11 WINDING UP

DEFINITION

The winding up or liquidation of a Company means the termination of the legal existence of a Company by stopping its business, collecting its assets and distributing the assets among creditors and shareholders, in the manner laid down in the Act. According to Professor Gower winding up of a company represents the process whereby its life is ended and its property administrated for the benefit of its creditors and members.

MODES OF WINDING UP

There are three methods of winding up a Company :

I. Compulsory Winding Up by the Court.
II. Voluntary Winding Up by the members themselves or by the creditors.
III. Voluntary Winding Up under the supervision of the Court.

COMPULSORY WINDING UP

Compulsory Winding Up takes place when a Company is directed to be wound up by an order of Court.

Grounds of Compulsory Winding Up (Sec. 433)

A Company may be wound up by the court under the following circumstances :

(*a*) Special Resolution of the Company

If the Company has, *by special resolution* resolved that the Company be wound up by Court.

(*b*) Default

If *default* is made in delivering the statuorty report to the Registrar or in holding the statutory meeting.

Comments : In this case the Court may instead of ordering winding up, direct the holding of the meeting and filling of the report and order the party responsible for the default to pay the cost of the proceedings before the court.

(c) Not Commencing or Suspending the Company

If the Company *does not commence its business* within a year from its incorporation, *or suspends its business* for a whole year.

Comments : The Court will not direct winding up under this clause if satisfactory reasons are given for the delay or suspension.

(d) Reduction of Members

If the *number of members is reduced,* in the case of a public Company to below seven, and in the case of a private Company to below two.

(e) Inability to pay debts

If the Company is *unable to pay its debts.* [See below for the circumstances under which a company is deemed unable to pay its debts.]

(f) The just and equitable clause

If the Court is of opinion that *it is just and equitable* that the Company should be wound up.

The interpretation of 'just and equitable' clause depends on the facts of each case. The court may order winding up of a company (1) when the object for which it was incorporated has substantially failed or it is impossible to carry on the, business of the company except at a loss or the existing and probable assets are inadequate to meet the liabilities, (2) when the majority of the shareholders are using their powers unfairly or (3) where there is a deadlock in the management of the company or (4) where public interest is likely to be prejudiced, (5) when the company was farmed to carry out fraudulent or illegal business, (6) when the company is a mere bubble and does not carry on any business.

Comments : The Court may refuse to order winding up under this clause if it is of opinion that some other remedy is available to the petitioners and they are acting unreasonably in asking for winding up, instead of pursuing the other remedies.

"There must be materials to show when 'just and equitable' clause is invoked, that it is just and equitable not only to the persons applying for winding up but also to the company and to all its shareholders.

A prima facie case has to be made out before the court can take any action in the matter. Even admission of a petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company if ultimately the petition has to be dismissed. The interest of the petitioner alone is not of predominant consideration". *Hind Overseas Private Ltd.* v. *Raghunath Prasad Jhunjhunwalla & another.*[1]

This clause gives a wide discretion to the Court and empowers the Court to order winding up in cases not coming within the previous five clauses.

The following examples will show how the "just and equitable" clause has been used.

Examples :

(*i*) *Loss,* Winding up may be ordered where a Company is carrying on its business at a loss and where it is totally impossible to make any profits.

(*ii*) *Loss of substratum of the company.* Where the "substratum of the Company" is gone, a Winding up order will be issued. The substratum of a Company means its subject-matter or the objects for which it was incorporated. A company had no title to the mine and had no prospect of obtaining possession of it. *In re Haven Gold Mining Co.*[2] A Company was formed for working a German patent. The German patent was not granted but the company purchased a Swedish patent. It was held that the substratum of the company failed. *Re German Date Coffee Company.*[3] A company lost its business through nationalization. *Re Eastern Telegraph Co. Ltd.*[4]

(*iii*) *Deadlock in management.* A Company may be wound up where there is a deadlock in the management. In the case of *Yentdje Tobacco Company*[5] there were two Directors who were not on speaking terms and so no business could be conducted and winding up was ordered.

(*iv*) *Fraudulent object.* A Company may be wound up under this clause if the objects of the Company are fraudulent.

(*v*) *Misappropriation and misconduct.* Where a director misappropriated the funds of a company an order of winding up will not be "just or equitable" because it is a sound concern. But if the rights of the shareholders are affected and in addition there is misconduct, the company can be wound up under section 433(f). *Rajahmundry Electric Supply Co.* v. *A. Nageswar Rao.*[6]

---

[1] AIR (1976) Supreme Court 565
[2] 20 Ch. D 151
[3] 20 Ch. D. 169
[4] (1947) 2 A.E.R.104
[5] (1916) 2 Ch. 426
[6] (1955) 2 S.C.R. 1066, 1073

Company when deemed unable to pay its debts (Sec. 434)

A company is deemed to be unable to pay its debts under the following circumstances :

1. If a creditor, entitled to receive a sum not less than Rs. 500, demands the money in writing and the company does not pay the money or settle the claim within three weeks of the date of demand. The notice of demand may be signed by the creditor or by his duly authorised agent or legal adviser.

If there are valid grounds for disputing the creditor's claim no order for winding up will be passed.

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

3. If the court, after taking into account the contingent and the prospective liabilities of the company, is of opinion that the company is unable to pay its debts.

Who can apply for Winding up ? (Sec. 439)

Subject to the qualifications mentioned below, an application for the winding up of a company can be made to the court by : (*i*) the Company (*ii*) any creditor or creditors, including any contingent or prospective creditor or creditors (*iii*) any contributory (which means a person liable to contribute to the assets of the company in the event of winding up) (*iv*) any of the aforesaid parties together (*v*) the Registrar (*vi*) a person authorised by the Central Government in cases where the Central Government can ask for the winding up of a company.

Company : A company can apply to the Court for winding up after a special resolution was passed in a meeting of the company.

Contributory : Any contributor can apply for winding up under ground (d) of Section 433. (See Grounds of Compulsory winding up). A contributory cannot apply on any other ground unless he was a registered shareholder for at least 6 months during the immediately preceding 18 months, or had obtained the share by the death of a previous holder.

All or any of the Prior Parties—under sec. 439(1)(d) all or any of the prior parties may file a petition to the court for winding up.

Registrar : The Registrar is entitled to apply for winding up under grounds (b) to (f) of Section 433. He must obtain the previous sanction of the Central Government. If he applies under ground (c) he must be satisfied on perusal of the balance sheet or the report of an inspector or special auditor that the company is unable to pay its debts.

Government : The Central Government can apply for winding up under ground (f) if, such action is considered necessary after an enquiry into the affairs of the company by inspectors. (See Ch. 10).

Creditors : Creditors usually apply for winding up on the ground that the company is unable to pay its debts. The court will not order winding up if the claim is doubtful or if the company can show good grounds for non-payment. When a creditor applies for winding up, leave of the court is necessary. Leave will not be granted unless a *prima facie* case is made out and unless security for the courts is given.

Workers : The workers of a Company are entitled to appear at the hearing of the winding up petition whether to support or to oppose it so long as no winding up order is made by the Court. The workers have a locus to appear and be heard. They would also be entitled to prefer an appeal and contend in the appeal that no winding up order should have been made by the Company Judge. *National Textile Workers' Union* v. *P. R. Ramakrishnan.*[1]

In addition, winding up can also be ordered of the Board of Industrial Finance & Reconstruction (BIFR) orders the winding up.

Commencement of Winding Up

The winding up of a Company by the Court is deemed to commence from the time of the presentation of the petition for winding up.—Sec. 441.

Where, there was a resolution for voluntary winding up, before the presentation of the petition to Court, the winding up is deemed to commence from the date of the resolution. But the Court may direct otherwise in cases of fraud and mistake.

POWERS OF THE COURT

After a winding up petition is filed, notice is issued on the Company to appear and state its case if any. After hearing both

[1] AIR (1983) Supreme Court 75

sides, the Court may dismiss the petition, adjourn the hearing conditionally or unconditionally, make any interim order necessary or pass an order for winding up.—Sec. 443.

If the order for winding up is passed, the Court appoints a Liquidator whose function is to take charge of and complete the winding up proceedings. To facilitate winding up proceedings the Companies Act gives the following powers to the Court.

1. Stay

The winding up proceedings may be stayed either altogether or for a limited period if considered necessary.—466.

2. List of contributories

The Court is to settle the list of contributories, *i.e.*, shareholders liable to pay money to the Company, determine how much is payable by each and direct the payment of the amount so determined.—Sections 467, 469.

3. Adjustment of the rights of the contributories

The Court adjusts the rights of contributories among themselves and distributes any surplus among persons entitled thereto.—Sec. 475.

