

Liquidation Provisions under Companies Act, 1956

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Week 01

Lecture 05

Welcome to all.

In today's session, as a part of the course on Insolvency and Bankruptcy Law in India, today we are going to discuss about the liquidation provisions under the Companies Act 1956. In the previous class, we have discussed the provisions under the Presidency Towns Insolvency Act and Provincial Insolvency Act.

So, let us recap what we have discussed in the previous class. So, in the previous class, we have discussed about Presidency Towns Insolvency Act 1909, then Provincial Insolvency Act 1920. It is a brief overview, it is not a detailed discussion, it is a brief overview of Presidency Towns and Provincial Insolvency Act.

Then under that under those legislations what amounts to insolvency okay which acts are considered to be insolvency. Then we have discussed the provisions relating to when a creditor may file a petition and when a debtor can. Then we have discussed about composition and scheme of arrangement ok. So, whether is there any possibility the debtor can compromise with the creditor, is there any possibility the debtor can frame a scheme and submit to the creditor.

So, we have discussed that ok. Then we have discussed about when a debtor can be discharged from the insolvency we have discussed. Then avoidance of voluntary transfer in certain circumstances, i.e., certain transfers has to be avoided before two years whatever may be the transaction that took place. So, all it is not all the transactions, but few transactions, if it is with the malafide intention. So, if the transfer is with the malafide intention, then in such cases such transfers can be avoided.

Then protection of the bona fide transactions we have discussed. Any transaction or any transfer of property that is in the regular course of business and in good faith if it is transferred, then such transactions are protected. Then subsequent to that, we have discussed the duties and powers of the receiver okay.

So today we will discuss the liquidation under the Companies Act. please remember these provisions will act as a basis for you to understand how liquidation was there actually

under the Companies Act. Then, moreover similar provisions are there under the Companies Act 2013 also, but some provisions were repealed under the Companies Act 2013 and they were incorporated or those provisions were there under the IBC Insolvency Bankruptcy Code. So, before understanding the IBC, it is essential for us to understand 1956 Companies Act, then subsequent to that we having Companies Act 2013, then subsequent to that we having IBC insolvency bankruptcy.

So, that is why it is essential for us to understand the liquidation under the Companies Act 1956. So, if you observe Companies Act 1956, so which is governed the Company law in India prior to Companies Act 2013. So, please remember Companies Act 1956, it is a legislation, where it is a comprehensive legislation which deals with from the incorporation of the company till the winding up of the company. Key area under the Companies Act 1956 is liquidation which was addressed under the part 7 of the Companies Act 1956 that is section 425 to 560.

So, very detailed provisions were there. Let us discuss the overview of the some of the provisions under the Companies Act 1956. So, section 425 provides for modes of winding up. So, under the Companies Act 1956, the winding up may be there are two categories or else there are two modes of winding ups are there, one by the tribunal and one by the voluntary winding up.

So, when winding up is done by the tribunal, it is also called as compulsory winding up and voluntarily the company may decide to go for winding up of the company. So, there are two modes are there in which you can go for winding up of the company. Section 433 speaks about the grounds for winding up. So, if the company has by special resolution resolved that the company be wound up by the tribunal. So, if the company by passing the special resolution at the general meeting that is by 75% of the majority, and the shareholders agree that the company should be wound up, then they may pass resolution and they may allow or they may authorize the board of directors to file a petition before the tribunal. then, there is at that point of time it was a court of law so CLB company law board so then in such cases the company may be wound up okay.

Then if default is made in delivering the statutory reports to the registrar or in holding the statutory meeting. So please remember every year you are supposed to submit the statutory reports compulsorily. So, if there is a default is there in delivering the statutory reports or else to the registrar of companies and in holding the statutory meeting. So under the old act, I mean even under the new act also you are compulsorily supposed to conduct the general meetings compulsorily. so even you are required to conduct the statutory meetings also under the old act so whenever there is a failure to conduct the statutory meeting then you are supposed to go for winding up okay.

then if the company does not commence its business within a year from its incorporation or suspend its business for a whole year. suppose take the example under the old act there was a concept called as certificate of commencement of business certificate of incorporation so once the company got incorporated okay so ROC is going to give the certificate of incorporation ok. and in case of public company they are supposed to get the certificate of commencement of business so that means you cannot start the business until and unless you get the certificate of commencement of business. that was the concept I am using that was the concept under the old time ok right now we don't have under the new act you don't have the concept of commencement of business okay but only declaration was there okay.

