the court, the liquidator in a winding up by the court must uphold an even and neutral hand between all the individuals whose benefits are concerned in the winding up. It is his duty to the entire body of creditors, the entire body of shareholders, and to the court to make himself carefully familiar with the company's affairs, and to restrain or hide nothing coming to his information in the way of his investigation/ probe which is material to determine the exact truth in every case before the court; and it is for the court to see that he does his duty in this respect.[681]

In Kong Long Huat Chemicals case, the Learned Court held that while directing the provisional liquidator to take control of the assets/ property of the company under liquidator's statutory right, the receiver's right to control and charge should not be ignored because a receiver enjoys priority.[682]

It is sometimes, the creditors and the creditors alone who have any financial interest in winding up. They are commercial organizations which deal in huge sums of money. They are the ones who stand to lose if the appellants disperse their assets in frivolous litigation. If any person sued by a liquidator could apply to the court for the removal of the liquidator and compel the liquidator to defend that application substantively by the production of evidence and the like, this could be extravagant of the company's assets and the time of the court. The rule of practice is that the simply persons who can apply to the court to exercise its powers of control over liquidators

[680] *Hardit Singh Giani v Registrar of Companies* (1969) AIR (Delhi) 112, 4 (1968) DLT 6.
[681] *Re Sphinx Group of Companies* (2010) (1) CILR 452.
[682] *Kong Long Huat Chemicals Sdn Bhd v Raylee Industries Sdn Bhd* (1998) 6 MLJ 330.

are the liquidator, the creditors in an insolvent company and both creditors and contributories in a solvent company.[683]

There is no proof of corruption or general maladministration. The proof goes no further than to ascertain error on his part in failing to obey with definite statutory duties. Infringes in question do not seem to have led to any real injustice to the applicant, and are improbable to do so in the future.[684]

The official liquidator is allowed to get the contribution from all the secured creditors, towards the expenses incurred by him. In the cases in which the other secured creditors, including the State Financial Corporation have not paid their contributions, they shall pay their contributions towards the expenses incurred by the official liquidator and in the cases where there is already a direction of the court to the secured creditors to pay definite amounts towards the expenses acquired by the official liquidator, such direction does not call for any alteration.[685]

Sometimes the ball is at the liquidators' feet: it is their duty to play reasonable and help the court by explaining/ providing the accurate situation to the court and acquainting the court with all the material facts and answering the accusations made by the plaintiff so as to leave the court in no uncertainty that what was done was done with reference to the real, considerable and truthful interest of the winding up and to the general advantage of those concerned in the assets/ property of the company. Quite clearly the liquidators have failed to emancipation the onus.[686]

9.8 STATEMENT PREPARED BY LIQUIDATOR

The Hon'able Andre Pradesh High Court held that under Section 441 (2) of the Companies Act, 1956, in the case of a winding up by the Court, the winding up dates from the filing of the application. The consequence of a winding up order is to evade all dispositions of the property/ assets of the company made between the beginning of the winding up, that is, the filing of the application, and the winding up order, unless the Court otherwise orders. Sections 631 to 537 of the Companies Act, 1956, deal with the consequence of winding up on antecedent and other dealings. The expression

[683] *Johnson & Dinan v Deloitte & Touche AG* (1997) CILR 120.
[684] *Mcauliffe v Lidia Perin Memorial Hospital Pvt Ltd* (2006) ACTSC 88.
[685] *Board for Industrial v Adivasi Paper Mills Ltd* (2000) 1 CompLJ 209 (AP).
[686] *Chua v McCormack* (1978) 6 Case 3 (HCSg).

'commencement of winding up', defined in Section 441 (2) of the Companies Act, 1956, has reference to the dispositions of the property/ assets of the company made between the date of the submitting of the application for winding up and passing of the winding up order. An order for winding up under the deeming clause in Section 441 of the Companies Act, 1956, has retrospective consequence only for the above reasons end not with respect to the duties of the Official liquidator. On a true construction of the provisions of the Section 551 of the Companies Act, 1956 and Rule 311 of the Companies (Court) Rules, the Official Liquidator shall have to submit the statements required by that Section within one month of the expiry of one year after the passing of the winding up order. A direction will be issued to the Registrar of Companies to admit the statement prepared and provided by the liquidator under Section 551 of the Companies Act, 1956, as from the date of the winding up order.[687]

The Hon'able Gujarat High Court held that the concern of the applicant, who admits to be guardian of public interest, appears to be that the office of the Official Liquidator should be run in a mode which he perceives to be right. The objections based upon his misapprehension of the affairs of the office of the Official Liquidator, are entirely devoid of substance. The applicant, who appears to be only a busy body, has arrogated to himself the role of supervisor and watch-dog of the performance of the respondent, and battered the machinery of this Court by invoking the special and extraordinary authority of this Court through this application, which is nothing more than accumulation of confusion. The undeserving action has resulted in entirely unfounded and uncalled for nuisance of the respondents. It is a fit case where the Court must to impose costs to avoid the mistreatment of the procedure of the Court, as has been done in the immediate case.[688]

The liquidator takes into his protection all the assets of the company. The assets do not vest in the liquidator. He is the trustee for all persons who were creditors of the company at the date of the winding up. The liquidator stands for both the company and the creditors; he is in the place of a receiver and manager of partnership assets/ property, and he must provide the creditors and contributories every help in inspecting the books of the company, etc. [689]

[687]*State of Andhra Pradesh v Taj Glass Works Ltd Hyderabad* (1963) AIR 132 (AP).
[688]*Mafatbhai Shah v Secretary Government of India* (2003) 41 SCL 116 (Guj).
[689]Alfred F. Topham, *Principles of Company Law* (4^{th} edn, Butterworth 1914) 276.

The court declined the liquidators petition to carry on the business for an indefinite period on the ground that the company's property/ assets could not then be sold except on disastrous terms but approved authority to carry on for six weeks while the property was publicized for sale. Though, the authority was approved to carry on business until the time of the year when the company's property/ assets, which consisted of a hall or public entertainments, could be sold to best benefit. [690]

A liquidator is not strictly speaking a trustee for the individual or contributories, his place being that agent of the company. During winding up a claim was made by a contributory for damages for delay in handing over to the contributory his percentage of the excess assets of the company. In the absence of deception, bad faith or personal delinquency, an action or damages would not lie against the liquidator at the suit of a creditor or contributory, the appropriate remedy being a petition to the court to manage the liquidator in the use of his powers.[691]

Unlike a liquidator in a winding up by a court, a liquidator in a voluntary winding up is not an officer of the court. He is the agent of company, but not of the individual members. He is appointed, by the company in general meeting, and within 14 days he shall provide notice of his appointment to the registrar of companies and issue it in the Gazette. He may be appointed at the meeting at which the resolution or voluntary winding up is passed. If there is no liquidator acting, the court may appoint one. The court might also, on cause shown, remove a liquidator and appoint another. Where a person had been appointed liquidator devoid of his information and he refused to act, it was held that the appointment was void and there was thus no need to remove him.[692]

If a winding up order is made, the first step required to be taken will be to appoint a liquidator or whom, as in all types of winding up, the administration of the company's affairs and property will pass. In contrast with an individual's trustee in bankruptcy its property/ assets does not vest in him but the control and management of it and of the company's affairs do and the board of directors, in effect, becomes *functus officio*. A liquidator may, certainly, be appointed, before a final order is made, for at any time after the filing of a winding up application the court may appoint a provisional

[690]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 549.
[691]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 550.
[692]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 564.

liquidator, usually the official receiver attached to the court. Once a liquidator is appointed, the procedure of the winding up continues very much as it would in the case of a voluntary winding up once the purpose is the same and his purposes are the same as those voluntary windings up, namely to protect that the assets/ properties of the company are got in, realized, and distributed to the company's creditors and, if there is excess, to the persons allowed to it.[693]

When the company's affairs are fully wound up the liquidator must "make up" an account of the winding up. The fact that meeting is being called is something is of wider interest than to members alone, for it will guide to the final dissolution of the company.[694] When winding up of a company is made, its end is judicially made and steps are taken for its burial which is known as dissolution of a company.[695]

The situation of a liquidator appointed by the court is not the same as that of a receiver and manager appointed by the court. A liquidator is the agent of the company, a receiver is not. It is factual that both are appointed and can be dismissed by the court, and both control the assets/ properties of the company and might have to conduct the contracts of the company, but the liquidator performs for and in the interests of the company; whereas the receiver and manager act for and in the interests of the debenture holders and not for the company. The description 'liquidator' has not the same implication as the depiction 'receiver and manager', and defendant did not allege to contract to his own behalf, nor did the plaintiffs provide him credit on his own behalf.[696]

The Official Receiver will notify the person concerned by registered post and the creditors and contributories by advertisement of the time and place appointed, and he will himself take part in the examination, which in the Court may be carried out by the Registrar instead of the Judge. The liquidator, where the Official Receiver is not the liquidator, might also take part, and the Court might put such questions as it thinks fit. The person examined is on oath and must answer all questions which the court allows to be put. The evidence given is taken down in shorthand by the official shorthand writer, and transcribed and read over to the person examined who must sign

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[693]Gower L.B.C Prentice D.D and Pettet B.G, *Gower's Principles of Modern Company Law* (5th edn, Sweet & Maxwell Ltd 1992) 763, 765.
[694]Gower L.B.C Prentice D.D and Pettet B.G, *Gower's Principles of Modern Company Law* (5th edn, Sweet & Maxwell Ltd 1992) 768.
[695]*Salma Noorani v Mandiviwala Estates Ltd* (1991) MLD 2675 (Kar).
[696]LS Sealy, *Cases and Materials in Company Law* (7th edn, Lexisnexis 2001) 531.

it.[697] Liquidator stands in a fiduciary position towards the company. Thus, where he has sold its property/ assets supposedly to another company, but really to himself, he is accountable as a trustee for the company for the secret profit. [698]

[697] H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 368.
[698] Kaikhosru J. Rustomji, *Company Law* (1st edn, Empire Publication 1926) 227.

CHAPTER 10

INCIDENTAL MATTERS OF SPECIAL INTEREST

10.1 DISSOLUTION OF COMPANY

As company is an artificial/ non-natural person. Its existence end three months following the registrar takes away its name from the register of active companies. This is called ‘dissolution’. Before a company can appropriately be dissolved it must generally be wound up (or ‘liquidated’ – the two terms are used interchangeably). In compulsory winding up if the liquidator concludes that the assets of the company will not be enough to cover the expenses of winding up and that its affairs do not necessitate further probe, may apply to the registrar for ‘early dissolution’, so that dissolution becomes definite with no further work or expense.[699]

In the logic in which the term dissolution is used in Britain, the dissolution of a company is consequence by the registrar taking away the name of the company from the register, Dissolution of a company ends its legal personality and disbands the relationship between company and members. The company finishes to be party to legal connection; if it has property/ assets at the time of dissolution then that assets passes to the Crown or a royal duchy (in England) in the same way as the assets of an intestate deceased individual who has no heirs. If a company was holding assets on trust for another at the time of its dissolution then a new trustee shall be appointed to substitute the company.[700]

In the matter of a compulsory winding up where either the liquidator provides notice to the registrar that the final meeting has been held and that he has left office or the official receiver issues notice that the winding up is absolute, the registration of that notice starts a period of three months at the end of which the company will be automatically dissolved until and unless on the petition of an interested party the

[699]Chris Shepherd, *Company Law* (8th edn, HLT Publications 1996) 294.
[700]Mayson S. W, French. D & Ryan C. L, *Company Law* (14th edn, Blackstone Press 1997) 691, 693.

Secretary of state (in England) defers the date. There is an appeal to the court from any such decision.[701]

In United Kingdom If the official receiver is the liquidator the procedure is the same apart from that registration is of a notice from the official receiver that the winding up is complete. Though, there is a rational process whereby he may bring about an untimely dissolution if it emerges to him that he realizable assets/ properties are inadequate to cover the costs of the winding up and that the affairs/ matters of the company do not necessitate any further investigation. He shall, before doing so, give at least 28 days' notice of his aim to the company's creditors and members and to an administrative receiver if there is one, and with the issuing of that notice, he finishes to be required to assume any of his duties other than to apply to the Registrar for the early dissolution of the company. On the registration of that petition the company becomes dissolved at the end of three months unless the Secretary of State, on the petition of the official receiver or any creditor, member or administrative receiver, provides directions to the contrary prior to the end of that period. The directions that may be issued may make provision for allowing the winding up to proceed as if the official receiver has not invoked the procedure or may comprise a postponement of the date of dissolution.[702] A company dissolved after a winding up cannot again be ordered to be wound up, except the winding up can be impeached for fraud.[703]

In England and other Jurisdictions in a case a company has been dissolved the Court may however announce the dissolution void on any terms it thinks fit at any time within 2 year of the date when it happened, on an application being submitted be the liquidator or any other person concerned. This means that the application, not essentially the Court's order, shall be within the 2 years. Such proceedings may then be taken as if the company had not been dissolved, e.g., proceeding to recover and distribute/ divide lost assets, or misfeasance proceedings against a director. Any person acquiring such an order must submit an office copy with Registrar or Companies within 7 days after it was made/ issued or such further time as the Court may permit.[704]

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[701]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 564.
[702]Gower L.B.C Prentice D.D and Pettet B.G, *Gower's Principles of Modern Company Law* (5th edn, Sweet & Maxwell Ltd 1992) 772.
[703]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 697.
[704]H.A.R.J. Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 377.