4. Delivery to the liquidator

The Court may direct delivery to the Liquidator of any money, property or books and papers in the custody or control of any Contributory, Trustee, Receiver, Banker, Agents, Officer or Employee of the Company, to which the Company is *prima facie* entitled.—Sec. 468.

5. Payment of calls

If any calls are due, the Court may direct the payment of the same.—Sec. 470.

6. Proof of the claims

The Court may fix a time within which creditors are to prove their claims, and may exclude creditors, not proving within the time, from the benefit of any distribution made before those debts and claims are proved.—Sec. 474.

7. Giving Priority

In case of deficiency of assets, the Court may give priority to the payment of costs and charges of the winding up proceedings.—Sec. 476.

8. Summon for questioning

The Court may summon, for questioning, persons suspected of having in their possession property, books and papers of the Company, persons indebted to the Company, and persons capable of giving information regarding the formation of the Company and its dealings and transactions. The Court may direct returns of property of payment of the moneys due to the liquidator. If any person summoned fails to appear, he may be arrested.—Sec. 477.

9. Public Examination

If the Liquidator reports that any person concerned with the formation of the Company or any officer of the Company, is guilty of fraud, the Court may direct his public examination. He can thereupon be publicly questioned in Court by the Courts. Creditors Contributories and the Official Liquidator.—Sec. 478.

10. Arrest of a contributory

If it is found that a contributory is about to quit India or to abscond or to remove and conceal any property for the purpose of avoiding payment or avoiding examination he may be arrested and the relevant books, papers and movable property may be seized.—Sec. 479.

***11.* To convene Meetings**

The Court may convene meetings of creditors and contributories with a view to ascertain their wishes.—Sec. 557.

OFFICIAL LIQUIDATORS

Appointment

The Companies Act provides that in each High Court there shall be an officer known as the Official Liquidator appointed by the Central Government. There may also be Deputy or Assistant Official Liquidators. In High Courts where there is insufficient work, there may be part-time Official Liquidators.

In District Courts the Official Receiver or such other person as the Central Government will decide shall be the Official Liquidator.—Sec. 448.

Upon the presentation of a petition for winding up, the Court may appoint, the Official Liquidator as the provisional liquidator. When the winding up order is passed, the Official Liquidator becomes the Liquidator of the Company.—Sec. 449.

Duties of the Liquida or

1. The liquidator shall conduct the proceedings in winding up the company.

2. After the winding up order is made, the Liquidator shall take into his custody and control all the properties, effects and actionable claims to which the Company appears to be entitled.

3. The Liquidator is to make a list of creditors.

4. The Liquidator is to summon general meetings of creditors and contributories, in order to find out their wishes.

5. This Liquidator is to pay the claims of the creditors *pro rata*. If the assets are sufficient to pay all the creditors, the left balance is to be distributed to the shareholders according to their rights.

6. In all the above matters, the Liquidator is subject to the control of the Court and must obtain directions from the Court whenever necessary.

7. The Liquidator must pay all moneys received by him into the public account of India in the Reserve Bank of India. He must submit the prescribed returns and reports to the Court. He must keep the prescribed books of account and they shall be audited at least twice a year.

8. The liquidators shall keep proper books for making entries or recording minutes of the proceedings at meetings.

9. The liquidator shall present to the court an account of his receipts and payments as liquidator.

10. The liquidator may call a meeting to determine whether a committee of inspection is to be appointed.

Comments : The Central Government is to keep watch over the conduct of the Liquidator and is to take suitable action if he does not carry out his duties faithfully. The Central Government may direct a local investigation of the books and vouchers of liquidators.

Statement of Affairs

After the liquidator has been appointed, a statement of the affairs of the Company is to be made to him in the prescribed form, verified by an affidavit, and containing particulars regarding the assets, debts and liabilities, names and addresses of the creditors etc. The statement shall be verified by a Director and the Manager, Secretary or other Chief Officer of the Company. The Statement of Affairs is required in both Compulsory and Voluntary Winding up.—Sections 454 and 511A.

The Statement of Affairs enables the liquidator to know the position of the Company. The Court may dispense with the submission of the Statement of Affairs.

Report by Official Liquidator

As soon as practicable after the receipt of the Statement of Affairs and within 6 months after the date of the winding up order (or within such extended time as the Court may allow) the Official Liquidator shall submit to the Court a preliminary report. The report shall contain a statement of the amount of the capital issued, subscribed and paid up, the estimated amount of assets and liabilities, causes of failure of the Company, and whether in the liquidator's opinion, fraud and punishable offences have been committed by directors and others, and further enquiry is necessary. The Liquidator may submit other report later on whenever necessary, particularly as regards evidence of fraudulent practices.—Sec. 455.

Powers of the Liquidator (Sec. 457)

(1) The liquidator in a winding up by the Court has power to do the following things *with the sanction of the Court*—

(*a*) to institute or defend any suit, prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of company ;

(*b*) to carry on the business of the company so far as may be necessary for the beneficial winding up of the company ;

(*c*) to sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer the whole thereof to any person or body corporate or to sell to the same in parcels ;

(*d*) to raise on the security of the assets of the company any money requisite ;

(*e*) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets ;

(*f*) to appoint any advocate, attorney or pleader entitled to appear before the court to assist him in his duties.

With the sanction of the Court, the Liquidator can pay any class of creditors in full, make any compromise or arrangement with creditors ; and compromise any call or liability.—Sec. 546.

The liquidator can disclaim any onerous property or unprofitable contract.

(2) The liquidator in a winding up by the Court has power to do the following things, *without taking special permission from the Court*—

(*a*) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal ;

(*b*) to inspect the records and returns of the company on the files of the Registrar without payment of any fee ;

(*c*) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency ;

(*d*) to draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company ;

(*e*) to take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company ;

(*f*) to appoint an agent to do any business which the liquidator in unable to do himself.

The Court can limit or modify the exercise of any of the powers of the liquidator enumerated under (2) above.

The liquidator can apply to the Court for directions on any matter.

The liquidator can summon meetings of creditors and contributories.

No Receiver can be appointed over assets in the hands of the Liquidator except by or with the leave of the Court.—Sec. 453.

The powers given to a liquidator by virtue of provisions of section 457 must not offend the general law of the land. *Jawantrai* v. *The State of Bombay.*[1]

DISCLAIMER OF ONEROUS PROPERTY BY LIQUIDATOR

Where any part of the property of a company, which is being wound up, consists of (*a*) land burdened with onerous convenants (*b*) shares or stock in companies (*c*) any property which is unsalable or not readily saleable, or (*d*) unprofitable contracts, the Liquidator may, with the leave of the court, give up such property. This is known as Disclaimer of Onerous Property.—Sec. 535.

The Liquidator may disclaim a property even though he may have taken possession of the property or done something in relation to it.

The disclaimer must be made in writing signed by the Liquidator within twelve months after the commencement of the winding up or such extended time as may be allowed by the court. But where such property did not come to the knowledge of the Liquidator within one month of the commencement of the winding up, he may exercise his right of disclaimer at any time within twelve months after he has become aware thereof such extended period as may be allowed by the court.

Any person, interested in a property or a contract may apply to the Liquidator in writing, requiring him to decide whether he will or will not disclaim. If the Liquidator does not (within twenty-eight days of the receipt of the letter or such extended time as the court may allow) give notice to the applicant that he intends to apply to the court for leave to disclaim, he shall be deemed to have adopted it.

Before granting leave to disclaim the court may also impose conditions on the disclaimer.

Upon disclaimer, the rights, interest and liabilities of the company in that property come to an end. The court may direct delivery of the property to any person entitled thereto.

---

[1] AIR (1956) Supreme Court 575

Any person injured by the operation of a disclaimer shall be deemed to be a creditor of the company to the amount of the compensation or damages payable in respect of the injury. He may prove the amount as a debt in the winding up.

COMMITTEE OF INSPECTION

The Committee of Inspection is a Joint Committee of creditors and contributories, consisting of not more than 12 persons. The function of the Committee is to keep a general watch over the acts of the liquidator for the protection of the interests of the creditors and contributories. For this purpose the Committee has the right to inspect the accounts of the liquidator at all reasonable times.

The court may, at the time of making the winding up order, or at any time thereafter, direct that there shall be appointed a Committee of Inspection. Within two months from the date of such direction, the liquidator shall convene a meeting of the creditors for the purpose of determining who are to be members of the committee. He shall also call a meeting of the contributories, within 14 days after the creditors' meeting (or such further time as may be allowed by the court). The contributories are to consider the decision of the creditors as regards the membership of the committee. If the two groups agree, the committee shall be formed accordingly. Otherwise the Court shall decide how the Committee is to be constituted.