So, if you observe the companies act 2013 okay so within 180 days after the date after the incorporation of the company, they are supposed to give a declaration within 180 days they are supposed to find the declaration. So other than declaration there is no concept of certificate of commencement of business or commencement of business under the new companies act but under the under the old companies act, every public company they are supposed to get the certificate of commencement of business unless and until they get the certificate of commencement of business they cannot start the business okay. That is one ground so if they fail to get the certificate of commencement of business.

Another ground was suspending its business for a whole year. So, during the whole year if they do not do any business, then in such cases that can be ground for winding up ok under the old act. Then if the number of members is reduced, so under the old act in case of public company the number of minimum number of members in case of public company was seven even under the new act also it is seven only in case of private company two members. So, there was no concept of one person company under the old act, other than the OPC the minimum number of members required the same okay so it remains the same actually. So, in case if the minimum number of members falls below the seven members that is in case of public company if the minimum number of members falls below the two members in case of private company, then if it continues for a period of more than six months, then in such cases that can be a ground for winding up of the company.

ok then if the company is unable to pay its debts ok so if they are unable to pay the debts then also there is a ground for winding up of the company. Then if the tribunal is of the opinion that just and equitable, that it is just and equitable that the company should be wound up. So this is a very, this is subjective in nature. So here the judiciary is having, the tribunal is having more powers actually.

Okay. So, if the tribunal is of the opinion that just and equitable. So, what is the meaning of just and equitable? Here you have to determine, you have to decide depending on the circumstances. okay. So, the court will say what is just and equitable. So, if the court is of

the opinion that it is just and equitable to continue the business, then in such cases they may give the order for winding up of the company.

Then if the company has made default in filing with the registrar its balance sheet and profit and loss account are annual returns for five consecutive years. So, this is also one of the defaults. So, suppose every company under the old act even under the new act also every company they are once the AGM is conducted, they are supposed to file the annual returns and they are supposed to file the financial statements. okay. So, under the new act they are supposed to file the financial statements in the form AOC-4, and annual return they are supposed to file in MGT -7 or 7A as a case may be, in case of small company 7A will be applicable. okay. So, anyway so under the old act and under the new act maybe forms are different but under the old act and new act every company compulsorily they are supposed to file their financial statements. And they are supposed to file the annual return also so if they fail to file the financial statements and annual return for a continuous period of five years then such delay or such non-compliance will be a ground for winding up of the company under the old act.

Then if the company has acted against the interest of the sovereignty and integrity of India. okay so, if any company is doing some activity or the business of the company is in such nature that if it allowed which is likely to impact the sovereignty of the country okay or else it is likely to impact the security or as friendly relations with the foreign nations then in such cases okay public order decency morality in such cases okay maybe the tribunal can give the order for winding up of the company. okay. then if the tribunal is of the opinion that company should be wound up under the circumstances specified in section. okay so, other circumstance are there under 424 G so if the tribunal is of the opinion that circumstances are satisfied then they can give the order for winding up of the company. okay.

these are all the various important provisions and various grounds on which what winding up order can be given. another important provision section 434, circumstances when a company is deemed okay so unable to pay the debts. So, when a company is deemed to be unable to pay the debts? So, if any company is unable to pay the debt for more than 1 lakh rupees, the triggering point at that point of time was 1 lakh rupees. So, if any company fails to pay the amount which is beyond 1 lakh rupees or 1 lakh rupees, then in such cases can be or such circumstance can be a ground for winding up of the company.

Then let us look at section 439. Who can file a petition for winding up? Everyone cannot file a petition, So, you should have the locus standi. So, the petition for winding up can be filed by the company.