If at the date of dissolution of any company there were any funds still in the hands of the liquidator representing unclaimed or undistributed assets/ resources or dividends, whether dividends declared in the winding up or dividends declared by the company and held in trust by it for the members permitted, these shall be paid forthwith into the Companies Liquidation Account if they have not already been so paid. Dividends might be unclaimed since members or creditors have not provided changes of address to the company or the liquidator.[705]

The Court has authority on petition to announce the dissolution void at any time within 2 years of the date when it occurred. It is the task of any person who procures an order under (a) or (b) above within 7 days after it was made to register and office copy of the order. If the winding up persists for more than a year, the liquidator must call upon an annual meeting of the creditors as well as of the members at the end of the year, or at the first expedient date within 3 months afterward, or such longer period as the Board of Trade may permit, to receive the account of his acts and dealings and of the manner of the winding up during the year and so on at the end of each year.[706]

A company ends to survive when it is dissolved. This can only occur when its affairs are entirely wound up. In winding up by the court, the liquidator issues notice of the final meeting of creditors and vacation of office by him to the Registrar of Companies, the notice is registered and the company is usually dissolved at the end of the period of three months from the date of registration. On conclusion of a voluntary winding up the liquidator submits his final accounts to meetings of the company's creditors and / or members. Within a week after that has been made, the liquidator shall provide copies of the account and a return of the holdings of the meetings to the Registrar of Companies. The registrar registers them and the company is usually believed to be dissolved three months afterward.[707]

The dissolution of a company sets an end to its power and to the powers which it has delegated. After the dissolution, neither the company nor the liquidator has authority to approve pro-notes/ financial matters payable to the company's order. If the liquidator has intentionally left unpaid a debt of which he had notice, he may after

[705]H.A.R.J Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 377.
[706]H.A.R.J Wilson & T.W South, *Company Law* (10th edn, Steller Press 1955) 385, 391.
[707]Janet Dine & Marios Koutsias, *Company Law* (6th edn, Palgrave Macmillan 2007) 323.

dissolution be individually legally responsible to the creditor. The court has no authority after dissolution to issue a winding up order apart from possibly where the dissolution proceedings are annulled by fraud; but it may set aside the dissolution.[708]

Simon Goulding, in his book on Company Law has discussed in detail the procedure of dissolution of company and stated that when the liquidator has submitted final accounts to the registrar, after winding up of the company, the company is dissolved after the expiry of three months after registration of accounts by the registrar.[709]

In the following land mark decisions duly delivered by the Hon’able Courts; the procedure and process of dissolution of the companies has been provided. During the winding up the Official Assignee/ Liquidator had sold the assets/ properties, and divided the same amongst the creditors of the company. Nothing remained in the hands of the liquidator for further division. The company was officially ordered to be dissolved by the Company Judge, in terms of section 350 of the Companies Ordinance, 1984. Though, it could be revived within two years of the date of dissolution provided; conditions provided in section 429 of the Companies Ordinance, 1984, are met. In the present case, more than two years have passed, there appears to be no likelihood of its revival. Consequently, it cannot be argued that two years from the date of dissolution have not passed and company is in coma or that its corps could be exhumed to rekindle it. It has come on record that all the properties of the dissolved company have since been applied to set off the liabilities; nothing remains in the hands of the liquidator for further distribution.[710]

The Joint Official Liquidators have tried their best but all their hard work in the right direction having born no fruit; let the matter now come to an end. In the state of affairs, this court is left with no view, but to allow the petition, therefore the bid of applicant, made through the said petition, is hereby accepted. Resultantly, the company stands hereby dissolved. The necessary steps stipulated by section 350 of the Companies Ordinance, 1984, and rules 246 to 248 of the Companies (Court) Rules, 1997, shall be followed.[711]

The winding up petition was capably filed and this Court has authority to consider the petition. It has been shown and this Court is contented on the basis of the record that

[708]Kaikhosru J. Rustomji, *Company Law* (1st edn, Empire Publication 1926) 267.
[709]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 397 -398.
[710]*Syed Mehmood Ali v Network Television Marketing Pvt Ltd* (2005) PLD 399 (Kar).
[711]*National Bank of Pakistan v Mohib Textile Mills Ltd* (2010) CLD 180 (Lah).

the company is incapable of paying its debts. The company has to be wound up. Winding up order will protect the interest of all the creditors as the properties of the company will be sheltered for division among the creditors. The foreign company, Hellenic Lines Limited, is ordered to be wound up as an unregistered company under the provisions of the Companies Ordinance, 1984. The Registrar of this Court is appointed Official Liquidator of the company with all powers and is directed to carry out all such jobs and take all such proceedings as are required under the provisions of the Companies Ordinance, 1984.[712]

The Hon'able Delhi High Court pleased to hold that it is just and equitable in the light of facts of the case that an order of the dissolution of the company is made for the winding up of the company. In the event of failure to do so, the statutorily prescribed consequences shall be ensured.[713]

In Re: Faizabad Roofing Co. Ltd., the Hon'able Court while taking into consideration the facts and the circumstances of case, and the submissions made by the official liquidator decided that no constructive purpose shall be served in keeping the matter alive. The record of the company does not exist. Unless a statement of affairs is submitted the official liquidator cannot proceed in the matter. Eight years have gone by and no progress could be made for want of records. The nominee director is claiming that the records were with other party who, in turn, has stated that he has resigned as far back as since long, and since then has no concern with the company. It has been alleged by the said ex-director that the records were with someone else. The company has already sold the whole properties of the company and nothing can be realized by the official liquidator. It will, therefore, be convenient to order that the company, the Company (in winding up) be dissolved under Section 481 of the Companies Act, 1956, from the date of this order.[714]

In Re: U.P. Presstressed Co. Ltd the Hon'able Court directed the registrar to appoint a chartered accountant and to submit the statement of affairs after doing the inspection from the records of the Registrar of Companies and the tax authorities, but that attempt was unsuccessful as the chartered accountant was not capable of obtaining the essential information adequate for submitting the statement of affairs. The half-yearly

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[712] *James Finlay PLC v Hellenic Lines Ltd* (1986) CLC 2933 (Kar).
[713] *Punjab Exchange Ltd v Rajdhnai Grains & Jaggery* (Delh) <www.indiankanoon.org/doc/> assessed 13 June 2011.
[714] *Re Faizabad Roofing Co Ltd v Unknown* (1998) 91 CompCas 22 (All).

account of the company (in winding up) shows a minus balance and there is no likelihood of realization of any sum from the properties of the company. The official liquidator has, consequently, no funds to continue with the winding up proceedings. No practical use will be served by keeping this issue alive and the company merits to be dissolved in the facts and state of affairs of the case.[715]

In Re: U.P. Roofing Co. Ltd, the Hon'able Court was pleased to observe that the submission made by the official liquidator that no positive use shall be served in keeping this matter alive and to proceed further with Company as all the properties of the company have been sold by the finance corporation and there are hardly any funds in the company. The winding up proceedings cannot carry on particularly in view of the fact that the records of the company are not available and the matter is pending before the court for many years. It will, therefore, be convenient in the interest of justice to order that the company, be dissolved under Section 481 of the Companies Act, 1956, from the date of this order. It is however, made obvious that the suit filed by the State Bank of India against the guarantors of the company which is pending before the civil court shall not be affected by this order and shall maintain against the guarantors in accordance with law.[716]

The Hon'able Gujarat High Court was pleased to hold that essential phase which requires the Companies to be voluntarily wound up and dissolved has not yet been reached as the Official Liquidator has not submitted any report before this Court as required under Section 497(6) of the Companies Act 1956. In absence of any such report, it cannot be said that the Company is already dissolved. Section 497(6) of the Act plainly specifies that from the date of the filing of the report to the Court, the Company shall be believed to be dissolved and Section 487 of the Companies Act, 1956, makes it profusely clear that the corporate status and corporate powers of the Company shall go on until it is dissolved. The combined reading of Section 487 and 497(6) of the Companies Act, 1956, makes it obvious that the Companies' position has still not been changed and though the essential declarations and resolutions were passed for taking the companies into voluntary winding up, the same would not ipso facto consequence into dissolution of the Company as the missing phase of filing the report by the Official Liquidator is still to be reached and prior to the said phase is

[715] *Re U.P Presstressed Co Ltd v Unknown* (1998) 91 CompCas 692 (All).
[716] *Re U.P Roofing Co Ltd v Unknown* (1998) 91 CompCas 831 (All).

reached, the members and contributories as well as the Creditors have collectively decided to restore the Company. There is no blockade under any statute to prevent the members and creditors from passing such resolutions for revival of the Companies. The Delhi High Court has made it very obvious that still in the case of a Company which was previously wound up by the Court, power under Section 466 of the Companies Act, 1956, to stay the winding up proceedings can be exercised and since the Management required to revive the Company and there was no hindrance whatsoever, the winding up proceedings must be stayed altogether. The applicants' case is on better footing as the Companies are not yet dissolved and before the report is submitted by the Official Liquidator, the members and creditors have themselves resolved to revive the Companies. Even the Karnataka High Court has taken the view that voluntary winding up proceedings, at whatever stage they were, were ordered to be stayed and shareholders were permitted to choose new board of directors to attain the aim for which the Companies had been incorporated/ established. The Company is previously dissolved and after dissolution of the Company, it is not open for the Liquidator to use its power.[717]

The judgment for stay under section 466 of the companies Act 1956 is the subject to following conditions.

- The court should be satisfied that the material in the application for stay is authentic and the principles regarding stay are applicable to the facts of the case.
- Mere permission of the creditors for stay or offer to pay the creditors in full is not enough.
- The court will consider the principle of commercial ethics and the wishes of creditors and contributories.
- The court will refuse stay if there is evidence of irregularity or fraud.
- The court will grant stay only if the revival of the company is in the interest of the creditors and the public at large.

[717] *Ankil Members Association v Vijaysinh Jadeja Liquidator* (Guj) <www.indiankanoon.org/doc/> assessed 17 June 2011.

- Before granting a stay the court must see that the ex-Directors have fulfilled their statutory duty by furnishing statement regarding state of affairs of the company to the liquidator.

The court will refuse stay if it deems that the petitioners who were ex- Directors wanted continuation of the company to advance their own unfair designs in an illegal and dishonest manner.[718]

Under the provisions of section 446(2) of the Companies Act, 1956, the expression "any claim" means any claim enforceable at law and, since the right to avail of the solution provided under clause (b) of section 446(2) of the Companies Act, 1956, arises only after the passing of the winding up order, the suitable date to be seen for the purpose of determining whether the claim was enforceable at law or not, is the date of the winding up order.[719]

If a company was holding property on trust for another at the time of its dissolution then a new trustee shall be appointed to substitute the company. Seldom is a statute essential to end the legal relations or duties of a company. A statute is generally necessary, for example, to transfer the business of one bank to another, so as to transfer to the acquiring bank the responsibilities owed to customers by the taken over bank.[720]

Just as a company is created/ formed by registration under the Companies Act, its existence ends i.e. it is dissolved, when its name is removed from the register. In most cases dissolution is affected by winding up. A liquidator is appointed for realizing the company's properties, paying its debts and distributing any surplus to members (in winding up called contributories).[721]

The liquidator or any other interested person may however, within two years of the dissolution, approach court for an order announcing the dissolution void: Section 631 of the Companies Act, 1956. An order would only be issued to permit the company to declare a claim to assets which belonged to it at the date of dissolution or to facilitate some person to implement such a claim against the company. But an order will not be issued to allow a company to claim advantage under the will of a person who was

[718] *Nilkanta Kolay v Official Liquidator* (1996) AIR 171 (Cal).
[719] *Official Liquidator Radel v Southern Screws P. Ltd* (1987) (Mad).
[720] J. M. Gullick, *Company Law* (13th edn, Butterworths 1987) 285.
[721] Mayson S. W, French. D & Ryan C. L, *Company Law* (14th edn, Blackstone Press 1997) 691.

living at the time when the company was dissolved. If a company's properties are not enough even to pay the costs of winding up, the creditors are improbable to appoint a liquidator, so that the official receiver continues in that competence. In these state of affairs until and unless the official receiver considers that further investigation/ probe is required because of suspected misconduct, he may be dissolved without more to do. He must however give a 28-days' notice to creditors, contributories and any administrative receiver before applying/ approaching to the court.[722]

10.2 STRIKING OFF/ WINDING UP DEFUNCT COMPANIES

Simon Goulding, in his book on Company Law has also explained the procedure of striking off and winding up of defunct companies and provided that a Company can be wound up under section 560 of the Companies Act, 1985. For this aim, the company is defunct when it has no asset and no liability. The company must manage audited accounts of the company with in thirty days of submission of winding up petition. These audited accounts must show that the company has neither any assets nor any liabilities. In case of a (Pvt.) Ltd company, an application for winding up, indemnity bond and an affidavit signed by at least two directors and in case of a public Ltd company, signed by three directors should be submitted to the Registrar of companies. These officials should also submit a signed copy of audited accounts showing no assets and liabilities. When the registrar is satisfied that the company is defunct with no assets and liabilities, he will issue notice to the company for striking of its name from the register; giving some time to withdraw the application. After the expiry of the time limit, he will issue notice thereby striking off the name of the Company from the register maintained by him and will send the same to publish in the Official Gazette. Once the said notice is published in the Official Gazette, the Company stands struck off from the Register.[723] An application for registration must include an outline clarification of why the company was struck off.[724]

The State Bank of Pakistan was not as such a petitioner for seeking the winding up of the defunct-company and, consequently, does not fall within the purview of relevant rules. There is no force in this argument in as much as in the order of winding up

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[722]J. M. Gullick, *Company Law* (13th edn, Butterworths 1987) 296.
[723]Simon Goulding, *Company Law* (2nd edn, Routledge Cavendish 1999) 398.
[724]Geoffery Morse, *Charles Worth and Morse Company Law* (16th edn, Sweet & Maxwel 1999) 564.

State Bank of Pakistan's petition is one of the sources for the direction of the Court to wind up the defunct-company. State Bank of Pakistan is, consequently, an entity which can be called upon to pay the amount.[725]

The Hon'able Delhi High Court was pleased to hold that it is note-worthy that the company is a very small one, the properties are also tremendously small compared to the usual amount available in companies and, a passage of time amounting to almost twenty years has taken place without any creditor or debtor appearing nor have any shareholders complained about the in-action of the Voluntary Liquidator. This period of twenty years is from the date of the beginning of the winding up. At the same time; this winding up could have been brought 'to an end either by the course just pointed out, or by getting this company dissolved in some other way. In fact, the petitioner asserts that the company could have been declared to be defunct under Section 560(4) of the Companies Act, 1956, the Court agreed with the petitioner that could have been declared as defunct, but at the same time, unless the Registrar of Companies is contented about the state of affairs, he cannot waive the defaults of the Voluntary Liquidator. To read Section 560(4) of the Companies Act, 1956, as obligatory would indicate that every time the Voluntary Liquidator fails to submit the return, the company would just be struck off the Registrar and this could lead to very grave misconduct and unfairness to various share-holders and creditors. Consequently, perhaps, the Registrar has acted properly in not declaring the company defunct. Of course, if the facts now brought to my notice in this application, had been carried out to the notice of the Registrar of Companies, he might have been inclined to announce the company as defunct and then the Voluntary Liquidator would have been released of the difficulties that he now faces due to the strange facts of this case.[726]

10.3 WINDING UP OF UNREGISTERED COMPANIES

The following rules as discussed in the judgments laid down by the Hon'able Courts relate to unregistered companies including a foreign company and any partnership, association or company consisting of more than five members. These rules do not concern a company which is incorporated under the Act as a general principle. An

[725]*Re Industrial & Commercial Finance Ltd* (1989) PLD 24 (Lah).
[726]*VSP Nanda v Registrar of Companies* (1978) 48 CompCas 552 (Delh), 15 (1979) DLT 160 (Delh).

unregistered company might be wound up in spite of the fact that it is wound up, or has been dissolved or finished under the laws of the land where it was incorporated.[727]

The Hon'able court held that the Hong Kong court could wind up an unregistered company if it was incapable of paying its debts.[728] An unregistered is assumed to be incapable of paying its debts where it is established before the court that the company is incapable of paying its debts and the same is liable to be wound up.[729]

The reason for winding up an unregistered company including a foreign company are contained in section 444 of the Companies Ordinance 1984, previously section 271 of the Companies Act, 1913. A foreign company can also be wound up on the reason included in subsection (iii) of section 444, of the Ordinance, 1984. If a company is formed outside Pakistan, but it has been conducting business in Pakistan, it can be wound up as a registered company if it ceases to carry on business in Pakistan. For maintaining an application for winding up of an unregistered company (including a foreign company), for any one or more of the grounds mentioned in subsection (1) (iii) of section 444, of the Ordinance, 1984, it is not required that the concerned company must have been conducting business in Pakistan or has an office or a place of business in Pakistan. However, for maintaining a winding up petition of a foreign company under subsection (3) of section 444 of the Companies Ordinance, 1984, it is required that the concerned foreign company had been conducting business in Pakistan. This is obvious from the wordings of subsection (3) of section 444 of the Ordinance, 1984, itself. There is no such condition if the petition for winding up is made on any of the causes mentioned in subsection (1) (iii). Such requirement is not spelt out from the wordings of subsection (1) (iii) of section 444 of the Ordinance, 1984. There are other requirements for maintaining a winding up petition of an unregistered company including a foreign company under section 444 of the Companies Ordinance, 1984 (previously section 271 of the Companies Act, 1913),

[727]Cross-Border Insolvency Arrangements between Singapore and Malaysia< https://wenku.baidu.com/view/9529be7a1711cc7931b71647.html> assessed 10 October 2017.