The Committee of Inspection may meet as often as it desires The liquidator or any member of the Committee can call a meeting. One third of the number of members, or two, whichever is higher constitutes the quorum. A member may resign. He loses membership if he becomes an insolvent or compounds with his creditors or absents himself from five consecutive meetings. A member may be removed by resolution of the group (creditor or contributories) from whom he has been selected as member (Sections 464, 465).

CONTRIBUTORIES

Definition

The term "Contributory" means every person liable to contribute to the assets of a Company in the event of its being

wound up. When a limited liability Company is wound up only those shareholders who have not paid in full the amount on their shares are liable to contribute. But the Companies Act includes, within the term contributory, the holders of fully paid up shares.—Sec. 428

The reason is that in winding up proceedings it is necessary to prepare a complete list of all the members of a company so that the Court can determine, not only who shall contribute to the assets but also, who will get the surplus assets, if any.

The list of contributories is made up of two parts, A and B. The A list contains the names of persons who are members of the company on the date of the winding up. The B list contains the names of persons who were members within a period of one year previous to the date of winding up.

Rights and Liabilities

The Court settles the list of contributories. The rights and liabilities of different contributories are determined by the Court according to the rules laid down in the Act. Section 426 provides as follows :

(*a*) A past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up ;

(*b*) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member ;

(*c*) no past member shall be liable to contribute unless it appears to the Court that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act ;

(*d*) in the case of a company limited by shares, no contribution shall be required from any past or present member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member ; and

(*e*) in the case of a company limited by guarantee, no contribution is required from any past or present member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up.

The liability of a contributory creates a debt payable by him at the time specified in calls made on him.—Sec. 429.

Upon the death of a contributory, his legal representative becomes a contributory.—Sec. 430. In case of insolvency, the contribution due can be proved as a debt in the insolvency proceedings.—Sec. 431. If the contributory is a company which is being wound up, its liquidator represents it and the amount of contribution due can be proved as a debt in the liquidation proceedings of the contributory company.—Sec. 432.

Contributory's right of set-off, where a contributory has been called upon to pay any money due from him to the company, the right to set off is allowed in the following cases.

1. In the case of an unlimited company, the court may allow to the contributory by way of set-off any money due to him by the company on any independent dealing but not in respect of any money due to him as dividend or profit.

2. In the case of a limited company the court may provide the above allowance to any director or manager having unlimited liability.

3. In the case of any company limited or unlimited where all the creditors have been paid in full. In such a case any money due to a contributory may be permitted to be set-off against any subsequent call.

Obligations of directors and managers whose liability is unlimited (Sec. 427)

Where according to the Act and the rules of a company the liability of any director, or manager is unlimited, he shall in addition to his liability, if any, to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up, a member of an unlimited company. But he shall not be liable to make such further contributions under the following circumstances.

(*a*) If he has ceased to hold office for a year or upwards before the commencement of the winding up;

(*b*) if the debt or liability for which contribution is required was contracted after he ceased to hold office; and,

(*c*) unless, the Court deems it necessary to require the contribution.

VOLUNTARY WINDING UP

Voluntary winding up means winding up by the themselves without the intervention of the court.

Section 484 of the Act provides that a company can be wound up voluntarily under the following circumstances :

1. By an *Ordinay Resolution* of the members passed in a general meeting in the following cases—

(*a*) where the duration of the company was fixed by the articles and the period has expired ; and

(*b*) where the articles provided for winding up on the occurrence of any event and the specified event has occurred.

2. By a *Special Resolution* passed by the members in all other cases.

When a resolution is passed for voluntary winding up, it must be notified to the public by an advertisement in the Official Gazette and in a local newspaper.—Sec. 485.

A voluntary winding up is deemed to commence at the time when the resolution for the winding up is passed.—Sec. 486.

TYPES OF VOLUNTARY WINDING UP

There are two types of voluntary winding up. If the company is, at the time of winding up, a solvent company, *i.e.*, able to pay its debts and the directors make a declaration to that effect, it is called a Members' Voluntary Winding Up. If the company is not in a position to pay its debts and the directors make no declaration of solvency it is called a Creditors' Voluntary Winding Up.

The Declaration of Solvency (Sec. 488)

The Declaration of Solvency is to be made by all the directors (when there are only two directors) or by the majority of the directors (when there are more than two directors). The declaration must be to the effect that they have made a full enquiry into the affairs of the company and that they have formed the opinion that the company has no debts, or that it will be able to pay its debts in full within a specified period (not exceeding three years). The declaration must be verified by an affidavit and must be made at a meeting of the Board.

The declaration must be made within the five weeks immediately preceding the date of the passing of the resolution for winding up and must be delivered to the Registrar for registration before that date. The declaration must be accompanied by a copy of the auditors' report on the profit and loss account, the balance sheet and a statement of the assets and liabilities of the company as at the latest practicable date before the making of the declaration.

Any director making a declaration of solvency without reasonable grounds, may be punished with imprisonment up to six months and/or fine up to Rs. 5,000. If the company is wound up in pursuance of a resolution passed within the period of five weeks after the making of the declaration but its debts are not paid or provided for in full within the specified period, it shall be presumed until the contrary is shown, that the director did not have reasonable grounds for his opinion.

DIFFERENCES BETWEEN MEMBERS' VOLUNTARY AND CREDITORS' VOLUNTARY WINDING UP

1. The former applies to solvent companies and a declaration of solvency is necessary. The latter applies to insolvent companies and no declaration of solvency can be made.

2. In the former, it is not necessary to have a creditors' meeting. In the latter there must be a creditors' meeting immediately following the members' meeting.

3. In the former, the liquidator is appointed by the members. In the latter both the members and the creditors may appoint a liquidator but if they nominate different persons, the creditors' nominee becomes the liquidator.

4. In the former, there is no Committee of Inspection. In the latter there may be one.

PROCEDURE OF A VOLUNTARY WINDING UP

The voluntary winding up of a company is done by following successive states.

In a Members' Voluntary Winding Up : (1) Declaration of Solvency. (2) Statutory Declaration to the Registrar. (3) A Resolution in a general meeting of the Company within 5 weeks of Declaration of Solvency. (4) Appointment of Liquidator.

(5) Collecting the company's assets, pay the liabilities of the company and pay the balance of the proceeds to the contributories.

In a Creditors' Voluntary Winding Up : (1) A Resolution for the winding up of the company in a general meeting of the Company. (2) On the same day or the following day there must be a meeting of the creditors. In the meeting of creditors the directors must state the position of the company and the list of creditors. (3) A liquidator or liquidators are appointed by the meeting of members and the meeting of the creditors. The nominees of the creditors are preferred. (4) A Committee of Inspection. (5) The work of winding up according to Statute.

Rules applicable to a Members' Voluntary Winding Up

1. The company in general meeting appoints one or more liquidators and fixes their remuneration. Vacancies in the office of liquidators are filled by the company in general meeting.

2. On the appointment of liquidators, the powers of the Board of directors, managing or whole time directors and managers, come to an end.

3. Notice of the appointment of the liquidator is to be given to the Registrar.

4. The liquidator must call a general meeting of the company at the end of every year and lay before it an account of his acts and dealings. If the liquidator finds that the company is actually insolvent he must immediately call a meeting of the creditors of the company.

5. As soon as the affairs of the company are fully wound up, the liquidator shall call a meeting of the company (by advertisement) and lay before it accounts showing how the winding up has been conducted. This meeting is called the Final Meeting of the Company.

6. Within one week after the final meeting, the liquidator shall send to the Registrar and the Official Liquidator a copy each of the account, and shall make a return to each of them. If the final meeting is not held for want of quorum, the return shall state so.

7. The Registrar, on receiving the accounts and the returns, shall register them.

8. The Official Liquidator, on receiving the accounts and returns, shall as soon as may be, make a scrutiny of the books

and papers of the company and upon such scrutiny, if he finds that the affairs of the company have *not* been conducted in a manner prejudicial to the interests of the members or to public interest, he shall report to the court to that effect. From the date of the submission of the report to the court the company shall be deemed to be dissolved.

9. If the Official Liquidator finds and reports that the affairs of the company have been conducted in a manner prejudicial to the interests of the members or the public interest, the Court shall direct the Official Liquidator to make a further investigation. After the result of the further investigation is reported to the Court, it can direct dissolution of the company or order such further steps as may be necessary under the circumstances.—Sec. 497.

Rules applicable to a Creditors' Voluntary Winding Up

1. The company shall call a meeting of the creditors to be held on the day or the day following the date on which the company will hold a general meeting of the members to pass the resolution for winding up. The notice of the creditors' meeting must be sent by post (simultaneously with the notice of the members' meeting) and must also be advertised in the Official Gazette and at least two local newspapers.

2. The Board of directors shall cause a full statement of the affairs of the Company and a list of creditors to be prepared and laid before the creditor's meeting. A Director is to be nominated to preside over the creditors' meeting. Copies of all resolutions passed in the creditors' meeting are to be sent to the Registrar.

3. The members and the creditors, in their respective meetings, can nominate a liquidator. In case the two groups nominate different persons as liquidator, the creditors' nominee shall be the liquidator. But the Court may, on an application made to it, appoint some other person (including the Official Liquidator) as the liquidator.

4. The creditors may, in a meeting, appoint a Committee of Inspection consisting of not more than five persons. The members of the Company may thereafter appoint not more than five members to the Committee from among themselves. If the creditors object to the persons nominated by the members, some

other persons must be appointed, unless the Court, on an application made to it, decides otherwise. The functions of the Committee are the same as those of a Committee of Inspection appointed in a Compulsory Winding up. (*See ante*)

5. The remuneration of the liquidator is to be fixed by the Committee of Inspection or if there is no such Committee, by the creditors. If they fix no remuneration, the Court is to do it.

6. On the appointment of a liquidator, the powers of the Board of directors come to an end except in so far as the Committee of Inspection or, if there is no such Committee, the creditors in a general meeting may sanction the continuation thereof.

7. In the event of the winding up continuing for more than one year, the liquidator shall call at the end of each year a meeting of members and a meeting of the creditors. The liquidator shall place before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year.

8. When the affairs of the Company are fully wound up the liquidator shall call a final meeting of the members and creditors and place before them final accounts.

9. Within one week after the holding of the above meetings, the liquidator shall send a return of the meeting and a copy of the final accounts to the Registrar and the official liquidator. If no meeting is held, the return shall state so. Thereafter the procedure is the same as in Members' Voluntary Winding up. (See items, 5 to 9 'under provisions applicable to Members' Voluntary Winding Up.)—Sec. 509.

Rules applicable to both types of Voluntary Winding Up

1. A body corporate cannot be appointed as liquidator. The use of corrupt inducements for the appointment of a person as liquidator is a punishable offence. When a liquidator has been appointed he shall within 30 days, inform the Registrar and advertise the same in the Official Gazette. If no liquidator is acting the Court can appoint the Official Liquidator or any other person as liquidator. The Court can remove a liquidator on a cause shown.

2. The liquidator or any contributory or creditor can apply to the Court for direction on any matter arising out of the winding up proceedings.

3. The liquidator may apply to the Court for an order directing the public examination of any promoter, director or officer of the Company where there is reason to believe that fraud has been committed.

4. An arrangement entered into between the company and its creditors is binding if it is sanctioned by a special resolution of the company and agreed to by three-fourths of the number of creditors and by persons entitled to three-fourths of the claims.

5. The costs of winding up, including the remuneration of the liquidator, are payable out of the assets of the company in priority to all other claims.

6. **Powers of the liquidator :** The liquidator in a voluntary winding up has all the powers which a liquidator in a compulsory winding up has. The powers which the latter can exercise with the sanction of the Court, the former can exercise with the sanction of a special resolution of the Company in the case of a members' voluntary winding up and in the case of a creditors' voluntary winding up, with the sanction of the Court, of the Committee of Inspection, or (where there is no such Committee) of the creditors in a general meeting.

In addition to the aforesaid, the liquidator in a voluntary winding up has the following powers :

(*a*) to settle the list of contributories and adjust the rights of contributories among themselves ;
(*b*) to make calls upon contributories ;
(*c*) to call general meetings of the company ; and
(*d*) to enter into schemes of arrangement or compromise with creditors with the sanction of a special resolution of the company (or the Court or the Committee of Inspection) and accept shares and properties of another company as part of such schemes.

WINDING UP SUBJECT TO THE SUPERVISION OF COURT

Definition

At any time after a company has passed a resolution for voluntary winding up, the Court may make an order that the voluntary winding up shall continue but subject to the supervision of the Court.—Sec. 522.

A supervision order is usually made for the protection of the creditors and contributories of the company. In *Re Prince of Wales State Quarry Co.*[1], it was held that such an order may be passed if (*a*) the Liquidator under voluntary liquidation is partial or is negligent in collecting the assets (*b*) the rules relating to winding up are not being observed, or (*c*) the resolution for winding up was obtained by fraud.

Effects

A supervision order has the following effects :

1. It gives jurisdiction to the court over suits and legal proceedings against the company to the same extent as in a winding up directly by the court.—Sec. 523.

2. The court can appoint an additional liquidator or liquidators. The court can remove any liquidator and fill any vacancy caused by removal, death or resignation. The Official Liquidator may be appointed liquidator in such cases.—Sec. 524.

3. **Powers of the Liquidator :** The liquidator in a winding up under the supervision of the Court can exercise all the powers of a liquidator in voluntary winding up. But the Court can modify or limit the powers and can also give him additional power.—Secs. 525, 526(1).

4. After a supervision order is passed the court can exercise all powers which it might have exercised if an order had been made for winding up by the court.—Sec. 526(2). The powers of the court include the power to make calls and to stay suits and proceedings.

COMPULSORY WINDING UP PENDING VOLUNTARY WINDING UP

Where a company is being wound up voluntarily or subject to the supervision of court a petition for its compulsory winding up may be presented by any person entitled to apply for winding up or the Official Liquidator. Upon the making of such a petition, the Court may pass an order for compulsory winding up, if it is of opinion that such a course of action is necessary in the interest of the creditors or contributories.—Sec. 440. However, under Section 433 winding up is not mandatory even if any of

[1] (1868) 18 L.T 77

the aforesaid circumstances exist. The Court has disretion in the matter. The Court must see that the winding up is not opposed to public interest or interest of the company as a whole. Even if BIFR issues order for winding up, winding up is not mandatory. In *V. R. Ramarajn* v. *UOJ* (1997) 89 *Comp. Case* 609(*SC*), the Supreme Court held that even if BIFR issues order for winding up under SICA, High Court should not automatically order winding up. High Court should consider the BIFR order but must decide the issue on merits of the case. High Court cannot abdicate its own function of determining the question of winding up.

CONSEQUENCES OF WINDING UP

The consequences which follow from winding up proceedings can be classified under three heads (*a*) those which follow all types of winding up; (*b*) certain other consequences in a compulsory winding up; and (*c*) other consequences of a voluntary winding up.

I. Consequences which follow all types of Winding Up

1. The Board of Directors of the Company ceases to have any powers (except in certain special cases in a voluntary winding up).

2. The property and effects of the company come under the custody of the liquidator who has to realise the assets and distribute them according to the rules laid down in the Act.—Sec. 456.

3. Every invoice, order for goods or business letters issued on behalf of the company by the liquidator and others and in which the name of the company appears, shall contain a statement that the company is in liquidation.—Sec. 547.

4. **Fraudulent Preference :** All transactions of the company, made within six months previous to the commencement of the winding up, which amount to fraudulent preferences, are invalid.—Sec. 531.

Fraudulent preference means any transfer of money or property to a creditor which has the effect of giving him an undue preference as compared with other creditors. (See p. 463)

5. **Avoidance of Voluntary Transfer :** The term 'voluntary transfer' in this context means any transfer of property or delivery of goods by a company, not in the ordinary course of business

and not in favour of a purchaser or encumbrancer in good faith and for valuable consideration. All such transfers, made *within a period of one year* before the presentation of a petition for winding up (by or under the supervision of the Court) or the passing of a resolution for voluntary winding up, are void as against the liquidator.—Sec. 531A.

6. Any transfer or assignment by a company of all its properties to trustees for the benefit of all its creditors, becomes void upon the winding up order being passed.—Sec. 532.

7. A floating charge created within 12 months previous to the commencement of winding up is invalid except to the extent of the cash actually paid to the company plus interest at 5 per cent or such other rate as may be notified by the Government. This rule will not apply if it can be shown that the company was in a solvent position immediately after the creation of charge.—Sec. 534.

8. Persons guilty of offences antecedent to or in course of winding up are liable to prosecution and punishment. *Some examples*: failure to give information or statement to the liquidator regarding assets of the company; falsification of books; failure to keep proper accounts; frauds committed in course of formation or working of the Company.—Sec. 538.

9. *Delinquent directors etc.* : If in the course of the winding up of a company it appears that any person who has taken part in the promotion or formation of the company or any past or present director, managing agent, secretaries and treasurers, manager, liquidator or officer of the company,—

(*a*) has misapplied, or retained, or become liable or accountable for any money or property of the company; or

(*b*) has been guilty of any misfeasance or breach of trust in relation to the company;

the Court may, on the application of the liquidator, or of any creditor or contributory, examine the conduct of such person and compel him to repay or restore the money or property or make him pay compensation for the misapplication, retainer, misfeasance, or breach of trust.—Sec. 543(1).