[728]Angela Wang , 'Companies Law Winding up of an Unregistered Foreign Company in Hong Kong' (*Mondaq* 8 April 2010) < www.mondaq.com/hongkong/x/97682/Corporate+Commercial+Law/Companies+Law+Winding+Up+of+an+Unregistered+Foreign+Company+in+Hong+Kong> assessed 11 December 2017.

[729]PJ Omar, 'Cross-Border Jurisdiction and Assistance in Insolvency: the position in Malaysia and Singapore' (2008) <www.scielo.org.za/scielo.php?pid=S1727-37812008000100006&script=sci_arttext> assessed 15 December 2017.

and these are that the concerned company has assets in Pakistan and that the petitioner is a creditor of the concerned company.[730]

The Hon'able Madras High Court held that there is no difference between the English law and the Indian law in respect of foreign company. The principle governing the proof of debts by foreign creditors in the bankruptcy proceedings is applicable to that of the winding up proceedings also. A foreign creditor is as much permitted to a share in the assets/ properties of an unregistered company in winding up as a creditor resident in the country where the unregistered company is situated, the nationality of the creditor not making a point of difference. For this position that a debt is capable of local situation, there are a number of decisions of English Courts and to passages in Cheshire's 'Private International law' and Dicey's "Conflict of Laws". The question of suit of a debt has not much of a bearing on the point whether a foreign creditor is excluded from participation in the assets/ properties of an unregistered company which is wound up. It is in connection with administration and succession actions that the suit of a debt has relevancy. The Hon'able Court further held that the contention urged by appellant that proof of debts of the foreign creditors should be wipe out not acceptable.[731]

The Clause (b) of section 582 of the Companies Act, 1956, defines an unregistered company in a comprehensive way and states that the said expression shall contain any partnership, association or company (other than those specified in clause (a) of section 582).[732]

10.4 WINDING UP OF FOREIGN COMPANIES

The Hon'able Supreme Court of Pakistan was pleased to hold that at this moment competence of respondent Company to invoke jurisdiction of a Company Judge for winding up of appellant company under the Companies Ordinance, 1984, has also gained essential significance. On having gone through section 2(7) of the Ordinance, 1984, which provides definition of "Company" i.e. a Company formed and registered under this Ordinance, 1984, or an existing company that respondent company does not fall within the definition of a company which has got its registered office in Pakistan. Thus question is whether as per the mandate of section 456 of the

[730] *James Finlay PLC v Messrs Hellenic Lines Ltd* (1986) CLC 2933 (Kar).
[731] *Rajah Vizianagaram v the Official Liquidator* (1952) AIR 136 (Mad), (1951) 1 MLJ 535 (Mad).
[732] *Malini Rao v Hotel Dwaraka* (1994) 1 ALT 36 (AP), (1997) 90 CompCas 179 (AP).

Ordinance, 1984, the respondent corporation has a right to adjust its liabilities under the contract. The respondent corporation was not required to complete formalities as have been envisaged by section 451/ 452 of the Ordinance, 1984, because as it has been observed that the respondent corporation is not a company duly registered in Pakistan or in foreign but is a statutory corporation which has its recognition in Pakistan by Act XXVIII of 1956 of the Parliament. The scheme of which reveals that it enjoys the status of the corporation possessing full juridical personality particularly empowered; under section 306(1) (a) of the Ordinance, 1984.[733]

Shaukat Mehmood and Nadeem Mehmood, in their book on Company Law have narrated that even where there is a winding up under part XI of the Ordinance, 1984, the liquidator appointed has to find out the whole body of creditors wherever they may be resident and the foreign creditor are to be allowed to prove their claims in the winding up proceedings in Pakistan. The Indian Court, however against all canons of justice have taken up the position that Pakistani creditors of companies incorporated/ formed in India must be treated on a different footing as compared to other foreign creditors where the applicant had a saving bank account in a Pakistan Branch of an Indian Bank, in respect of which Indian High Court had sanctioned a scheme. The Pakistan High Court refusing to recognize the scheme made winding up order in respect of the branch. The applicant applied to the Indian High Court for getting the benefit of the scheme. It was held that he should participate in winding up proceedings in the Pakistan High Court and that he could not get the benefit of the scheme sanctioned by the Indian High Court.[734]

If the company has not been doing business for a year an order will not be made on the ground that the business of the company has been suspended for the time being. The order will also not be passed if there is an intention to proceed with the business. A company does not cease to carry on business, because it has given up a part of its business. Although the power to wind up is optional, it has to be exercised judicially. This means that it is only where the balance of equities is shown by a petitioner to incline appreciably in favour of a winding up order that it will be made ex debito justitiae.[735]

[733]*Hala Spinning Mills Ltd v International Finance Corporation* (2002) CLD 1487 (SC).
[734]Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 598.
[735]*Paramjit Lal Badhwar v Prem Spinning and Weaving Mills* (1986) 60 CompCas 420 (All).

The court dealing with winding up of a company can ordinarily deal with assets/ properties within its authority and not with the assets of the company outside its authority.[736] The business of a foreign company having assets in Canada might be wound up here though the company is in process of being wound up elsewhere. Canadian policy holders petitioned/ applied for distribution of the "deposit made by a company, a foreign corporation, the company being insolvent. The Hon'able Court held that they were entitled to the relief asked notwithstanding those proceedings to wind up the Company were pending before the English Courts. A company's sphere of action being out of Canada is no bar to its being wound up provided it is incorporated there and is insolvent.[737]

A distinct jurisdiction which not directly justifies the winding up of foreign companies in the public interest deserves consideration. It can be exercised in respect of solvent companies incorporated abroad, but only if a sufficient link with the English jurisdiction can be established. To arrogate to the English court jurisdiction to wind up a foreign company just because of its association as an investment vehicle outside the jurisdiction with another foreign company that has been active within the jurisdiction would be to make a giant, impermissible and unjustified extension of the jurisdiction of the English court.[738]

Notwithstanding these cautionary tales, the usefulness of Section 426 of Companies Act 1985 was revealed in the early case of Re Dallhold Pty Ltd. Here a company, which had been incorporated/ established in Western Australia but which owned assets/ properties located in England, needed safety from its creditors. As English law stood then, it was not feasible for a foreign company to utilize the administration order regime National corporate law in a globalized market because the pertinent statutory provisions did not automatically pertain to foreign companies. To get around this obvious obstacle, a petition was made to the English courts to persuade them to apply the administration order facility to this situation.[739]

An aggrieved shareholder approached the English courts seeking either relief under the Companies Act 1985, s. 459 (the unfair prejudice remedy) or a winding up on the

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[736]Shaukat Mehmood & Nadeem Shaukat, *Company Law* (4th edn, New Fine Printing 2001) 713.
[737]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 695, 710.
[738]David Milman, *National Corporate Law in a Globalized Market*, (Edward Elgar Publishing 2009)103.
[739]David Milman, *National Corporate Law in a Globalized Market*, (Edward Elgar Publishing 2009) 114-5.

just and equitable ground (under s. 122(1) (g) of the Insolvency Act 1986). This solicitation was not unsuitable in this instance, as the company in question was incorporated in this country. However, the company had always been efficiently controlled and managed in Argentina. Indeed, that was where all of the crucial documents (which were written in Spanish) were located. Taking an overview, the Court of Appeal held that Argentina would be the preferable location for the litigation and accordingly, the English proceedings were stayed on the basis of *forum non conveniens*.[740]

The company was incorporated and had its main office in India but it had a branch office in England. The Hon'able Court held that the company might be wound up in England. [741] It is considered that the modern trend has flexible approach, so that assets could be distributed equitably in foreign proceedings.[742]

The particular company was neither registered nor carrying out its business locally. The Supreme Court of Western Australia lacked authority for its winding up of the company because the jurisdiction for winding up is completely statutory. There must be enough nexus with the forum.[743]

In re Lloyd General Italiano, the Hon'able Court held that the company is established/ incorporated at Geneva, and it carries on business there. In every case in which a foreign company has had any dealings in this country--whether the company is established in China, or Japan, or Australia--there is jurisdiction to order it to be wound up. In the cases which have been cited of orders made to wind up foreign companies, the companies had an office in England, but that is not so in the present case. The Hon'able Court finally held that this Court has no jurisdiction at all, and the petition is dismissed with costs.[744]

The Court, which had authority to issue a winding up order in respect of a foreign company, it was not essential for it to be established/ proved either that the company had a place of business within the jurisdiction or that it had ever conducted business

[740]David Milman, *National Corporate Law in a Globalized Market*, (Edward Elgar Publishing 2009) 125.
[741]Alfred Totiiam, *Principles of Company Law* (3rd edn, Butterworth 1910) 223.
[742]Baragwanath, 'Cross Border Insolvency' (1999) <www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R52.pdf 8-9, assessed 17 December 2017.
[743]Rosalind Mason, Local Proceedings in a Multi-State Liquidation: Issues of Jurisdiction (*MULR,* 2006) <www.austlii.edu.au/au/journals/MULR/2006/5.html> assessed 19 December 2017.
[744]*Re Lloyd Generale Italiano* (1885) 29 Ch. D. 219.

there, unless the application was based on the state of affairs that the company had ceased to carry on business or was carrying on business only to wind up its affairs. It was enough to find jurisdiction to show that the company had some asset or assets within the jurisdiction and that there were one or more persons concerned in the appropriate distribution of the assets, over whom the jurisdiction was exercisable and that such assets did not have to be of a commercial nature or assets, which indicated that the company had formerly carried on business within the jurisdiction. The assets could be of any nature and did not require being assets, which would be distributable to creditors by the liquidator in the winding up and it was sufficient if by the making of the winding up order the assets would be of advantage to a creditor or creditors in some other way. It was observed that the jurisdiction or the Court would, however, be excluded if it was shown that there was no reasonable possibility of benefit accruing to creditors from the making of a winding up order. The Hon'able Court finally held that the comparison of the provisions of sections 399 and 400 of the English Companies Act, 1948 with section 444 of the Companies Ordinance, 1984 and section 271 of the Companies Act, 1913 find no material difference in the provisions.[745]

During the winding up proceedings, the date of issuance of winding up is required to be proved for ascertainment of certain facts for start of winding up proceedings under the principle of universality.[746]

In the country of incorporation, the law of winding up will usually have extra-territorial effect; a winding up elsewhere has only local operation. In the case of local winding up, other foreign countries may not recognize the winding up order or the appointment of liquidator by local courts. The effect of winding up order, in theory is worldwide, but in practical terms there is question of jurisdiction. The liquidator will refrain from recovering assets beyond his jurisdiction.[747]

10.5 WINDING UP OF INSURANCE COMPANIES

The process of winding up of an insolvent insurance company is prolonged. It cannot be concluded in a short period of time. The insurance company has long term business such as employers' liability cover. The claims of such a company could continue to

[745] *Re Compania Merabello San Nicholas SA* (1972) 3 A E R 448.
[746] *Wight, Pilling and Mackey v Eckhardt Marine* (2003) GMBH CILR 211- 222.
[747] *McMahon v McGrath* (2005) EWHC 2125 (Ch).

arise for thirty to forty years. There are often disputes, particularly in respect of large losses, to be settled and reinsurance to collect. A mechanism is therefore, required to ensure that there is an orderly continuation of the company's business and that the maximum possible distribution is made to creditors in the shortest possible time without affecting the potential reinsurance recoveries.[748]

There was a special provision for winding up of an insurance company in the Insurance Act, 1938. In the precedent case came to the conclusion that there being a special provision regarding winding up of an insurance company in the Insurance Act, 1938, general provisions contained in the Companies Ordinance, 1984, shall be overridden by the Insurance Act, 1938. The law declared in the precedent case, therefore, cannot be made applicable in the present case. [749]

The fact that the companies are stated to have merged, the company has ceased to carry business, license has been cancelled after return of amount of deposit as required under the provisions of Insurance Act and after refund of the deposit by the Controller of Insurance after the cancellation of its license, the company does not stand any chance of carrying on the business of insurance in Pakistan together the petitioners undertake to make all claims, liabilities and demands as may be set against the company, this petition is allowed and the company is ordered to be wound up under the Companies Ordinance, 1984, but to liability of the company shall be extinguished. The same, if any, shall be satisfied by the petitioners in view of the fact that the company has merged with the petitioner. The business is being carried on by the petitioner since 1975; the question of appointment of Liquidator in the peculiar circumstances of the present case does not arise. However, the petitioner undertakes to file a certificate to the effect of no liability and the statement of affairs and accounts of the company before this Court.[750]

From a plain reading of section 444(3) of the Companies Ordinance, 1984, it is obvious that in the case of an unregistered foreign company an order of winding up can be passed by this Court, subject, however, to such conditions as incorporated under the said section. There is no dispute to the offer that the petitioner is an agent of Messrs Croatia Line-Rijeka in Pakistan which has left behind the assets and in view of

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[748]Nigel Rackham & Caroline Rifkind, 'Insurance Insolvency Achieving Finality' (2004) <www.chasecambria.com/site/journal/article.php?id=75> assessed 18 December 2017.
[749]*Muslim Commercial Bank Ltd v Dewan Salman Fibre Ltd (*2009) CLD 1483 (Kar).
[750]*Muslim Commercial Bank Ltd v Dewan Salman Fibre Ltd Islamabad* (2009) C L D 1483 (Kar).