An application under the above rule shall be made within five years from the date of the order for winding up or the date of the first appointment of the liquidator or of the misapplication, misfeasance etc., whichever is longer.—Sec. 543.(2).

Action under Section 543 may be taken notwithstanding that the liable matter is one for which the person is criminally liable. —Sec. 543(3).

II. Certain other consequences of Compulsory Winding Up

1. When a winding up order is passed the court has to send intimation thereof forthwith to the Official Liquidator and the Registrar.—Sec. 444.

2. A certified copy of the winding up order must be sent to the Registrar by the petitioner and the company within one month of the date of the order. Failure to do so is a punishable offence.—Sec. 445.

3. The winding up order operates as notice of discharge to the officers and employees of the company, except where the business of the company is continued according to the provisions of the Act.—Sec. 445(3).

4. After the winding up order is passed or the official liquidator is appointed as the provisional liquidator, no suit or proceeding can be commenced against the company, and pending suits and matters cannot be proceeded with, except by the leave of the winding up court and subject to such terms as the court may impose. The court which has passed the winding up order can entertain and dispose of suits and claims by or against the company and questions of priorities in winding up. It can also transfer to itself suits and proceedings pending in other courts except those pending in appeal before the Supreme Court or a High Court.—Sec. 446.

5. In the case of a winding up by the court or under supervision of the court, the following transactions are void : any dispositions of property or actionable claims or transfer of shares or alteration in the status of a member made after the winding up order, unless the court otherwise declares ; and, any attachment, distress or execution and sale of the company's properties without the leave of the court.—Sections 536 (2), 537.

III. Additional consequences in a Voluntary Winding Up

1. The company shall, from the commencement of the winding up, cease to carry on its business except so far as may be required for the beneficial winding up of such business, But

the corporate state and corporate powers of the company shall continue until it is dissolved.—Sec. 487.

2. Any transfer of shares and alteration in the status of any member made without the leave of the liquidator, is void.—Sec. 536(1).

Thus the consequences of winding up may be summed up :

1. Consequences as to shareholders—A shareholder is liable to pay the full amount up to the face value of the shares held by him.

2. Consequences as to creditors—Where a solvent company is wound up, all claims of its creditors, when proved, are fully met. In the case of an insolvent company the same rules prevail as in the case of law of insolvency.

3. Consequences regarding preferential payments—Some unsecured debts are paid in preference to all other debts.—(Sec. 530).

4. Consequence as to servants and officers—An order of winding up is considered to be notice of discharge to the officers and employees of the company, except when the business of the company is carried on.

5. Consequences as to proceedings against the company—When an order of winding up is issued or an official liquidator is appointed, no suit against the company can be made except by the leave of the court.

6. Consequences as to costs—If the assets are inadequate to satisfy liabilities the court may order for payment for the costs, charges and expenses of the winding up out of assets.

MODE OF DISTRIBUTION OF ASSETS

Preferential Payments (Sec. 350)

The costs of the winding up proceedings are to be paid first out of the assets. Next in order of priority comes the following debts :

1. All revenues, taxes, ceases and rates due to the Central or a State Government or a local authority. The debts must be due at the *relevant date*, having become due and payable within the 12 months next before that date. "Relevant Date" means, in a compulsory winding up—date of appointment or first appointment of the provisional liquidator or (where no liquidator

was appointed) the date of the winding up order; and, in other cases—date of resolution for voluntary winding up.

2. Wages and salary of any employee for a period not exceeding 4 moths within the 12 months before the relevant date, and, subject to certain limits, the compensation payable to any workman under the Industrial Disputes Act. For any one claimant priority shall not be given for any sum exceeding Rs. 1000, except where the claimant is an agricultural labourer.

3. All accrued holiday remuneration to an employee becoming payable on account of the termination of service by the winding up order.

4. The company's contribution as an employer under the Employees' State Insurance Act (or any other law for the time being in force) during the 12 months next before the relevant date, unless the winding up is for the purpose of reconstruction or amalgamation.

5. Payments due to a workman under the workmen's Compensation Act, for death or disablement.

6. All sums due to an employee from a provident fund, pension fund, gratuity fund or any other fund maintained for the welfare of the employees.

7. Expenses of enquiries and investigations, payable by companies.

The debts mentioned above rank equally among themselves and must be paid in full if there are sufficient assets. They have priority over the claims of debenture-holders under any floating charge, and over the claims of landlords and others in goods distrained by them within three months next before the winding up order. But if the assets are insufficient, the preferential payments shall abate proportionately.

Payment to Creditors

If any money remains after meeting the costs and the preferential payments, it is used to pay the creditors of the company. All debts payable by the company and claims, whether certain or contingent and whether present or future, can be proved in the winding up proceedings and payment claimed from the liquidator (Sec. 528). As regards proof of claims and the respective rights of secured and unsecured creditors the rules applied are those applicable to insolvency proceedings under the

nsolvency Acts. (Sec. 529). From this it follows that in case f insufficiency of assets the claims of the creditors are reduced *ro rata*. The creditors are paid at a time or by instalments as ssets are realised. (See p. 474)

The effect of a winding up order is that except for certain referential payments provided in the Act the property of the ompany is to be applied in satisfaction of its liabilities *pari assu*. The undertaking and the assets of the company pass under ne control of the liquidator whose statutory duty is to realise nem and to pay out of the sale proceeds to its creditors. *J. K. Private Ltd.* v. *New Kaiser-I-Hind Sp. & Wvg. Co.*[1]

Payment to Contributories

If any money remains after paying the costs, the preferential payments and the creditors in full, it is paid to the contributories ccording to their rights. They may be paid at different times y instalments as assets are available for distribution. Such payments are also called dividends.

MISCELLANEOUS PROVISIONS

Dissolution of the Company

When the affairs of the company have been completely wound up (assets collected and distributed etc.) the court shall nake an order that the company be dissolved. From the date of he order the company is dissolved. (The same order may be passed if the court is of opinion that the liquidation cannot proceed for want of funds or other reasons.)

Books and Papers of the Company (Sec. 550)

When the affairs of the company have been completely wound up, its books and papers shall be disposed of in the following way :

(*a*) in a members' voluntary winding up—as the company by special resolution directs ;

(*b*) in a creditor's voluntary winding up—as the Committee of Inspection or, in its absence, as the creditors direct ; and

(*c*) in all other cases—as the court directs.

[1] AIR (1970) Supreme Court 1041

After the expiry of 5 years from the date of dissolution, no responsibility shall rest on the liquidator or any other person to produce the books, unless the Central Government otherwise directs.

Unclaimed Dividends and Undistributed Assets (Sec. 555)

If any money payable to a creditor or contributory remains unclaimed or undistributed for six months after the date on which it became payable, the Liquidator shall deposit it into the public account of the Government of India in the Reserve Bank of India. The same thing is to be done with other moneys lying in the hands of the Liquidator at the date of the dissolution of the company.

In the case of a voluntary winding up, with or without a supervision order, the Liquidator shall pay undistributed assets into the Company's Liquidator Account of the Reserve Bank of India.

Any person claiming any money lying in the above account may apply to the court or the Central Government for an order directing payment to him.

Moneys which remain unpaid in the Company's Liquidation Account for a period of 15 years shall be transferred to the General Revenue Accounts of the Central Government. But orders may be passed for payment to any person who can prove his claim for any sum originally lying in the Company's Liquidation Account.

Declaring dissolution to be void

The Court may, at any time within two years of the date of dissolution of a company, declare the dissolution to be void. Such orders may be passed on the application of the liquidator or any other person interested. After the order such proceedings may be taken as might have been taken if the company had not been dissolved.—Sec. 559.

Defunct Companies

A defunct company means a company which is not carrying on business or is not in operation. Section 560 provides as follows :

When the Registrar has reasonable cause to believe that a company is a defunct company, he shall send a letter to the

company asking whether it is so. If no reply is received within one month, the Registrar shall within another fourteen days, send a registered letter referring to the first letter. If no answer is received to the second letter within one month a notice is to be published in the Official Gazette and a letter is tc be sent to the company informing it that its name shall be struck off the Register within three months, unless cause is shown to the contrary. If no such cause is shown within three months, the Registrar shall strike off the name of the company from the Register.

A similar procedure is to be followed when in the case of a company in liquidation, the Registrar believes that there is no liquidator or that the liquidator is not acting.

The court may restore the name of the company to the Register if sufficient cause is shown.

Winding Up of Unregistered Company

For the purposes of winding up, the expression, "unregistered Company"—(*a*) shall not include—(*i*) a railway company incorporated by any Act or Parliament of the United Kingdom ; (*ii*) a company registered under this Act ; or (*iii*) a company registered under any previous companies law and not being a company the registered office whereof was in Burma, Aden or Pakistan immediately before the separation of that country from India and

(*b*) save as aforesaid, shall include any partnership, association or company consisting of more than seven members at the time when the petition for winding up the partnership, association or company, as the case may be, is presented before the Court.—Sec. 582.

An unregistered company can be wound up under the Companies Act. The procedure applicable is, with certain minor exceptions, the same as in the case of a compulsory winding up. Such companies cannot be wound up voluntarily or under the supervision of the court. If a foreign company carrying on business in India, ceases to do so, it can be wound up according to the procedure applicable to unregistered companies.

EXERCISES

1. What are the modes of winding up ? Discuss the circumstances in which a company may be wound up by court. (Pages 761-763)
2. Under what circumstances will a Court order winding up of a company ? What are the consequences of such an order ? (Pages 761-763, 765-766)
3. When is a company deemed unable to pay its debts ? (Page 764)
4. On what grounds could a creditor present a petition for the winding up of a company by the Court ? (Pages 765-766)
5. What is the distinction between voluntary liquidation and compulsory liquidation ? What are the powers of the liquidator regarding payment of dividends to (*a*) creditors, and (*b*) contributories ? (Pages 761, 787-788)
6. What are the powers of the Court in the winding up proceedings of a company ? (Pages 765-767)
7. When is it necessary to state a 'declaration of solvency' ? What conditions must be fulfilled for its validity ? (Pages 775-776)
8. Discuss fully the powers of an Official Liquidator in a case of : (*a*) Compulsory liquidation : or (*b*) Voluntary liquidation. (Pages 769-770)
9. Who is an Official Liquidator ? How is he appointed ? What are the duties and powers of the Liquidator ? (Pages 767, 767, 768-770)
10. Define the term "Contributory" in the context of the Companies Act ? What are the rights and liabilities of the contributories ? (Pages 772-774)
11. State the procedure of Members' Voluntary winding up of a company. (Pages 776-777)
12. What are the consequences of winding up ? (Pages 781-783)
13. What is the method of distribution of assets of a company under winding up ? What payments are preferred under winding up ? (Pages 785-787)
14. Write explanatory notes : The just and equitable clause ; The Substratum of the company ; Public examination ; Disclaimer of onerous property by liquidator : Committee of inspection. Fraudulent preference ; Delinquent director ; Dissolution of the company ; Unclaimed dividends and undistributed assets ; Defunct companies. (Pages 762 ; 763 ; 767 ; 771 ; 772 ; 782 ; 783 ; 787 ; 788 ; 788)

BOOK XII

MONOPOLISTIC AND RESTRICTIVE TRADE PRACTICES ACT

1 MRTP ACT
(Monopolistic and Restrictive Trade Practices Act)

1. BACKGROUND OF THE MRTP ACT

The planning process and the weak licensing system gently helped the growth of economic giants in India. In due course they have come to command over the scarce resources and to control over the means of production. Consequently, they have adapted discriminately and restricted trade practices. Any welfare state cannot be rest contended with this trend of economic affairs. It, therefore, called for such legislation which would check concentration of economic power in the common interest. The idea of such legislation has been implicit in Article 39 of the Indian Constitution, under the Directive Principles of the State Policy. It enunciates that the ownership of and control of the material resources of the community are so distributed as best to subserve the common good. Moreover, the state must ensure that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment. This spirit has been reiterated by the Industrial Policy Resolution, 1956 which seeks to reduce disparities in income and wealth, to prevent private monopolies and the concentration of economic power in the hands of a small number of individuals. It was also observed that since 1960 the operation of the economic policy over the years led to concentration of economic power in a group of large industrial houses. The Mahalanobis Committee on distribution of Income and Levels of Living appointed by the Planning Commission in 1960 warned against this trend of economic development. In its report the Committee observed that concentration of economic power in the private sector is more than what could be justified as necessary on functional grounds and it exists both in generalized and specific firms. The Hazari Committee appointed earlier on industrial licensing procedure observed that the existing licensing system has led to the disproportionate growth of industries in India.

In pursuance of all these a five-member Monopolies inquiry Committee under Justice Sengupta of the Supreme Court of India

was appointed in April, 1964 to study the extent and effect of concentration of economic power in private hands and the prevalence of monopolies and restrictive practices adapted by them and the factors responsible for such concentration and the factors leading to monopolistic and restrictive practices and their social and economic consequences and thereby suggest measures to protect the public interest.

Among the various measures, the commission recommended a new legislation—the Monopolistic and Restrictive Trade Practices Act. It also recommended a case for setting up of a permanent independent commission to look into monopolistic and restrictive trade practices, and mergers and expansion of dominant undertakings. The report of the commission was accepted by the government. The Government of India through a resolution adapted on 5th September, 1966 proposed for the establishment of a permanent statutory MRTP Commission with mandatory judicial powers in respect of restrictive trade practices and with advisory powers in respect of matters relating to concentration of economic power. Consequently, the Monopolistic and Restrictive Trade Practices Act, 1969 was passed and the Act came into force on June 1, 1970.

During the process of the implementation of the Act several difficulties cropped up. To remove these defects a high power committee headed by Justice K. S. Hedge of the Supreme Court of India and subsequently by Justice Rajinder Sacher of Delhi High Court was set up to study :

1. What improvements were required to be made in the prevailing administrative structure and procedures regarding the enforcement of the provisions of the MRTP Act ?

2. What charges were required to be made in the MRTP Act in the light of the experience gained in the administration and operation of the Act ?

3. Any other matters incidental or ancillary to the administration of the Act, having regard to the growth and development of trade, commerce and industry.

These recommendations have resulted in a series of amendments to the MRTP Act in 1982, 1984, 1988 and finally, under the New Economic Policy in 1991.

Objects

The objects behind the MRTP Act are—

(1) To control concentration of economic power which in detrimental to common interest.
(2) To control monopolistic trade practices.
(3) To control certain restrictive trade practices.

Scope of the Act

The Act extends to the whole of India except the state of Jammu and Kashmir. The provisions of the Act are applicable in addition to any other law for the time being in force. The Act is not, however, applicable to companies which are incorporated under the laws of England and do not carry on any kind of activity or business in India or even elsewhere. As a matter of government policy, the government-owned or government-controlled undertakings are exempted from the purview of the MRTP Act as in Section 3.

It has been the declared policy that the activities of the public sector shall grow in size and assume significant control in their spheres.

Administration of the Act

The MRTP Act provides for a dual machinery for the implementation of its provisions—the Central Government on the one hand and the MRTP Commission on the other. It is for the Central Government to ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment and to control the monopolistic undertakings and monopolistic practices. The rule of the Commission in these areas is only of advisory nature. But the Commission has independent power to enquire into restrictive trade practices.

2. MONOPOLIES AND RESTRICTIVE TRADE PRACTICES COMMISSION

The follow up action on the Report of the Monopolies Enquiry Commission culminated in the passage of the Monopolies and Restrictive Trade Practices Act in 1969. Under this Act, a permanent statutory Commission, known as Monopolies and Restrictive Trade Practices Commission, has been set up to investigate, case by case, the effects of such practices on the public interest and recommend suitable corrective measures.

The MRTP Commission consists of a Chairman and not less than two and more than eight members to be appointed by the Central Government. The Chairman must be a person who is or has been or is qualified to be a judge of the Supreme Court or of the High Court. The other members of the Commission must be persons of ability, integrity and standing in dealing with problems related to economics, law, commerce, accountancy, industry, public affairs or administration. Members are appointed for a period of 5 years subject to extension up to 10 years or the attainment of 65 years, whichever is earlier.

The Central Government may remove from office any member, (i) who has been adjudged an insolvent or (ii) has been convicted of an offence involving moral turpitude or (iii) has been physically or mentally incapable of acting as member or (iv) has acquired such financial or other interests affecting prejudiciously his functions or (v) has so abused his position as to render his continuance in office prejudicial to the public interest. No member, however, can be removed on the last two grounds mentioned above unless the Supreme Court so opined.

Powers of the Commission

The Commission can make, by notification regulations for the effective performance of its various functions. The powers of the Commission may be exercised by Benches formed by the Chairman from among the members of the Commission. The Commission is empowered to regulate (*a*) the procedure and conduct of its buisness, (*b*) procedure of the Benches of the Commission, and (*c*) the delegation to one or more members of such powers and functions as the Commission may specify.