the pending litigation in the shape of Suit the petitioner is a prospective creditor of Messrs Croatia Line-Rijeka and thus, entitled to file this petition. The allegations made in the petition that Messrs Croatia Line-Rijeka has been legally dissolved because of commercial insolvency and the substratum of the company is gone have also remained unchallenged from any corner.[751]

The jurisdiction of the Court to direct winding up of unregistered company including a foreign company under section 444(1)(iii) of the Companies Ordinance, 1984, it is not the requirement of law that the said company had been conducting business in Pakistan or had an office or a place of business in Pakistan. For winding up a company, it would be sufficient to demonstrate that company proceeded against had some assets/ properties within the jurisdiction of this Court. Such assets are not required to be of commercial nature but could be of any nature. It would be enough if by making of winding up order, assets/ properties of the company would be of benefit to a creditor or creditors in some other way.[752]

The petition has been published in the newspaper and other formalities have been complied with. It is obvious that the company is not in a position to pay its dues. The private respondents namely, the partners of the unregistered company have also absconded. A case is made out under section 444 of the Companies Ordinance, 1984, for winding up of the respondent company.[753]

Whether the circumstances are as such would rationalize the issue of an injunction. If the secured creditor has instituted legal proceedings in respect of immoveable property situated, in a foreign country belonging to the mortgagor, then even though the mortgagor company is in the course of winding up in England, English Courts, will not hold by an injunction the secured creditor from prosecuting such proceedings particularly when the party seeking to restrain can appear before the foreign Tribunal and assert his rights.[754]

The court of the country must be understood to know more about the law of its own country than the court of a foreign country and the risk of miscarriage of justice in this

[751]*Re Pak Shaheen Pvt Ltd* (2002) CLD 746 (Lah).
[752]*Abdul Khaliq v Abandoned Properties Organization* (1998) CLC 1194 (Kar), *James Finlay PLC v Hellenic Lines Ltd* (1986) CLC 2933 (Kar).
[753]*Abdul Latif Khan Sheerani v Shahid Akhtar & Co* (1991) CLC 1148 (Kar).
[754]*Ramnad District Central v Official Receiver of Ramnad* (1954) AIR 12 (Mad), (1953) 2 MLJ 359 (Mad).

court if it undertook to administer Italian law would be much greater than in the courts of Italy, who are, of course, more familiar with their own law, and as all parties can appear in that court and have their rights finally settled, it would be in the highest degree inconvenient for the court to interfere at all, more specially when, to use an English phrase, the Italian Courts first had jurisdiction in of the matter, and have had jurisdiction in of it for some 2 or 3 years now past.[755]

As soon as the judicial course is set in motion, the company comes under the power of the Court. A liquidator will be appointed to wind up its affairs. The Court's control will guard those policy holders who have got unsatisfied claims against the company. The liquidator will collect the assets/ properties of the company and pay those claims as far as probable from the realized assets. The company whose registration has remained entirely cancelled for less than six months from the appointed day can revive itself. It cannot be wound up by the Court at the instance of the Controller. The claims of the policy holders against such a company will go unprotected. The company may or may not pay the claims. It may waste away its assets. The policy holders would be constrained to resort to litigation against the company or realization of their claims against it. The takeover of the under taking of the company under the Act improves by reason of Government's management the prospects of their claims satisfaction. It is also calculated to protect all interests by applying after the takeover, if that course is deemed necessary, to revive the business of the company.[756]

A company erratically incorporated is non-existent and cannot be wound up. The same applies to an illegal company.[757] It is immaterial whether the company was carrying on business at the date of the winding up. An incorporated bank which has never become entitled to begin business as a bank may be wound up. The Court has jurisdiction to wind up the Company having its head office in the province if it has assets in Canada.[758]

[755] *Moor v Anglo Italian Bank* (1879) 10 Ch. D. 681.
[756] *Neptune Assurance Co Ltd v Union of India* (1973) AIR 602, (1973) SCR 2 940 (SC).
[757] *Commercial Union General Insurance Company PLC v Eagle Star Insurance Company Ltd* 2005 CLD 879 (Kar).
[758] C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 698.

10.6 STRIKING OFF THE REGISTER

A private company which is live and not defunct and which is sending pertinent documents and returns to the registrar may apply to the Registrar to be struck off the register. The procedure is helpful, e.g., for companies formed to follow what was thought to be a good project but which has failed. However, the directors may be in a position to deal with its assets and liabilities and make certain that he company's affairs are brought to a conclusion without the cost of employing an insolvency practitioner as liquidator. However, until the company is struck off the register the directors are burdened with duties under the Companies Act, 1985, such as filing accounts ad annual returns.[759]

The registrar has a statutory power to strike off the register, without any winding up, a company which he has rational cause to suppose is not carrying on business or in operation as per section 652 of the Companies Act 1985,. This power is used to clear off the register defunct companies for which no one will answer. A wholly owned subsidiary, if it has no assets or liabilities other than a balance owing to or by its holding company, may also by arrangement with the registrar be dissolved in this way without the expense of liquidation.[760]

10.7 REVIVAL OF WOUND UP COMPANY

The Hon'able Supreme Court of Pakistan held that from the date of the impugned order till stay was granted/ issued by this Court nothing had occurred during above time relating to the Company's financial affairs and no transaction whatsoever was done during said time. The Company's financial rights and obligations remained the same. Under the state of affairs, the winding up order of the Company is probable to be set aside and the Company is allowed to function as it was doing before. It is not obvious whether other creditors of the Company would be affected or not by restoring the earlier status of the Company. Under the state of affairs, impugned order/ judgment is set aside and the case is remanded to High Court to decide it afresh on merits regarding restoring the previous status of the Company or otherwise, having

[759]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 486.
[760]J. M. Gullick, *Company Law* (13th edn, Butterworths 1987) 285.

taken into consideration all the state of affairs and also keeping in view the interest of those other creditors of the Company.[761]

Under the provisions of section 320 of the Companies Ordinance 1984, the Court shall, as to all affairs relating to a winding up, have regard to the wishes of the creditors or contributories whereas in terms of section 421 of the Companies Ordinance, 1984, the liquidator is empowered to use specific powers, subject to sanction of the Court that is to say during winding up, he may make conciliation or go into arrangement with the creditors or persons asserting to be creditors or having or alleging themselves to have any claim present or future. Similarly under section 422 of the Companies Ordinance, 1984, again the Court in all matters relating to the winding of a company shall have regard to the wishes of the creditors or contributories and might, if considers fit to decide those desires direct meetings of the creditors or contributories to be called and for such cause may appoint a person to act as chairman of any such meeting.[762]

Under section 319 of the Companies Ordinance, 1984, the court may revive company within three years of winding up order, under a petition of any creditor, contributory, the registrar or any other person, if the court is satisfied that all the creditors have been paid and a compromise had been arrived at between creditors and the company. Moreover, under section 429 of the Ordinance, 1984, the court may revive a dissolved company within two years of its dissolution under a petition of the liquidator or any other person as the court deems fit. It can declare the dissolution null and void. It would be considered that the company was never dissolved.[763]

The application under section 338(5) of the Companies Ordinance, 1984, read with rule 3 of the Companies Court Rules, 1997 has been submitted/ filed by the contributories alongwith an affidavit with the prayer that the sale and order be recalled and set aside. At the phase the applicant filed first application under section 319 of the Companies Ordinance, 1984, thereby requesting that the winding up order be withdrawn and revoked and at the same time offered a scheme for rehabilitation through restructuring and change of management which was sought to be enforced under the orders of the Court. It was intimated that the credentials of this third party

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[761]*Hamza Board Mills Ltd v Habib Bank Ltd* (2005) SCMR 1314 (SC).
[762]*Additional Registrar of companies v Karim Silk Mills Ltd* (2011) CLD 109(Kar).
[763]*Investment Corporation of Pakistan v Sunshine Jute Mills Ltd* (2005) CLD 713 (Lah).

are neither disclosed nor known and that the Directors failed to furnish statement of affairs as required under section 328 of the Companies Ordinance, 1984. Even no record was made available or could be found by the liquidators. The whole process was clear and in continuation of the advertisement, consequently, it could not be upheld that the sale was completed by way of restricted auction in the chambers or in the Court. The bidders having offered their bid in response to the advertisement continued to compete with each other till such time that one of the bids was accepted by the Joint Official Liquidators and approved by the Court.[764]

The Hon'able Lahore Court held that before the expiry of three years from the final order of winding up issued by the Supreme Court, the Company applied under section 319 of the Companies Ordinance, 1984, for withdrawal/ revocation of the final winding up order on the cause that the Directors of the Company had arranged the necessary funds for discharging the liabilities of the Company in winding up. In the consequence, the order for winding up of the company passed by this Court, is withdrawn the proceedings pending in pursuance thereto, are dropped, and subject to the encashment of Bank drafts/cheques of various amounts issued in favour of the Bank.[765]

Section 320 of the Companies Ordinance, 1984, necessitates the Court to have regard to the desires of the creditors and contributors in all matters relating to the winding up of a Company. None of the creditors and shareholders has maintained the winding up petition. The petitioner had primarily relied upon a letter from one of the shareholders showing his displeasure regarding the management of the Company. The said shareholders, conversely, disowned the letter and opposed the winding up application filed in this Court. It is difficult to prefer the desires of one shareholder as opposed to the remaining shareholders having an overpowering majority. It would not be just and equitable in the case to wind up the Company and accordingly the present application is dismissed and all interim orders shall stand vacated.[766]

Section 439 of Companies Ordinance, 1984 provides that the Registrar will serve statutory notices upon the company through post. The officer fails to submit the postal receipts and in absence of postal receipts it cannot be said that statutory notices have

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[764] *Pakistan Industrial Credit & Investment Corporation Ltd v Shahdin Ltd* (2004) CLD 897 (Lah).
[765] *National Bank of Pakistan v Punjab National Silk Mills Ltd* (1989) MLD 2963 (Lah).
[766] *Aminuddin v Azad Friends & Co* (2002) CLD 1519 (Kar).

been served upon the applicant, without service of statutory notices upon the applicant the order for striking off the name of the petitioner is bad in law and cannot be sustained. It is now well settled law that no adverse action can be taken without affording proper opportunity of hearing. This case is not based on right of hearing on the basis of principle of natural justice but, on the basis of right given by statute. The petitioner further claims that all the returns have been filed and the company is appropriately functioning.[767]

The copy of the sale deed plainly supports the claim of the applicant company that since the date of its incorporation/ formation it held the piece of land as a known asset/ property. Consequently, in view of the provisions of subsection (8) of section 439 of the Companies Ordinance, 1984, the Registrar could not hold the company as a defunct company and struck off its name from the "Register of Companies". Instead, only a winding up application could be submitted against the company if any one or more state of affairs including the failure of the company to submit statutory reports as contemplated/ provided in section 305 of the Companies Ordinance, 1984, were answered. As mentioned/ observed previously, the company being in custody of known assets/ properties in the form of said immovable property the said provisions of section 439 of the Companies Ordinance, 1984, permitting the Registrar to strike off the name of the company from the Register were not applicable. In the existence and availability of considerable immovable properties it is otherwise just and appropriate that the name of the company be restored to the Register.[768]

In Tahir Umar case, the Hon’able Lahore Court was pleased to hold that from the application it appears that the applicant has been perturbed by the attribution of his permission in the allegedly "unanimous" resolution of the Board of the Directors seeking dissolution of the Company. It is prima facie obvious that the said resolution does provide a false claim of unanimity. But the fact of the matter is that even if there was no resolution the Registrar still had authority under section 439(1) of the Companies Ordinance, 1984, to strike off the name of the Company from the Register where he had realistic reason to consider that the Company was not carrying on business or was not in operation. The written statement by the Registrar reports that

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[767] *Zahooria Builders Pvt Ltd v Registrar of Companies SECP* (2008) CLD 1312 (Kar).
[768] *Combined Ginners Pvt Ltd v Registrar Securities & Exchange Commission of Pakistan* (2007) CLD 1234 (Lah).
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the management of the Company had not submitted any statutory return including Form-A and Form-29. Accordingly, the Registrar got published notices in the Gazette inviting objections to the striking off the Company name. Such notices were published twice in the official Gazette. Once under section 439(3) of the Companies Ordinance, 1984, and again under section 439(5) of the Companies Ordinance, 1984, thereof where after the Company stood dissolved. The petitioner may not have received personal notice from the Registrar but he is believed to have been served with notice by publication. He never disputed the dissolution of company at that time nor has he shown any cause to rationalize the conditions essential for an order of restoration of the name of the company to be passed. In these state of affairs, there is no merit in the present application for the relief prayed in terms of section 439(6) of the Companies Ordinance, 1984.[769]

The objection taken by the learned Joint Registrar is that the petition is time-barred, since the impugned action was taken on 31-07-1981 and the present petition has been filed on 12-5-1990. Reference has been made to section 439(6) of the Companies Ordinance, 1984, which has now succeeded Companies Act, 1913, subsection (6) whereof provides a period of three years for making an petition for restoration of the Company's name to the Register maintained by the Registrar. No period of limitation was provided by section 247 (G) of the Act under which the impugned action had then been taken to grant the petition and order restoration of the name of the Company to the Register of the Companies, as prayed in the petition, i.e. 31-07-1981, the date on which it had been removed from the Registrar.[770]

In Re: Messrs Associated Electrical Enterprises Limited, the Hon’able Sindh Court was pleased to hold that the applicant has made out a case for restoration of its name on the register of the companies. Section 247 of the Companies Act, 1913 under which the action was taken by the Registrar Joint Stock Company against the applicant provides for striking off name of a company which has finished doing its business. From the material brought on record it is adequately recognized that during the years 1976 to 1985 the applicant was not only functioning but was doing active business as is obvious from the returns of income filed by it for these years and the

[769]*Tahir Umar v Sun Colour Garments* (2005) CLD 1177 (Lah).
[770]*Ark Industrial Managements Ltd v Joint Registrar Government of Pakistan Corporate Law Authority* (1991) CLC 1520 (Kar).
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amount of income-tax paid. The applicant was conducting on business and was in operation at the time its name was struck off from the register of the companies. With regard to the period of limitation stipulate under section 439 of the Companies Ordinance, 1984 for submission of such application, it is correctly urged that it will not apply in this case as the name of the company was struck off by the Registrar under section 247 of the Companies Act, 1913 in the year 1981 when Companies Ordinance, 1984 had not come into existence. It is fairly obvious from reading of subsection (6) of section 247 of the Companies Act that it did not prescribed any period of limitation for making an petition for restoration of the name of the company in the event of its removal from the register of companies under section 247. The certified copy of the notices issued by the Registrar Joint Stock Company to the applicant under subsections (1), (2) and (3) of the Companies Act, 1913, it emerges that only notices issued under subsections (3) and (5) were published in the official Gazette as required but the notice issued under subsection (2) was not published in the official Gazette as required by law. As the procedure given under the Act was not sternly followed, the name of the applicant is restored in the register of the companies. The applicant will, still, file the returns which were required to be submitted by it under the law.[771]

This petition for winding up of the applicant under section 305 read with section 444 of the Companies Ordinance, 1984, has been relied on the reasons that the substratum of the company has gone and that it has failed to pay any interest on the money, deposited with it by the applicant, onwards or to refund the money or any part thereof. It is reasonably obvious that, on the facts disclosed in the case, the company is not an "association" and, consequently, not an ‘unregistered Company’. Admittedly, the petitioner himself as well as the several persons who have filed affidavits supporting the application is creditors of the company.[772]

After the winding up of a company, the court cannot revive a company under sections 391 to 394 A of the Companies Act 1956, because these sections are only procedural provisions. The powers under section 466 of the companies Act 1956 are conferred or the court to revive the company for public interest and commercial morality.[773] The

[771]*Re Associated Electrical Enterprises Ltd* (1988) CLC 1538 (Kar).
[772]*Zahoor Khan v Shahabuddin* (1992) PLD 230 (Kar).
[773]*Meghal Homes Pvt Ltd v Shree Niwas Girni K.K.Samiti* (SC) <www.indiankanoon.org/doc/> assessed 21 June 2011.

Court cannot hand over a commercially insolvent company to the shareholders and allow the shareholders loose upon the market, free to raise loans. The Court owes a duty to the public in such a matter.[774]

In Income-Tax Officer case, the Hon'able Kerala High Court observed that the period of limitation fixed in the above provision is evidently for the submission of the petition. Section 560(6) of the Companies Act, 1956, deals with the authority of the court to restore to register the name of a company which has been struck off the register, while Section 559(1), of the Companies Act, 1956, as already noticed, deals with the power of the court to announce dissolution of a company void. In Section 559(1), of the Companies Act, 1956, the time of limitation is fixed for passing the order on the petition, while in Section 560(6), of the Companies Act, 1956, the limitation is provided for filing the petition. It is hard to hold that Parliament did not aim this differentiation, when it employed different languages in the said two provisions. Under Section 559 of the Companies Act, 1956, the court has no authority to pass an order after the expiry of two years from the date of the order of the dissolution of the company. Even on the view that the limitation given under Section 559(1) of the Companies Act, 1956, is one against the entertaining of the petition. The petition in this case is time-barred. Rule 285 of the Companies (Court) Rules, 1959, which relates to an application under Section 559 of the Companies Act, 1956. Since as a result of amalgamation the company has ceased to have any assets and liabilities and as it is not the case of the applicant that it has left any undistributed assets before dissolution, no purpose would also be served by declaring the dissolution void except that the income-tax department will have approval of having taken reconsideration proceedings against the company, whatever may be the result of that. The matter the jurisdiction under Section 559 of the Companies Act, 1956, can be exercised by this court.[775]

One of the accepted grounds for setting aside the dissolution is fraud. But the fraud alleged has to be strictly proved. That is the accepted position, though, the section itself does not state. In as much as the fraud alleged has not been proved as found by me, the petitioner is not entitled to the relief prayed for.[776] Companies struck off under

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[774] *Sree Shanmugar Mills Ltd v S.K Dharmaraja Nadar* (1970) AIR 203 (Mad).
[775] *Income Tax Officer v Mambad Timber and Estates P* (1973) 43 CompCas 332 (Ker), 1973 89 ITR 312 (Ker).
[776] *Income Tax Officer Companies v Vemulapalli & Sons Pvt* (1967) 66 ITR 331 (AP).

the new petition arrangements can also be restored to the register for up to 20 years after dissolution. A court order is essential and petition to the court can be made, e.g. by interested parties such as creditors, mainly those who did not receive a copy of the company's petition for striking off.[777]

10.8 CONDUCTING BUSINESS AS GOING CONCERN BY COMPANY DURING WINDING UP

While the winding up is going on, the company may be directed to carry on the business for the reason of winding up and in that case it will be essential for the official liquidator to maintain various account books. It is for that reason that Rule 286 appears to have been framed.[778]

In Sudarsan Chits (India) Ltd. case, the Hon'able Kerala High Court observed that the winding up in abeyance and on taking into consideration of the quarterly reports if at any time find that a phase is reached when under the arrangement that we have made the company is probable to function on its own, may then regard as revoking the winding up order so much so the company will function on its own or subject to such limits as are called for in the state of affairs. If on the other hand, on a consideration of any report, even though there might not be any definite default on the part of the appellant company, it is not possible to permit the functioning of the company and it is not to the benefit of the creditors to permit such functioning, it is open to this court to pass orders confirming the order of winding up, a situation justifying winding up having already been found in this order, and the attempt by this judgment being only to prevent winding up by an alternate mode, if possible.[779]

The averment/ argument has been given by the applicant the petition that notices under sub-sections (1) & (2) of Section 560 of the Companies Act, 1956, were not served upon the applicant. But there is a rational basis to consider when the company has failed to submit the annual returns for more than five preceding years in spite of there being a requirement U/s 159 of the Companies Act and a rational explanation for Registrar of Companies in taking action U/s 560 of the Companies Act, 1956. Though, in the particulars of the instant/ present case the company has been

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[777]Denis Keenan, *Company Law for Students* (11th edn, Pitman Publishing 1999) 487.
[778]*Gulzari Lal Bhargava v Official* (1972) 45 CompCas 419 (Delh), ILR (1972) 401 (Delh).
[779]*Sudarsan Chits India Ltd v Sukumaran Pillai (1985)* 57 CompCas 85 (Ker).

competent to justify as to why in the preceding years annual returns could not have been submitted regardless of this being statutory requirement U/S 159 of the Companies. Act, that apart it can be considered by this Court in the interest of justice for restoration of the name of the company provided the statutory mandate of law complied with by the applicant.[780]

The Hon'able Rajasthan High Court held that no time is given for publication of the notice of striking off. Usually, the Registrar must do it as soon as the name is struck off; and this would signify that the authority of the court to wind up such a company, which is specifically saved by Clause (b) of the proviso, can hardly be invoked by an aggrieved or interested person. Such a construction of the Clause is opposite to the understandable legislative aim of the said provision, which, as mentioned by the Hon'able Madras High Court, only makes clear what is actually implied by Clause (a) of the proviso. Sub-section (6) of Section 560 of the companies Act, 1956 empowers the court to reinstate to the register a company whose name has been struck off the register on a petition made by any of the persons given therein within 20 years of the date of publication of the notice of striking off; and the court can do it, if it is just to do so. This sub-section does not refer to the dissolution of the company resultantly on the publication of the notice, and it cannot be asserted that a petition under this sub-section is not maintainable, as the company is not existent consequential on the dissolution. If that were so, such a contention is not available for the same cause against the use of the power of the court, expressly saved by Clause (b) of the proviso to Sub-section (5) for the winding up of a company whose name has been struck off the register. On reading Sub-sections (5) and (6) of Section 560, of the companies Act, 1956, it emerges that the court's power to wind up a company whose name has been struck off the register is not affected by the publication of the notice of striking off by the Registrar.[781]

In Re: Morning Star Private Ltd., the Hon'able Kerala High Court observed that apprehension voiced in this approach is that if by continuing the commercial activity by working the plant, further debts are to be messed up, the secured creditors as well as unsecured creditors and in the eventual analysis the contributories are probable to suffer. That is a situation one shall take into account and probably guard against. But

[780] *Amit Pabuwal v Registrar of Companies* (Raj) <www.indiankanoon.org/doc/> 15 June 2011.
[781] *Amit Pabuwal v Registrar of Companies* (Raj) <www.indiankanoon.org/doc/> 15 June 2011.

even as running the plant, arrangement is so made, that not merely there will be no further piling up of the debt, but by the steps, which the court suggests to take, the debt of the company is possible to be reduced. It could, consequently, he said with confidence that conducting business of the company is completely essential for the useful winding up of the company, and eventually winding up can be evaded, which everybody should strive to avoid, and if a scheme goes through, definitely, the sponsor of the scheme would be the happiest man, because he gets a healthy working proficient plant as against a carcass. Care must, of course, be taken to see that no unjust benefit is taken by a person to whom plant is given for its working and operation. Care shall further be taken to see that no right is created in him whom he can set up against the liquidator if eventually the winding up order is made. Care will have also to be taken to observer that in the occasion or the other scheme goes through, the sponsor would not experience complexity in getting possession of the plant. There is no uncertainty that it would be firmly legal and utterly just and appropriate that the court should believe the proposal to run the plant, pending the final decision either on the scheme application or on the winding up application.[782]

If the property of a dissolved Company could accrue previously to the Crown in India then as bona vacantia it now goes to and vests in the Union of India under Article 296 of the present Constitution. Generally a defunct Company would scarcely have any assets/ property. The Registrar of Joint Stock Companies was asked to find out whether on the point the office of the Registrar, had previously any procedure. Parliamentary legislation emerges to be essential to evolve administrative machinery for the safety and disposal of the assets/ properties of a Company, dissolved under Section 560 of the Companies Act, 1956. For unclaimed dividends and undistributed assets of Companies in winding up there is provision for their going to the public account of India in the Reserve Bank under Section 555 of the Companies Act, 1956. But there appears no comparable provision for assets/ properties of dissolved Companies under Section 560 of the Act.[783]

The restoration of the company's name to the Register maintained by the respondent will be subject to the payment of exemplary costs, payable to the common pool fund of the Official Liquidator. In addition, further costs are paid to the Registrar of

[782] *Re Morning Star Private Ltd* (Ker) <www.indiankanoon.org/doc/> 26 June 2011.
[783] *Re U.N Mandal Estate* (1959) AIR 493 (Cal), (1960) 30 CompCas 172 (Cal), 63 CWN 889 (Cal).

companies. Costs are paid within three weeks from today, and subject to the completion of all rules and regulations, including payment of any late fee or any other charges which are laviable by the Registrar of Companies for the late deposit of statutory documents. The impugned order for striking off the name of the applicant company shall then stand set aside. The name of the applicant company, its Directors and members must, as a result, stand restored to the Register of the Registrar of Companies, as if the name of the company had not been struck off, in accordance with Section 560(6) of the Companies Act, 1956.[784]

The objects of section 560(6) of the Companies Act, 1956, is to provide a prospect to the company, its members and creditors to revitalize the company which has been struck off by the Registrar of Companies, inside a time of 20 years, and to provide them an opportunity of conducting the business only after the company judge is contented that such restoration is crucial in the interests of justice. The company judge may be contented that either the company was conducting its business or was in operation or otherwise, and it is, in the state of affairs of the case, equitable and just to restore the company. It, though, does not imply that the rights and liabilities of the company are lost during the interim period, inasmuch as section 560(6) of the Companies Act, 1956, gives that after an order of restoration is issued, it shall be believed as if the company was never struck of the register of companies. The section also gives the company judge with ample powers to put definite conditions or directions at the time of ordering the restoration.[785]

In light of proviso (b) to Sub-section (5) of Section 560 of the Companies Act, 1956 a winding up order can be issued against a company devoid of first getting the dissolution order set aside. There can be no suspicion nor has it been disputed by the respondent that the instant appeal is an extension of the original proceedings. It has also not been disputed that change of law can be taken into consideration. The contention of the respondent simply is that, by applying the said proviso (b) to Sub-section (5) of Section 560, of the Companies Act, 1956. It will be invalidating the consequence of the utter provisions contained in Sections 647 and 658 of the Companies Act, 1956. So far as Section 647 of the Companies, Act 1956 is concerned, the same is not, applicable. The said provision assumes a winding up order

[784] *Santaclaus Toys Pvt Ltd v Registrar of Companies* (Delh) <www.indiankanoon.org/doc/> 25 June 2011.
[785] *Purushottamdass v Registrar of Companies* (1986) 60 CompCas 154 (Bom).

having been issued before the beginning of the 1956 Companies Act and deals with the definite winding up of the affairs of the company. No doubt, the winding up of a company by the court starts from the date of the application but it is only when an order for the winding up is issued that it relates back to the date of application. The reference to Clauses (i) and (ii) also directs to the proposal that the view taken by is in accord with the intent of the legislature.[786]

Sub-section (6) of Section 560 of the Companies Act, 1956 gives that the person aggrieved by the striking off the name of the company from the register has to earlier than the expiry of twenty years, apply to this Court, and the Court on its contentment may restore the name of the company to the register. In the present case, the Registrar published the notice in the A.P. Gazette on 14-9-2000, while the petitioner submitted the present Company application on 26-8-2003, which is much earlier than the expiry of twenty years, and having regard to the fact that the instant Company application has been submitted earlier than the expiry of twenty years, as is mentioned under Section 560(6) of the Companies Act, 1956, the same can be considered for the same is not barred by limitation, and before considering this Company application.[787]

The provisions of the companies Act, 1913 or any Act repealed by it for winding up a registered or unregistered company are not relevant. Section 590 of the companies Act 1956 leaves untouched the provisions for dissolution of companies under chapter VI of the Indian Partnership Act.[788]

The situation under the Insurance Act appears to be wholly diverse and, as the vital difference arises out of the truth that an Insurance company might as well be a partnership comprising of less than seven members which could only be governed by the Partnership Act. Such a company, can by no means be ordered to be wound up under the Companies Act, and, in so far as such partnership is also considered by the expression "Insurance Company" as used in Section 53 of the Insurance Act, the High Court cannot, in exercise of jurisdiction awarded upon it by Section 10 of the Companies Act, 1956, consider an application for the winding up of such a company. This is the main cause which must interpret the expression "Court" as used in Section

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[786] *Seth Kundan Lal v Hanuman Chamber of Commerce* (1966) 36 CompCas 231 (PH).
[787] *Vijayawada Chamber of Commerce v Registrar of Non Trading* (2004) 2 ALD 353 (Ald), (2004) 2 ALT 357 (Ald).
[788] *Vasant Rao v Shyamrao* (1977) AIR 2021 (SC), (1978) 1 SCR 218 (SC).