The Commission has powers to regulate the procedure and conduct of its business regarding inquiry. The Commission is vested, with certain powers of a Civil Court for enforcing production of documents, attendance of witnesses for examination.

The Commission is vested with certain original powers in respect of restrictive and unfair trade practices. The MRTP Act also provides for a reference by the Central Government to the Commission and report in regard to cases of substantial expansion of undertakings, setting up of new undertakings, mergers, amalgamation or takeover and division of undertakings. Similar

power of enquiry and report is also vested with Commission in relation to a reference regarding monopolistic trade practices. However, the Commission is vested with full regulatory power in regard to restrictive trade practices and unfair trade practices. It has also the power to cause investigation to find out whether or not orders made by it have been complied with.

The Committee has also the power to impose temporary injunctions. Besides, where as a result of the monopolistic or restrictive trade practices, carried on by any undertaking or any person, any loss or damage is caused to the Central Government or any State Government or any trader or class of traders or any consumer, such government or, as the case may be trade or class of traders or consumer may, without prejudice to the right of such government, traders or class of traders or consumer, to institute a suit for the recovery of any compensation for the loss or damage so caused, make an application to the Commission for an order for the recovery from that undertaking or owner thereof or as the case may be, from such person, of such amount as the Commission may determine as compensation for the loss or damage so caused.

The Commission, however, suffers from some inherent defects. First, there has been a general reluctance and delay in referring matters to the MRTP Commission. It cannot be denied that the Commission is an autonomous body. But it cannot by itself came to know the nature of certain monopolistic and restrictive trade practices and start the process of enquiries into various monopolistic or restrictive practices. Secondly, the Commission has not been empowered with mandatory power in dealing with specific cases and take necessary action thereby. Thirdly, although there is provision for appointing up to 9 members, the government had appointed, over the years, a limited number of members only. Naturally, in such a big country like India, without increasing the number of members and creating several benches of the Commission it is difficult to enquire into the prevalence of various restrictive and unfair practices in different industries in different parts of the country.

3. CONCENTRATION OF ECONOMIC POWER

The monopolistic and restrictive practices are the two likely instruments with the help of which economic power gets

concentrated. The MRTP Commission has highlighted the existence of two kinds of concentration of economic powers in the industrial field. The first is known as productive concentration. The second type of concentration is known as country-wise concentration. The first one occurs when in respect of production and distribution of any particular commodity or service, the controlling power whether by reason of ownership of capital or otherwise, is in a single concern or comparatively a limited number of concerns themselves are controlled by one family or a few families or buisness houses. Where the concern is engaged in the manufacture of one product, it may be called industry-wise concentration. The country-wise concentration occurs where a large number of concerns engaged in the production or distribution of different commodities are in the controlling hands of one individual or family or group of persons connected closely by financial or other business interests.

It cannot be denied that the concentration of economic power leads to higher industrial development and development of skill, quality and managerial technique. But at the same time it has the risk of emergence of monopoly with attendant evils like high prices, deterioration of quality and extinction of small industrialists. The intention of the MRTP Act is not to prevent concentration of economic power. The aim is just to control and prevent concentration of economic power wherever it becomes prejudicial to common good and public interest. The exact connotation of 'concentration of economic power' has not been defined in the Act. The Act has only adopted the criterion of *size* in terms of assets and any increase in size beyond the prescribed level will result in concentration of economic power. Buisness may be carried on either individually or together with *inter-connected undertakings*. Any increase in the *size of the undertaking* or control by *the undertaking* of assets beyond the prescribed limit is subject to scrutiny and is permitted only when it satisfies the test of public interest.

Undertakings

Under the Act, undertaking means an enterprise which is, or has been or is proposed to be engaged in the production, storage, supply, distribution, acquisition or control of articles or goods or the provision of services of any kind, either directly

or through one or more of its units or divisions, whether such unit or division is located at the same place where the undertaking is located or at different places. The definition calls for three essentials—

(1) there must be an undertaking,
(2) the undertaking must be engaged in buisness activity, and
(3) the activity may relate to production, supply, distribution or control of goods or provision of service of any kind.

Dominant Undertaking

An undertaking becomes a dominant undertaking when it fulfils any one of the following four situations.

(*i*) An undertaking which has all the following three features : (*a*) it is an undertaking within the purview of the Industries Act, (*b*) it has a licensed capacity for the production of goods of any description, and (*c*) its licensed capacity for the production of such goods or the aggregate of its licensed capacity and of the licensed capacity of inter-connected undertakings for the production of such goods is not less than one-fourth of the total installed capacity in India for the production of such goods, as–

(*ii*) An undertaking which has all the three functions : (*a*) it is an undertaking within the purview of the industries Act, (*b*) it by itself or along with inter connected undertakings produces, supplies, distributes or otherwise controls not less than one-fourth of the total goods of any description that are produced, supplied or distributed in India or any substantial part thereof, and (*c*) it has no licensed capacity for the production of such goods, or

(*iii*) An undertaking which has both the following features : (*a*) it is not an undertaking within the purview of the Industries Act, and (*b*) it, by itself or along with inter-connected undertakings produces supplies, distributes or otherwise Controls not less than one-fourth of the total goods of any description that are produced, supplied or distributed in India or any substantial part thereof, or

(*iv*) An undertaking which produces or otherwise controls not less than one-fourth of any services that are rendered in India or any substantial part thereof.

For the clauses (ii) and (iii) the goods produced by an undertaking, which employs (a) less than fifty workers on any

day of the relevant period and in any part of which a manufacturing process is being carried on with the aid of power, or (*b*) less than one hundred workers on any day of the relevant period and in any part of which a manufacturing process is being carried on without the aid of power, shall not be taken into account.

In determining the question as to whether an undertaking is or is not a dominant undertaking in relation to any goods supplied, distributed or controlled in India, regard shall be had to the average annual quantity of such goods supplied, distributed or controlled in India by the undertaking during the relevant period. Moreover, domination of an undertaking is determined with reference to the licensed capacity or market share of the undertaking.

Inter-connected Undertakings

'Inter-connected Undertakings' means two or more undertakings which are inter-connected with each other. Inter-connection between undertakings is determined by the MRTP Act on the basis of ownership, control or management. Unless any of these tests is satisfied by legal evidence, inter-connection cannot be established. Undertaking may be owned by a single individual group of persons or firms or bodies corporate. Although ownership is, synonymous with control, control may be exercised independently of ownership. The promoter of a company used not necessarily control or manage its affairs or own the majority or even a substantial quantity of shares.

Control

Control as contemplated by the MRTP Act is not defined in the Act itself. Leaving aside the case of complete or majority ownership of the share capital, control can be exercised in two broad ways, (1) by possessing an effective block of equity holding with which it is possible, having regard to the dispersion of the remaining shares, among a larger number, to get resolution passed at the shareholders' meetings by a combination of the available voting strength and control of the proxy gathering machinery (2) by management control.

Management

Two undertakings are inter-connected if one manager controls the other or if one or more individuals together with their relatives or partners own or manage both the undertakings. Two undertakings are inter-connected if they are owned by bodies corporate and are under the same management or where one undertaking is owned by a body corporate and another by a firm in which partners are bodies corporate and they are under the same management.

Chapter III of the MRTP Act seeks to regulate primarily substantial expansion, establishment of new undertakings and amalgamation, merger or take over of undertakings. The provisions of the chapter are applicable only to those undertaking, which either by themselves or together with inter-connected undertakings hold assets of the value of not less than Rupees 100 crores and to the dominant undertakings which either by themselves or together with their inter-connected undertakings hold assets of the value of not less than one crore of rupees. The scheme of this chapter envisages prior approval to be obtained by the registerable undertakings from the Central Government before embarking on substantial expansion, establishment of new undertakings. Where the Central Government feels it expedient, the proposal may be referred to the MRTP Commission, for an enquiry and after the receipt of the report from the Commission, the Central Government may pass such orders as it may think fit.

During any approval of the proposal under Section 21 (expansion of an undertaking), Section 22 (establishment of new undertaking) and Section 23 (merger, amalgamation or take over) the guidelines to be followed by the Central Government are found in Section 28. Matters to be considered by the Central Government before providing approval are as follows :

(*a*) to achieve the production, supply and distribution, by most efficient and economic means, of goods of such types and qualities, in such volume and at such prices as will best meet the requirements of the defense of India and home and overseas markets ;

(*b*) to have the trade organized in such a way that its efficiency is progressively increased ;

(*c*) to ensure the best use and distribution of men, materials and industrial capacity in India ;

(*d*) to effect technical and technological improvements in trade and expansion of existing markets and the opening up of new markets ;

(*e*) to encourage new enterprises as a countervailing force to the concentration of economic power to the common detriment ;

(*f*) to regulate the control of the material resources of the community to subserve the common good ; and

(*g*) to reduce disparities in development between different regions and more especially in relation to areas which have remained markedly backward.

4. MONOPOLIES AND RESTRICTIVE TRADE PRACTICES

The monopoly concerns require the surveillance and control of their activities in accordance with socially desirable priorities and towards this and the MRTP Act aims at restraining monopolistic trade practices which are detrimental to public interest. Under the Act, where it appears to the Central Government that the owners of one undertaking are including in any practice which is, or may be, a monopolistic trade practice and as a result the trade practice operates or is likely to operate against the public interest, the Central Government may, pass such orders as it may think fit to remedy or prevent any mischiefs which result or may result from such trade practice.

The Monopolies and Restrictive Trade practices Act has drawn a destination between monopolistic and restrictive trade practices. Accordingly, monopolistic trade practices can better be described as dominant firm practices. They refer to the behaviour of an individual firm or an oligopolistic group of not more than three firms which have attained such a dominant position in the industry that" they are able to control the market by regulating prices or output or eliminating competition".

Restrictive trade practices refer to concerned action undertaken by a group of two or more firms to avoid competition regardless of whether the market share of the member firm is or is not dominant.

Produces and distributors may report to restrictive trade practices which have the effect of preventing, distorting or

restricting competition in some manner. These practices are "deemed to be prejudicial to public interest".

If they raise costs to other unreasonably, or the prices and/ or profits unreasonably, or if they restrict competition or if they had to lowering of quality, that may to against public interest. Wherever such trade practices are adopted, the same may be referred to the MRTP Commission whose decision on the matter is binding on all parties concerned.

More precisely, when the Commission has received a complaint of facts, which constitutes an unfair trade practices, from any trader or consumers' association having a membership of not less than twenty-five persons or more consumers, the commission must order an investigation to be made by the Director General to satisfy itself as to whether the complaint requires to be enquired into. Then the Commission may enquire into any unfair trade practice on the basis of the report of the Director General. If after such inquiry, the Commission is of the opinion that the practice is prejudicial to public interest or to the interest of any consumer it may direct by order that—

(*a*) the practice must be discontinued or shall not be repeated, and

(*b*) any agreement relating to such unfair trade practices shall be void or shall stand modified in respect thereof in such manner as may be specified in the order.

Thus the Commission can make a 'Cease and desist' order in relation to the unfair trade practices as void or order a modification to the agreement mollifying the terms or clauses constituting, in the agreement, the unfair trade practices.

AMENDMENT TO THE COMPANIES ACT, 1956

In the Companies Act, 1956 some new Sections—108-A to 108-I have been inserted—

108A (i) It imposes restriction on acquisition of certain shares. It provides that without prior approval of the Central Government, no firm, group, body corporate or bodies corporate under the same management shall jointly or severally acquire any equity shares in a public company or a private company which is a subsidiary of a public company, if the total nominal value of the equity shares to be so acquired exceed twenty-five per cent of the paid-up equity share capital of such company.

Article 108B imposes certain restriction on transfer of shares.

Article 108C imposes restriction on the transfer of shares of foreign companies.

Article 108D specifies that if the Central Government is satisfied that any transfer of shares of a company leads to a change in the controlling interest of the company and such changes would be prejudicial to the interest of the company or to the public interest, the Central Government may direct the companies not to give effect to the transfer.

Article 108E declares that the Central Government must within a period of sixty days from the date of receipt of such request, communicate to the person by whom the request was made that the approval prayed for cannot be granted.

Article 108F provides that nothing in Sections 108A to 108D shall apply to government companies.

Article 108-I specifies penalty for acquisition or transfer of share in contravention of Sections 108A to 108D. Any person who acquires anywhere in contravention of such sections shall be punishable with imprisonment for a term which may extend to 3 years or with fine which may extend to 5000 rupees or with both.

Every body-corporate which acquires any share in contravention of such section shall be punishable with fine which may extend to 5000 rupees.

The Amendment Act inserts a new Schedule XV.

EXERCISES

1. Discuss the Monopolistic and Restrictive Trade Practices. (Page 801)
2. What are the objects behind the MRTP Act ? (Page 793)
3. Discuss about the formation of MRTP Commission. (Page 794)
4. State the powers of the MRTP Commission. (Page 795)
5. Discuss about the Concentration of Economic Power. (Page 796)
6. Write short notes :

   (*a*) Administration MRTP Act ; (*b*) Dominant Undertaking ; (*c*) Management ; (*d*) Inter-Connected Undertaking ; (*e*) Undertakings. [(*a*) 794 ; (*b*) 798 ; (*c*) 799 ; (*d*) 799 ; (*e*) 797]

BOOK XIII

INDUSTRIAL LAW

INTRODUCTION

OBJECTIVE AND SCOPE

Definition

The term Industrial Law is used to denote laws passed for the purpose of regulating the conditions under which work is carried on in factories and other establishments and the relationship between employers and employees.

Objective

Industrial legislation has a two-fold objective : (*i*) the preservation of the health, safety and welfare of workers, and (*ii*) the maintenance of good relations between employers and employees. All laws dealing with these matters come within the scope of Industrial Law.

Labour Laws, Violation of : Labour laws are enacted for improving the conditions of workers and the employers cannot be allowed to buy off immunity against violation of labour laws by paying a paltry fine which they would not mind paying, because by violating the labour laws they would be making profit which would far exceed the amount of fine.

They would remain merely paper tigers without any teeth or claws. Violations of labour laws must be viewed with strictness and whenever any violations of labour laws are established the errant employers should be punished by imposing adequate punishment. *People's Union for Democratic Rights and others* v. *Union of India and others.*[1]

THE NEED FOR INDUSTRIAL LEGISLATION

Industrial legislation is necessary for following reasons.

1. Workers in factories, mines etc. are exposed to certain risks. For example, a worker may be injured by moving parts of machines if protective measures are not adopted. Therefore, laws are necessary for the health, safety and welfare of workers. It has been found that employers do not make adequate provisions for these things unless compelled to do so by law.

[1] AIR (1982) Supreme Court 1473

2. Legislation for the protection of labour is needed because the individual worker is economically weak. If the relationship between employers and employees is left to contract, the employers are able to impose harsh and oppressive terms (e.g., long hours and low wages).

3. Legislation is necessary to encourage and facilitate the formation of workers' associations or Trade Unions. Such associations increase the bargaining power of workers and provide the channel through which the grievances of labour can be made known.

4. Legislation is necessary for dealing with industrial disputes which arise between employers and employees. Industrial disputes lead to strikes and lock-outs which are damaging not only to the parties involved but also to the economy of the country. Laws are needed for securing the quick settlement of the industrial disputes.

5. An important branch of industrial legislation is Social Insurance. Owing to their low level of earnings, workers find themselves in great difficulty when faced with sickness, accident, unemployment and old age. Government action is needed for providing some measure of security against these risks.

A CLASSIFICATION OF INDIAN INDUSTRIAL LAW

Indian Industrial Law can be classified under the following headings :

1. Laws regulating conditions of work in factories and establishments. There are two types of such laws :

(*a*) General laws applicable to all establishments not otherwise provided for.

Examples :

The Factories Act of 1948 and the Industrial Standing Orders Act of 1946.

(*b*) Specific laws applicable to particular industries.

Examples :

The Indian Mines Act of 1952, the Plantations Labour Act of 1951, the Dock Workers [Regulation of Employment] Act of 1948 etc.

2. Laws relating to industrial disputes, *e.g.*, the Trade Union Act of 1926.

3. Laws relating to associations of workers, *e.g.*, the Industrial Disputes Act of 1947.

4. Law relating to wages and emoluments, *e.g.*, the Payment of Wages Act of 1936, the Minimum Wages Act of 1948, the Provident Funds Act of 1952, Payment of Bonus Act, 1965, etc.

5. Laws relating to Social Insurance, *i.e.*, laws which provide security against risks like accident, maternity etc.

Examples :

The Workmen's Compensation Act of 1923, the Maternity Benefit Acts of the different States, the Employees' State Insurance Act of 1948.

STATE LEGISLATION ON LABOUR

The States of India possess power to pass laws relating to labour. A large number of such Acts have been passed, *e.g.*, Maternity Benefit Acts. They have been passed in all States. Laws have been passed in Maharashtra and Gujarat regarding industrial disputes. There may be local amendments to Central Acts. For example, the Payment of Wages Act has been modified in certain respects by several States. Many States have passed laws for the regulation of work in shops and commercial establishments.