53 of the Insurance Act in the sense in which it is defined in Section 2(6) of that Act.[789]

The opening words of section 582 of the Companies Act, 1956 make it clear that "for the purpose of Part X"; the expression "unregistered company" shall comprise any association, partnership or company comprising of more than seven members at the time when the application for winding up was filed before the court. Consequently, the word "association" has to be understood in its general senses and not with reference to the provisions contained in section 11 of the Act, prohibiting partnerships or associations consisting of more than 20 members from conducting any business in matters mainly mentioned in section 11(2) of the Act. Thus construed, there could be no bar to maintain this application for the winding up against an association like the respondents-association properly registered under the Societies Registration Act, as an unregistered company.[790]

The provisions of the Partnership Act along with the provisions of the Companies Act relevant for the reason which requires that if there be a legal relationship of partners called "a firm" either registered or unregistered, such a relationship can be brought to an end by the procedure of dissolution considered by Chapter VI of the Partnership Act and nothing in Part X of the Companies Act influences that position. Section 583 of the Companies Act, 1956, by itself operates on a restricted sphere and contingencies. It is not a provision of universal application. Being a provision enacting specified remedy, it will have to be firmly construed and only applied to the matters specifically governed. Moreover, there is a provision of Section 590 of the Companies Act, 1956, which elucidates with regard to dissolution or winding up of partnership made by any other Act is not effected by' anything enacted by Part X of the Companies Act, 1956.[791]

It is not every partnership which can be ordered to be wound up under the Companies Act. The partnership which is considered by section 582 of the companies Act, 1956, is one which has more than seven members at the time when the petition for winding up is filed. But the partnership referred to in section 2(8) of the Insurance Act is a

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[789]*All India Motor Transport Mutual v Raphael George of Bombay* (1963) AIR 7 (Bom), (1962) 64 BOMLR 219 (Bom), (1962) ILR 266 (Bom).
[790]*Bangalore Timber Industries v Madras Sapper Ex-Servicemen* (1986) 60 CompCas 44 (Kar), (1988) ILR KAR 237 (Kar).
[791]*Vasantrao Dattaji Dhanwatay v Shyamrao Dattaji Dhanwatay* (1977) AIR 188 (Bom).

partnership to which the Indian partnership Act. 1932 applies. Such partnership may consist of less than seven members, and it is clear that such a partnership would not be covered by the provisions of section 582 of the companies Act, 1956. Such a partnership can, though, be wound up as an insurance company under section 53 of the Insurance Act.[792]

It is quite obvious from the special provisions of law contained in section 394(4)(b) of the Companies Act, 1956, that the transferor company could be a body corporate incorporated outside India but the transferee company could not be a foreign company. The transferor company was a foreign company but the transferee company was and is an Indian company. Section 394(4) (b) of the Companies Act, 1956, is a special provision. The court had jurisdiction to pass the impugned order sanctioning the scheme of amalgamation and the impugned order, does not suffer from inherent lack of jurisdiction. There is no merit in the argument that the impugned order is likely to be taken as a nullity. Section 584 of the Companies Act, 1956, is not pertinent. The said section does not forbid or confine the authority of the court to wind up a foreign company or sanction amalgamation of the Indian undertaking of a foreign company with the Indian company.[793]

Section 584 of the Companies Act, 1956, confers authority on the Company Court in India to wind up a foreign company incorporated outside India which conducts or which has ceased to conduct business in India as an unregistered company. Section 584 of the Companies Act, 1956, empowers the court to wind up a foreign company when it ceases to carry on business in India or its substratum is gone even where it is dissolved in its country of incorporation. The Companies Act, 1956, is relevant to banking companies in so far as the said provisions are not incompatible with the provisions of the Banking Companies Act, 1949. The BCCI carried on business on a large scale in India and has large assets/ properties located in this country and large number of creditors and members of the Indian public are placed in grave suffering by cause of its suspension of banking business and its other operations in India. The provisions contained in section 584 of the Indian Companies Act, 1956, are same with that of provisions contained in the English Companies Act. As paragraph 1865 of Halsbury's Laws of England, volume VII, formulates the same principle of law in

[792] *All India Motor Transport Mutual v Paphael George* (1963) 33 CompCas 1166 (Bom).
[793] *Bombay Gas Co Pvt Ltd v Central Government* (1996) 3 BomCR 312 (Bom), (1997) 89 CompCas 195 (Bom).

relation to winding up of a foreign company as an unregistered company by the English Courts, i.e., when the foreign company conducts business in England at all material times and its assets/ properties and creditors are placed in England. The above provisions are made in the benefit of members of the Indian public dealing with a foreign company incorporated outside India. It is, consequently, clear that this court has authority to consider the proceedings though the company is incorporated out of India because the bank has conducted business on a large scale in India and at Bombay until suspension of its business.[794]

The proceedings do not essentially take into account state of affairs wherein frauds have taken place or funds have been embezzled, though the law does authorize the liquidator to begin action in that regard also. However, it will not forbid such actions or prosecutions from continuing but the only prerequisite is that they should be done with the approval of the company court. In considered view, having regard to the current state that is common of which judicial notice will have to be taken, the company court would be completely judicious not only allowing such actions to persist but in suitable cases, a direction should be given to begin such actions in the public interest.[795]

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[794] *Reserve Bank of India v Bank of Credit and Commerce*, 1993 78 CompCas 207 Bom.
[795] *N. Venkoba Rao v B.K Shreenivasa Iyengar* (1997) 88 CompCas 195 (Kar), (1996) (7) KarLJ 89 (Kar).

PART V

CHAPTER 11

CONCLUSIONS/ SUGGESTIONS

During research, the Companies Ordinance 1984 and its sections dealing with winding up were studied, discussed and reviewed. From the introduction of the Companies Ordinance, 1984, it is obvious that the purpose and rationale behind the introduction of the Companies Ordinance is certainly that the law relating to the companies and other specific associations is required to be amended and consolidated suitably for the better and healthy growth of corporate sector, raising of capital investment, development of the economy, better protection of the investors, creditors and members, stability of the regulators and other relevant matters connected with the process of winding up of the companies. Therefore, the simple object and purpose of the Companies Ordinance, 1984, is clearly to arbitrate/ adjudicate all matters falling under the Ordinance finally to achieve the results for which the Ordinance has been enacted and being enforced.[796]

The whole scheme of the Companies Ordinance is meant to protect/ guard the interest of the stakeholders such as creditors and shareholders and not to put their concern/ interest at risk by interim arrangements.[797] Most corporate law models deal with the subject of winding up and have provisions for the winding up and dissolution of companies. There is a constant pursuit for cost-effective changes/ variations. For example, in English law, for insolvent companies with limited or no assets, a procedural device for the quick dissolution was introduced in 1985 on the back of proposals from the Cork Committee.[798]

It is needless to mention here that the Companies Ordinance, 1984, is a special statute therefore the provisions under it will supersede the general law. The objective of Companies Ordinance, 1984, is to accelerate the process of winding up proceedings, and also provide a very cheap and summary remedy to the members and creditors in respect of their claims for and against the company, and to save the company and its directors from unnecessary litigation especially the prolonged civil litigation which lasts for years and years being unproductive. Moreover, the company Court normally

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[796]*Rauf Baksh Kadri v National Technology Development Corporation Ltd* (2005) CLD 747 (Kar).
[797]*Hala Spinning Limited v Industrial Development Bank of Pakistan* (2002) CLD 978 (Lah).
[798]David Milman, *National Corporate Law in a Globalized Market (*Edward Elgar Publishing 2009) 74.

exercises a wide range of jurisdiction and powers, over all matters relating to the process of winding up of the company. Therefore, the matters relating to a company in winding up are to be adjudicated before one Court and the wisdom behind the provisions of the Companies Ordinance is that the company should be dissolved finally, without any procedural and legal complications.[799]

Winding up may be done as a last resort. The court would regard to its consequences, the reason being the winding up would result in, (1) closing down of a unit which produces some goods or provides some service; (2) it would throw out the employment of numerous persons and result in greater hardships to the members of families of such employees; (3) loss of revenue to the State by way of collection that the State could hope to make on account of customs or excise duties, sales tax, income-tax, etc; Therefore, the courts priority will not be to wind up a company by an order of court and this is exercised by the court only on the reasonable ground that the company is not financially sound and unable to pay back its debts to its creditors. However, the present corporate existence as going concern of company even by the way of restructuring would be a blow in future to do so. It would not be right to say that creditors can insist on as a matter of right for winding up of the company by court if the position of the company is such that it would be unable to pay its debts to them even then the company can be revived.[800]

At the time of winding up proceedings, it is not binding upon the court to entertain the desires of the majority of the creditors but in each and every case the court must provide them stern consideration. But whether the court must pass such an order depends upon the state of affairs finding in each case.[801]

The Court before passing the winding up order has to convince itself and to make view in terms of subsection (h) of section 305 of the Companies Ordinance, 1984, that it is just and equitable that the company should be wound up. The purpose of the proceedings seems to be to get out solvency or insolvency of the company and not to resolve the claims/ issues of the creditors. The purpose is not to compel the company to pay dues to unpaid creditor but to safe discontinuation of tasks of such company, which had finished to be commercially solvent and feasible. Therefore, the provisions

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[799] *Pakistan Industrial Leasing Corporation v Sunrise Textile Mills* (2009) C L D 1662 (Lah).
[800] *Re Navjivan Trading Finance Pvt Ltd* (1978) 48 CompCas M P 402 (Guj).
[801] *F G Robson v Dawsons Bank Ltd* (1932) 2 CompCas 371, 376.

of Section 305 of the said Ordinance are important in such situations in which company may be wound up by Court if the company is not financially sound enough to return its debts to the creditors and continue its business.[802]

The right to submit a winding up petition cannot be eliminated by an agreement between the parties. The company court has to be satisfied that whether debt is due and whether the company is incapable of paying the same and whether the defense taken in the winding up petition was genuine and probable to succeed on a point of law.[803]

The Court in its discretion may refuse the winding up order because the Court will regard the desires of the majority in value of the creditors, and if, for some good reason, they object to a winding up order. This right to a winding up order is, however, qualified by another rule, viz. that the court will test the desires of the creditors on the reasons as to whether the reason for the opposing of the winding up of the company is rational; secondly, there are certain matters which are required to be inquired into and investigated in case a winding up order is made by the court on the stance of the members and the creditors of the company. Moreover, it is well established principle of law and one of the good practices of the court that a winding up order of the company will be made only on a creditor's application if it would benefit him or the company's creditors. The grounds provided by the creditors opposing the winding up will have a significant bearing on the rationality of the case.[804]

In the light of provisions of the Companies Ordinance, 1984, the winding up is to be considered as the last remedy which is available for the creditor or the investor of the company. The objective and purpose of winding up is that firstly the assets/ properties of the company should be realized/ collected, its debts finally ascertained and settled by payment through disposal of assets of the company and the surplus any remained should be distributed amongst shareholders of the company by liquidator. It is important that these objectives can be achieved only by if the realization after the disposal of the assets of the company is maximized by the liquidator. In a winding up of the company, the court has to ensure even-handed justice and powers may be

[802] *Islamic Republic of Pakistan v Sabah Shipyard (Pakistan) Ltd* (2009) CLD 999 (Kar).
[803] *Gramercy Emerging Market Fund v Essar Steel Ltd* (2002) 111 CompCas 1 (Guj).
[804] *Bharat Petroleum Corporation v National Organic Chemical* (2004) BC 402 (Bom), (2004) 120 CompCas 333 (Bom).

exercised to protect the interests of the creditors, the shareholders/ members and others.[805] It is well established that the filing of an application for winding up is a maltreatment of the process of the Court if the debt on which application is presented/ filed is disputed to be authentic.[806]

In the Companies Ordinance, the liquidator has been provided with certain powers which he has to exercise in a judicial manner. Once a winding up order has been issued and inconsequence of which the liquidator was appointed by the court, it is more appropriate and rational that the court will not get in the way with the exercise of an optional power given to the liquidator, until and unless the liquidator has acted fraudulently and deceitfully and performed his duties in such a way that no rational person would do such act. However, on the other side the liquidator may also require to approach the court for seeking proper guidance to solve and deal with the particular matter arising in the winding up, but here again it is important that usually the court will not go for exercising a discretion, given by the law and so will not decide routine matters, for example, whether a particular contract should be entered into or asset should be sold.[807]

Another form of winding up that can be considered is the possibility of winding up in the public interest reflecting desire to maintain some state control. Winding up in the public interest extends to foreign companies, provided an enough jurisdictional link with foreign law can be recognized. Companies can be required to change their names. The fact that where companies are dissolved and surplus unclaimed assets pass to upon the state via the concept of bona vacantia might also indicate the underlying nature of the relationship between companies and their ultimate progenitor, the state.[808]

A fundamental principal of law is that a petitioner who submits his case for the winding of the company on the basis of 'just and equitable' clause is required to satisfy the court. Moreover, it is not appropriate that he will insist on winding up the company if other members and creditors wish to continue it.[809]

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[805]*Commercial Art Engravers Pvt v Indian & Eastern Newspapers* (1978) 48 CompCas 36 (Bom).
[806]*Ofu Lynx Ltd v Simon Carves India Ltd* (1970) AIR 418 (Cal), (1971) 41 CompCas 174 (Cal).
[807]*Commercial Art Engravers Pvt v Indian & Eastern Newspapers* (1978) 48 CompCas 36 (Bom).
[808]David Milman, *National Corporate Law in a Globalized Market* (Edward Elgar Publishing 2009) 75.
[809]*Kumagai Gumi Co Ltd v Zenecon Kumagai Sdn Bhd* (1994) 4 14 (HCM).

It is the duty of the court before accepting a winding up petition, especially one brought by a shareholders, to satisfy itself that there are genuine grounds and it is well settled that, even after the court has accepted a petition, however it can still stay proceedings and revoke the admission on the filing of objection petition against the winding up order either by the company, member, creditor or some other interested person. Misconduct and mismanagement are not by themselves sufficient for a winding up order. Similarly the close relationship between the several directors of a company is no ground for winding up a company although it can be considered as a factor in cases where that close relationship has stimulated misconduct and mismanagement and has enabled the directors to dominate the other shareholders and monopolize the company for their own personal benefit. [810]

The commercial enterprises are established with the objective to gain economic and financial gains. As far as the law of commerce, economic gains etc., is concerned, it is clear that joint commercial or economic activity for the purpose of gaining can be carried on by more than one individuals. Now as discussed earlier the main purpose and objective of the incorporation of the company is to secure more and more financial benefits. Law has to ensure and watch that public damage involving uncertainty and obvious dangers to the innocent third parties in transacting business against such joint ventures should have a legal character. The purpose of legal control, as is envisaged by the Companies Act, 1984, the basic object is being to safeguard the public interest.[811]

A company being a corporate entity has a legal and moral duty towards its creditors. The company further owes a duty to its creditors to ensure the safety and maintenance of the assets which are provided as collateral and are to be available and utilized in case of repayment of the debts outstanding against the company. All the affairs of the company and its management, is required to be delegated to its directors for proper functioning of the company as per Memorandum and Association of the company. A moral and legal duty requires both the directors of the company and the creditors of the company to jointly ensure that the affairs and matters of the company are being properly administered by them and that the company's assets are not misused for the

[810] *Jose J Kadavil and K.T Mathew v Malabar Industrial Co Ltd* (1986) 59 CompCas 969 (Ker).
[811] *Vasantrao Dattaji Dhanwatay v Shyamrao Dattaji Dhanwatay* (1977) AIR 188 (Bom).

personal benefits of the directors of the company themselves to the prejudice of the creditors.[812]

Just and equitable, is the core principle underlying the winding up process. During the winding up of the company the management of affairs of a company is not the business of the court.[813] The legal phrase just and equitable which has prime importance for the filing of the winding up petition and also is a well-known concept in legal jurisdictions whose insolvency and companies laws derive from English 19th century legislation. It is a flexible jurisdiction regarding the winding up of the companies which has been applied by Commonwealth courts for well over a century in a judicious manner, mostly in relation to traditional trading companies.[814]

The courts, by considering the principle of "just and equitable", look beyond strict legalities and consider the rights of share-holders. Justice will not be done if one party is allowed to disregard the rights of other parties. The principle of equity cannot be applied to all companies and the circumstances which permit application of equitable considerations cannot be laid down conclusively.[815]

As per the provisions of Subsection (2) of section 314 of Companies Ordinance, 1984, a winding up petition is admissible on the ground that it was just and equitable that the company should be wound up. But if the court feels that other remedies are available to petitioners, however that they are pursuing their winding up application in an irrational and unreasonable manner instead of pursuing/ following other available remedies from other body or legal forum, the court in its discretion for the benefits of the members and creditors of the company may refuse to make an order of winding up of the company. It is pointed out that there was no identical provision in the Companies Act, 1913. This change in the law is important as it has expressly provided that the petitioners can be directed to pursue the other remedy available to them in case the winding up petition had been moved by the petitioner on the single/ sole ground to establish its case that the company should be gone into winding up on simple just and equitable ground. It has again been left to the prudence of the Court to pass such an order even in such a situation and the stage for taking a decision whether

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[812] *Bakemans Industries Pvt Ltd v New Cawnpore Flour Mills* (2008) (SC).
[813] *VSVS Krishna Iyer Sons v New Era Manufacturing Co Ltd* (1965) AIR 241 (Ker).
[814] Matthew Crawford, 'Cayman Islands Investment Funds: Winding up Petitions International Corporate Rescue' (*ICR*, 2010) <www.maplesandcalder.com/news/article/cayman-islands-investment-funds> assessed 19 December 2017.
[815] David Milman, *National Corporate Law in a Globalized Market* (Edward Elgar Publishing 2009) 67.

caution should be exercised in favour of asking the petitioner to pursue the other remedy in the final hearing of the main petition.[816]

It is still to be decided and remains debatable whether discretion vested in the Court under the provisions of section 314(l) of the Companies Ordinance, 1984, should be exercised in favour of making an order of winding up in the facts and circumstances of the case and even after the available proof of the fact that the company was unable to pay the debt. It is well-settled law that the prudence vested in a Court is required to be exercised judiciously on application of the mind to the facts and circumstances of each case and after examining the particularly previous and present conduct of the defaulting company towards its creditors and others persons.[817]

In contrary to the voluntary winding up the Compulsory Winding up is both lengthy and expensive and if the winding up is the only remedy available then it would be better to initiate a creditors' voluntary winding up if the company is really insolvent. This process would be quick as it will require to pass an extraordinary resolution with 2/3 majority in favour; the winding up would be subject to close supervision by the creditors. It would be wise to avoid compulsory winding up. It is possible to file the petition for a compulsory winding up order of the company and it does not matter that the company is in voluntary winding up.[818]

In majority of the cases liquidations are voluntary, which are initiated by way of resolution passed in general meeting for beneficial winding up of the company. Moreover, even if a company is insolvent, unable to pay back its debts and is under the pressure from its creditors, it is still in the best interest of the stakeholders to continue and go for the voluntary winding up which is a less expensive and formal procedure. However, compulsory winding up should be considered as a measure that should be used as a last resort for creditor or member, if company inflexibly refuses to satisfy their legitimate demands or is simply unresponsive usually because it has been abandoned by the director. However, all petitions for compulsory winding up should be supported by sufficient and appropriate evidence and must have specified grounds upon which the court in its discretion may order compulsory winding up.[819]

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[816] *National Bank of Pakistan v Ittefaq Foundries Pvt Ltd* (1998) PLD 332 (Lah).
[817] *Habib Bank Ltd v Hamza Board Mill* (1996) PLD 633 (Lah).
[818] Jennifer James, *Company Law* (4th edn, 2003-4) 223, 265-6.
[819] Chris Shepherd, *Company Law* (8th edn, HLT Publications 1996) 298.

Compulsory winding up of the company should be considered as a last resort, if a company obstinately refuses to fulfil the legitimate demands. However, a petition for compulsory winding up of the company must be supported by evidence upon which the court may order the compulsory winding up.[820]

A creditor can also file suit for recovery of money, however winding up proceedings can be proceeded simultaneously. The mere fact that a creditor has other or alternate remedy under general law or a special law does not deter him from pressing in aid the provision of section 306 read with section 309 of the Ordinance, 1984, for seeking the winding up of the debtor company. The winding up proceedings cannot be regarded as useless on the strength of the objection of the other side that the dispute is going on in some different proceedings between the same parties for establishing the liabilities of each other and despite such other proceedings the company judge is competent of passing a winding up order because in terms of section 305, of the Ordinance, 1984, it has to base its judgment for winding up of a company on the conditions given therein including non-payment of debts by it.[821]

The court will not interfere with a voluntary winding up and order a compulsory winding up unless it is shown to the court beyond the reasonable doubt that it is apprehended that the rights of the petitioners are being compromised by the voluntary winding up on the stance of the members of the company, the Court can refuse to revoke a voluntary winding up of the company and make/ issue a compulsory order for the winding up of the company for the benefit of all stakeholders at the instance of a shareholder, if the insufficient evidence is provided that could prove that any benefit would thereby result to the shareholders.[822]

The protected creditor in case stayed outside the winding up proceedings just like the State Financial Corporation has an option to exercise his rights to realize the security without intervention of the Court. If so happens, the provisions of Section 529 of the Companies Act, 1956, will be applicable and enforce the pari passu charge to divide the share as per law in favour of the workmen and it is further required that the amount realized after the disposal of assets of the company proportionately for the payment/ discharge of the workmen dues which may feel necessary for the Court to

[820]Chris Shepherd, *Company Law* (8th edn, HLT Publications 1996) 298.
[821]*Central Cotton Mills Ltd v Habib Bank Ltd* (2004) SCMR 1443 (SC).
[822]C. A. Hasten & William Kaspar Fraser, *Company Law* (2nd edn, Carswell 1920) 719.

intervene and impose conditions, which may be found necessary for the realization of the pari passu charge in favour of the workers.[823]

The Court while exercising its discretionary powers in favour of a shareholder under section 433(f) corresponding to section 305(h) of the Ordinance, 1984, must not only establish that the situation is such that not only winding up of the company is the only alternative but also that no other solution is available. An order to winding up is an extreme step. A heavy burden lies on a shareholder to show clearly how he considers that the company has lost its purpose.[824]

The property in hand at the date of the winding up, and the contributions of all the present shareholder, were primarily and justly liable to pay all the debts of the company equally, as far as they would extend before any liability of past shareholder could arise meaning thereby that the liability of the past members would arise only after the existing assets and the contributions of the shareholders are found to be insufficient to meet the debts and liabilities of the companies against its creditors. The liability of past shareholder to contribute with regard to debts contracted/ received before they ceased to be shareholder could not exceed the residual amount of those debts, after writing off from them the full amount of dividends paid out of the property in hand and the contributions of present members.[825]

Some legislators have adopted a co-operative approach with regards to winding up which can be phrased as an international insolvency, so as to achieve a fair distribution of the assets. The English courts a long ago said that they would provide assistance to foreign liquidators in a winding up, recognizing their right to assets and allowing other proceedings in England to secure local assets for them. Some of the relevant jurisprudence evolved in the winding up of banks. As per the provisions of section 426 of the Insolvency Act, 1986, obliges courts in the United Kingdom to provide assistance to other courts, notably those of the county of incorporation. Assistance can include staying an action by local creditors.[826]

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[823] *Andhra Pradesh State Financial v T.G.L Quick Foods Ltd Adoni* (2000) (2) ALD 398 (AP), (2000) (4) ALT 502 (AP).
[824] *Arshad Tanveer v Sindh Industrial Trading Estates Ltd* (1997) C L C 456 (Kar).
[825] *Re Prabhakar Glass Works Ltd v Unknown* (Mad) <http://www.indiankanoon.org/doc/> 24 June 2011.
[826] Ross Cranston, *Pinciples of Banking Law* (2nd edn, 2002) 19.

In the winding up process of the company all creditors, whether inland or foreign, if they are able to establish/ prove their debts against the company have equal rights to receive due amount as per their share. The winding up of the unregistered Company by the court should be treated as ancillary and the Courts dealing with it should act in aid of the winding up of the company in the country of its incorporation.[827]

The protected creditor who seeks to prove the whole of his debt in the course of the proceedings of winding up must before he can prove his debt give up his security against his credit for the benefit of the general body of the creditors of the company. In case he opted for surrendering of his security/ collateral for the benefit of the general body of creditors of the company, he may prove the whole of his debt. If the protected creditor has realized his security, he may prove for the balance due to him after deducting the net amount that has been realized.[828]

The principle of globalization in bankruptcy proceedings has been an issue of discussion for many years. In the absence of international treaty achieving this goal, the common law has been allowed to fill the void.[829] Any apprehension that the company is likely to lose its corporate existence and commercial value through winding up of the company may cause a huge loss to the company and its business in the commercial sense both in its effort to restructure and, in day-to-day manufacturing and commercial operations. It fulfills all the criteria where the courts have in spite of the presumption having been arisen under section 434(1) (a) of the Companies Act, 1956, in favour of the petitioning creditor.[830]

It is difficult to list all the circumstances that can lead to petition for winding up being successful however, it might be difficult to mention and cover all the reasons, causes and circumstances which provide a base and give rise to a company’s investors/ creditors to initiate the winding up petition against the company. Moreover, some general principles have evolved and emerged from the cases decided by the courts of different law jurisdictions which can provide a proper and visible guidance to the commercial liquidity funds, promoters, investors, directors and investment managers of the corporate sector. A winding up order of the company on the ground of just and

[827]*Rajah Vizianagaram v Official Liquidator* (1952) AIR 136 (Mad), (1951) 1 MLJ 535 (Mad).
[828]*Canfin Homes Ltd v Lloyds Steel Industries Ltd* (2001) 4 BomCR 84 (Bom), (2001) 106 CompCas 52 (Bom).
[829]Simon Dickson, ‘The Quick March of Modified Universalism’ (*CFR*, 06 October 2010) < The-Quick-March-Of-Modified-Universalism-/Bottom> assessed 11 December 2017.
[830]*Re Pradeshiya Industrial and Investment Corporation* (1994) 79 CompCas 835 (UP).

equitable by simple/ mere conflict and disagreement between minority shareholders and management or a majority of shareholders is not justifiable. Minority shareholders of the company for seeking winding up order of the company would need to clearly express by cogent evidence that they are subject to oppression at the hands of the majority and not by merely the exercise of majority rule of the shareholders of the company.[831]

It is well established that during winding up, a company cannot be treated as a dead unit; it remains alive. Compromise/ arrangement that would revive a dead project into a going concern which would only be in the interest of national economy and would create jobs. since prima facie the revival plan and the merger would be for the good of the company and the benefit of their members which will ultimately be in the best interest of economy of this country, it would be just and proper that an attempt would be made for the revival of the company as it would be in dominion of corporate and commercial wisdom.[832]

The thought and concept of making a petitioner the judge in his own cause is absolutely against the fundamental principle and the rule of law. It is a fundamental right of the every citizen of the country no matter how serious the charges and evidence against him which indicted him in a case against him; he should be given a reasonable opportunity to put his defense before the court prior to meriting punishment or penalty, to deny the truthfulness of the charge against him and to present his defense along with evidence in his support to deny the allegations against him. But however, all these protections which are the foundation of the rule of law and provided by the law might not be destroyed during the process of winding of the company.[833]

The reason for appointing the provisional liquidator is to ensure that the properties of the company are not moved or transferred by directors during the period when winding up order can be made. However there are some conditions which should be met prior to the appointment of the provisional liquidator It has been appraised that a

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[831]Matthew Crawford, 'Cayman Islands Investment Funds: Winding up Petitions International Corporate Rescue' (*ICR*, 2010) <www.maplesandcalder.com/news/article/cayman-islands-investment-funds> assessed 19 December 2017.

[832]*Additional Registrar of Companies v Karim Silk Mills Ltd Karachi* (2011) CLD 1095 (Kar).

[833]*Joseph Kuruvilla Vellukunnel v Reserve Bank of India* (1962) AIR 1371 (SC), (1962) SCR (3) 632 (SC).

provisional liquidator for the winding up of the company will only be appointed if the company is the petitioner or if it consents to the appointment or if the company is clearly insolvent or if it is obvious to the court that a winding up order will be made. This dicta shows the court's unwillingness to pre-judge the issue between the petitioner and the company by appointing a provisional liquidator before the hearing of the petition, However the court’s decision is not just restricted to the situations mentioned above, and may be exercised if there is a public interest to safeguard for example, if the company subject to the winding up is an insurance company on whose continuous solvency the effectiveness of policies issued by it depends or where the petition is presented by the Secretary of State for Trade and Industry who makes out a strong prima facie case that the company's business activities have throughout been designed to mislead the public into making hazardous speculations on vague terms which have resulted in excessive charges being made by the Company for its services. [834]

When a liquidator has been appointed, the court has the legal powers to limit and restrict his powers in order to conduct a beneficial winding up of the company. His appointment does not completely expel the powers of the board; it may still cause the company to oppose the winding up petition or to apply to discharge the provisional liquidator. If it is deemed necessary and in the public interest that the company would be wound up by the court on presentation of the petition from the regulator and concerned department, such petitions can be considered by the court if it thinks it just and equitable for the company to be wound up. The Department however, may in addition to winding up of the company or instead of, presenting a petition for winding up, present a petition for an order under the provisions of section 210 of the Companies Act 1985.[835]

When from the record it appears to be convenient in the public interest and just and equitable that the company should be wound up for beneficial winding up; the mischief of a fraudulent company is possible to be more efficiently dealt with by winding up the company than by leaving it in existence and relying on prosecuting those who have taken part in any criminal activity; and the State have not to be

[834]*Pennington's Company Law*, (5th edn, 1985) 14.
[835]Boyle & Sykes Gore *Browne on Companies*, (43rd edn, 1982).

prevented from exercising its statutory powers in this behalf by being required to provide any undertaking in damages.[836]

The law has vested in the court a wide jurisdiction in the interests of commercial ethics; and if the facts reveal a strong case for investigation regarding the affairs of the company into the incorporation/ formation or promotion of the company, or the issue of debentures and other related matters of the company, the Court will make a compulsory order irrespective of creditors' opposition for the same.[837]

While deciding the cases the courts always remember that `legislation is for practical problems, and economic problems are highly sensitive and complex. Laws are not theoretical. They deal with practical problems. Judgment is largely a prediction based on interpreted experience.[838]

There may even be possibilities of abuse, but on this count, too, legislation cannot be disregarded. No lawmaker can predict or anticipate abuses or distortions of legislation in advance. A law maker may employ utmost care in framing legislation; so that laws are not abused by tainted human cleverness. The court, therefore, must judge constitutionality of such legislation and not its imbalances or possibilities of its abuse. If any crudities and possibilities of abuse come to light by the court, the legislature can step in and enact proper amendatory legislation. This is the right approach which should inspire legislation in dealing with complex economic issues with respect to winding up of the companies. [839]

During the conduct of affairs of the company if an economic offence/ white collar crime is committed before and after the commencement of winding up proceedings with cool calculation and purposeful design for personal benefit against the interest of the company and business community; such offence must be dealt with an iron hand to establish faith and trust of the community in the justice system. The criticism of those who see white collar crime with permissive eye should be ignored as this white collar crime ruins National economy and National interest.[840]

A director, promoter, or an officer of a company during his life time through his misdeed wrongly transferred assets of the company into his own estate. At his demise

[836]Re *Highfield Commodities Ltd* (1984) 3 All ELR 890.
[837]Palmer's *Company Law* (21st edn, 1968) 742.
[838]R.K Garg v Union of India (1981) AIR 2138 (SC).
[839]Secy. of Agriculture v Central Roig Refining Co (1950) 94 L Ed 381.
[840]M.R. Bhakshi v Fintra Systems Ltd (Delh) <www.indiankanoon.org/doc/> 12 June 2011.

this property went to his legal representative. The law provides that a person, who is legal and lawful beneficiary of the assets of the company, can recover assets of the company from the legal representative of the deceased. The law provides that if a person who has caused financial loss to the company fraudulently must make good the loss from the sale of assets of the company held by the legal representative of the deceased.[841]

At the global level the insolvency profession is still emerging, although it is facing pressures for change arising due to competition policy challenges. Nevertheless, relative legal analysis has much to commend it. Due to the range of the influences which impact on it similar to securities law, insolvency law is becoming increasingly globalized. Perhaps one area where further efforts are required is in regard to the development of a more flexible corporate rescue regime.[842]

The date, on which order for the winding up of the company is passed, it is considered as the dooms day for the company. The order of dissolution, by the Court in a dissolution proceeding, is a death warrant for a legal entity, with order of dissolution, company is declared dead, and it ceases to exist under law. A company which has been dissolved, no longer exists as a legal entity, competent of holding any assets or being sued in any Court. This in contrast to when the company is in winding up, it retains its corporate existence, as during winding up, its administration and management powers are bestowed on liquidator. If the winding up is stopped, company revives. The principle, "*actio personalis moritur cum persona*" (reason gone and quenched with the death of wrong doer or the party wronged), is appropriate in case of a living person may not be extended in cases of corporate or juristic person. Then, in the case of death (i.e. dissolution) of corporate or juristic person such right of action abates, as it abates on the death of natural person.[843]

When a company is dissolved from a legal perception it ceases to exist consequently the Liquidator cannot represent a non-existing company or discharge any duty or perform any function on its behalf without express legal authority.[844]

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[841]*Official Liquidator v Parthasarathi Sinha* (1983) 188 AIR (SC), (1983) 2 SCR 211 (SC).
[842]Roman Tomasic, 'Insolvency Law Principles and the Draft Bankruptcy Law of the People's Republic of China' (1998) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=143812> assessed 16 December 2017.
[843]*Syed Mehmood Ali v Network Television Marketing Pvt Ltd* (2005) PLD 399 (Kar).
[844]*Ankil Members Association v Vijaysinh Jadeja Liquidator* (Guj).

In the preceding chapters of this thesis, the Law and Practice of Winding up of Companies have been discussed in detail through the study and referring of Books Case Laws, Articles and Papers from Pakistan and Foreign Jurisdictions. I have tried my level best to conduct deep research in this area; however I feel that there is further need to conduct study in this area. On the basis of this research conducted so far, I have identified that there is involvement of some elements in delay of completion process of winding up as well as procedural implementation which ultimately hampers the process of winding up a company. Further, there are various modes of winding up of a company as discussed in detail in first two parts of this thesis and also mentioned complications/ implications involved regarding these modes in the rest of parts of thesis. I have also discussed and written about what are best options available to stakeholders to get maximum benefit from the process of winding up of company through different modes of winding up, as by the Court, voluntary winding up and subject to supervision of the Court? I also have recommended suggestions at the same time to be considered by the stakeholders in order to conducting further study in this area, if it would be considered an appropriate proposal for logical and better understanding of these important areas of research.

Firstly, it is considered that there is need of better and healthy growth of corporate sector in Pakistan, rising of capital investment through healthier approach/ competition, better performance of the economy, better protection of the investors, creditors and members, accountability of the regulators. In this regard, there is a vital importance of timely disposal/ completion of winding up process and delays in completion of this process adversely affect the economic welfare of stakeholders and state economy which ultimately contribute towards negative growth of corporate sector.

The one objective and purpose of winding up is that the assets of the company should be realized, its debts ascertained and payments made through disposal of assets of the company. In this regard, the liquidator of the company sometimes fails to exercise these powers in a judicial manner to safe guard the interests. The role and duty of liquidator must be observed by the creditors, members and courts. The liquidator either appointed during the voluntary or compulsory winding up should take timely measures/ steps to complete the procedural and legal formalities in league with the stakeholder of company and while following the court directions.

The winding up of foreign companies having assets in more than one state have some problems in disposal and distribution of assets of company. The just and equitable clause is the core principle underlying the winding up process and the same is not being pursued on judicial basis in all times in cases where the option of winding up of companies is taken.

Generally, it is considered that the process of winding up proceedings provides a very cheap and summary remedy to the members and creditors in respect of settlement of their claims against the company and members. However, practically this does not happen in every case of winding up, especially in compulsory winding up.

Mostly the courts and Jurists consider that the winding up option may be exercised as a last resort. The company while going concern does business and produces some goods or provides services for consumers and public. On the other hand, winding up throws out the employment of numerous people and creates negative impact towards manpower/ human capital of company, especially for Labour class in addition to loss of revenue to the State by way of less collection of taxes. Further, the purpose of winding up proceedings would be to get out from the solvency or insolvency of the company but not to solely resolve the claims/ issues of the creditors through the provisions of this special law. Sometimes due to procedural involvements the most vulnerable Labour class is badly affected by delayed completion of procedure of winding up process, especially when matter is taken by the state institutions.

The court has to decide the matter on the merits of the each case. It is not binding upon the court to decide the matter on the wishes of the majority of the creditors. As discussed in preceding paras, it is well-settled law that the powers vested in the court are required to be exercised judiciously on an apt application of judicious mind as per facts and circumstances of each case. The court has to provide maximum benefit to the stakeholders and address their grievances when winding up process is directly under hearing of the court or under the supervision of the court.

If the winding up is the only remedy available then it would be better to initiate a creditors' voluntary winding up, if the company is really insolvent in that case, amicable settlement of matter is better rather than to seek remedy through a long and cumbersome process. The voluntary winding up as an alternate to compulsory winding up should be considered as a last resort, if the management of the company adamantly refuses to fulfil the legitimate demands of the creditors of the company then in that scenario the process of winding up be initiated to protect the rights. The various options under winding up process would be exercised for the maximum benefit of the stake holders.

There will be no or least interference of the court with a voluntary winding up and the court will not issue order of compulsory winding up of company unless and until it is proved before the court that the petitioner is an aggrieved party and without the interference of court, voluntary winding up is not proving fruitful for the members and creditors of the company.

During winding up most of times, the business of company is stopped and company is treated as a dead unit without carrying out any business activity. In this regard, compromise, arrangement and administration provisions of company Ordinance/ Act would be invoked and an effort could be made to revive a dead project into a going concern. The same exercise would be in the best interest of national economy and stake holders and this could become a better source of employment in the country. These options could be exercised before going into procedural issues which hamper the process of winding up process and at the same time element of delay be considered which resulted into economic losses to company and the opposite parties, seeking relief through winding process.

During winding up proceedings, the persons/officers engaged with process usually commit criminal offences. If such economic offences/ white collar crimes are committed, then these offences must be dealt with an iron hand to establish faith and trust of corporate community on judicial and fair winding up process without economic losses to the stake holders.

It is considered that the winding up process is integral part in Company’s Law. However, in third world countries the fruits of these provisions of Company law are not worth tangible as are expected and the profession and practice about winding up process is still in emerging stage and needs further improvements. The various alternatives to winding up of companies such as reconstruction, administration, and arrangement with creditors, management buyout, mergers, acquisition and receivership would be exercised through legal process. As discussed earlier the winding up should be taken as last resort as some times all forms of winding up could not be regarded as beneficial for the stakeholders. At the conclusion of either type of winding up, everyone will sit on loser side due to element of delay, procedural impediments and misappropriation of company assets/ properties and they fail to get maximum benefits through winding process as imagined before start of this process.

The anti-corruption agencies in Pakistan NAB and FIA should be given free hand, ample powers to take action against corrupt elements and pursue cases against corrupt state officials and corrupt management of companies in courts to curb the white collar offences in this process to provide benefit to stakeholders who they were actually expected through winding up process.

Review of provisions of Companies Ordinance, 1984/ Companies Act 2007 to simplify the lengthy / procedures of winding up of company in order to minimize the element of delay which ultimately hampers the process of winding up of a company. Further, by making quick decisions to save time and costs of the winding up process, the economic and legal rights of workers must be safeguard by the Courts, SECP and Liquidator of the company. This stakeholder of company is not being properly represented before the Courts, SECP, Committee of Inspection and Liquidator to protect their rights being one of the creditors of company. There is great need to protect the rights of workers of the company during the whole winding up process.

There is requirement of formulation/ implementation of a fool-proof internal accountability mechanism through participation of all stakeholders in Pakistan. The business community and the corporate sector should be associated with anti-corruption reforms and initiatives to keep a check and balance on the company management, liquidator and SECP officials who are handling/ controlling the matters during the winding up of companies. The selection process of official liquidator during winding up should be transparent and must be remained strict under supervision/scrutiny of court.

There is also requirement to review the provisions of Companies Ordinance, 1984 to simplify the lengthy process of winding up of company to make quick decisions to save time and costs of the winding up process and system. The SECP and the concerned institutions should initiate steps to make the process of filling application form and attaching documents online for the application for winding up of companies and others incidental matters during this process. There should be follow up for all relevant deadlines given in law/ procedure for filing of applications and necessary approvals during the winding up of corporate entities. There should be no or minimum costs, if any, associated with winding up. Facilitation desks should be set up in various cities for providing all the information and facilitation of company management interested in winding up of companies. Government should make arrangements with financial institutions for providing financial support, rescheduling or eliminating debts and providing other facilities for quick and trouble-free revival or winding up. The Government would have to address these challenges by devising a comprehensive plan regarding this subject through implementation of provisions of this Ordinance. Further, there is need of an effective implementation of such plan alongside aggressive pursuance of appropriate strategy to achieve rapid economic growth which is necessary in present scenario in Pakistan.[845]

Some amendments have been introduced in company Ordinance 1984 through enactment of Companies Act, 2017. These amendments are as, (1) receiver, not to be appointed for assets of the company with liquidator, (2) Committee of Inspection in compulsory winding up, (3) constitution and proceedings of Committee of Inspection, (4) Discretion of official liquidator,(5) provisions applicable to members voluntary winding up, (6) Notice of resolution passed by creditor's meeting to registrar, (7) appointment of Committee of Inspection, (8) provisions applicable every voluntary winding up, (9) accounts and statements to be audited, and (10) duty of liquidator to call meetings of creditors and company at end of each year. [846]

As earlier mentioned, as per views of expert of SECP, these amendments are not enough to meet out the needed requirements in Company Law in Pakistan. The expert has also proposed some material aspects/ issues beneficial for the smooth working/ completion of winding up process may also be addressed. These proposed amendments are as, (1) the companies which are struck off from register by the SECP being no assets and liabilities and if in future there arises any asset and liability of that company in that case there are not clear provisions provided in law how to proceed against such companies. The Gazette Notifications are not regularly received after printing from the Printing Press of Pakistan which is a cause of delay for certain actions under the law. (3) The magisterial powers of the liquidator have been withdrawn in new legislation due to which the implementation of different orders of courts and certain actions required under law are not complied/ implemented with in time. (4) During the winding up proceedings, the shareholders and company are required to get extension from the Courts; however, sometimes they fail to get the

[845]Business Climate in Pakistan: Challenges and Remedies (*ICMA, Pakistan*) < https://www.icmap.com.pk/downloads/Business_Climate_in_Pakistan.pdf> assessed 05 December 2017.

[846]Companies Act 2017 (SECP, 31 May 2017) <https://www.secp.gov.pk/document/companies-act-2017/?wpdmdl=28472> assessed 20 December 2017.

required permissions which cause legal complications. Therefore these proposals are required to be considered for suitable amendments in Law, if required so.[847]

In view of foregoing, suggestions and conclusions, it is concluded that the lengthy procedures and proceedings are being carried out and the delaying tactics are also being used in order to complete the process of winding up in Pakistan and foreign jurisdictions which slows the process of investment in the economy. This phenomenon encourages the defaulted and insolvent companies to manage the engineered defaults which usually have caused loss to general public/ stake holders as well as the economy. It is suggested that the present law on winding up of companies may be suitably amended by incorporating the provisions which allow for presentation of winding up petition by general public, in cases of cheating public at large, the reason being stake holder to safeguard their interests. The cases of misappropriation, cheating and criminal breach of trust must be forwarded to investigating agencies like National Accountability Bureau of Pakistan and Federal Investigating Agency of Pakistan for criminal investigation and recovery of the misappropriated assets by directors, managers, officers, promoters and other beneficiaries of such defaulted and insolvent companies.[848] The process of winding up may be completed as soon as possible by following the legal provisions which are in the interest of all stake holders' especially general public and the state economy.

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[847]Deloitte Study, Companies Ordinance 1984 (*Deloitte*, 2017) <www2.deloitte.com/content /dam/Deloitte/pk/Documents/public-sector/Comparative%20Index%20of%20Companies%20Act,%202017%20vs.%20Companies%20Ordinance1984-deloittepk-noexp.pdf > assessed 17 December 2017 and interview with Mr. Hassan Zaidi Dy. Registrar SECP Lahore(Lahore Pakistan, 12 December 2017).

[848]Rouf Int Advisory Services Pvt Ltd Ref No. 24/2004; Bulls and Bears Pvt Ltd Ref No. 35/2005, Trade Station Securities Pvt Ltd Ref No. 32/2004, Mehdi Securities Pvt Ltd Ref No. 28/2010, Accountability Courts Lahore. This recommendation is given on the basis of analysis and study of these cheating at public large cases filed by National Accountability Bureau, Punjab Lahore.

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