First category is company. Second category is creditor. So, any creditor or creditors. Then any contributories or contributory or contributors. So, any person who is contributing to the company, So he can be. Then by all or any of the parties. So maybe, possibly company, creditor, contributors together. Or maybe, they can file it separately even that is also possible. sometimes the petition can be filed by even registrar also if the registrar of the company is of the opinion that okay so compliances are not there. okay. in such circumstances even registrar also can go for filing a petition before the court of law okay.

then in case of filing under section 243 by any person authorized by central government or in case of filing a class H of section 433 by the central government or the state government. So, who can file a petition for winding up? company, creditor, contributories, and registrar or any person authorized by the government or central government or state government. okay. So, any one of them can file a petition for winding up of the company. Okay now let us discuss other provisions. section 441 okay commencement of winding up. So, the winding up of the company shall deem to have commenced at the time of passing of the resolution, so, when you are filing a petition for winding up of the company by passing the resolution.

So please remember one of the ground for winding up of the company is when at the general meeting, when the shareholders pass a special resolution stating that the company should be wound up, that is also one of the grounds for winding up of the company. So, if the shareholders pass a resolution and subsequently, they file a petition before the tribunal, then in such cases, the date of passing the resolution shall be deemed to be commencement of winding up. so, this is not applicable in all the cases. If winding up petition is filed based on the resolution, then in such cases the winding up is deemed to be commenced from the date when the resolution was passed. So, this is under section 441. Then 448 appointment of official liquidator. So, once the petition is admitted by the court of law then they are going to appoint the official liquidator okay.

Then let us look at the voluntary winding up process okay so section 484 of the act provides for the voluntary winding up of the company. So, a company may be wound up voluntarily when the period if any fixed for the duration of the company by the articles has expired or the event if any has occurred on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting pass resolution require the company to be wound up. So, there they have given various grounds for winding up ok. So, whenever if you want to go for voluntary winding up first ground will be in the articles of association when you are incorporating the company itself, ok at the time of incorporation of the company only in the articles of association it is clearly provided that the company will be there or the company will do the business for a period of five years maybe 10 years maybe 20 years. So, that is up to you how you are going to fix the period. okay so a fixed period is there in the articles of association. So,

when a fixed period is in the articles of association and when the fixed period is completed you can go for winding up, or else you have created one company a particular project imagine so that particular project is completed so for completion of the project only you have created a particular event that particular event has occurred.

So, for the completion of, suppose take the example you have created a company for completion of a thermal power project. Okay, so, once it is completed, you can close down the company. Generally, we don't do that, but you can have such provision in the articles of association. Okay, so, if a particular event is happening, or else if the articles of association provided that on the occurrence of so-and-so event, the company should be wound up. Maybe that event happened. Then in such cases, okay, so in all these cases, okay, so the company at the general meeting pass resolution. So, you are passing a resolution stating that the company may be wound up. So, in such cases, you can go for voluntary winding up of the company. So, if the company passes a special resolution, that the company be wound up. So, these are all the various circumstances where you can go for voluntary winding up of the company.

Then section 488 speaks about the declaration of solvency. So, once if you are going for voluntary winding up of the company so you have to give a declaration that is the board of directors they are expected to give a declaration that company is solvent. why? because once the company is wound up, okay, if any creditor is there, okay, to the creditor who is responsible so that's why the board of directors are expected to give a declaration of solvency stating that the company is solvent and in case if any creditors are there okay so where the after the wound up it is found that the creditors are there then the board of directors will be personally liable. okay so they should give a declaration. okay. Then section 490 appointment of liquidator so in case of voluntary winding up, how you are going to appoint the liquidator is provided in the section 490.

So, how you are going to appoint liquidator a company in general meeting ok appoint one or more liquidators for the purpose of winding up because in case of voluntary winding up it is decided by the company itself. Ok, the shareholders they are passing the resolution by passing the resolution they have decided to close down the company. So, that's why they are supposed to appoint the liquidator for the purpose of winding up of the company ok and while they are appointing the liquidator they are supposed to fix the remuneration. Okay, how much remuneration to be paid everything must be fixed. Okay that any remuneration so fixed shall not be increased in any circumstances. okay so please remember at the time of passing the resolution only we have to fix everything. okay so how much remuneration you are paying okay what is included in terms of remuneration what can be included in the remuneration, everything the terms and conditions must be specifically stated okay. subsequent to the resolution you cannot increase the remuneration.

Subsequently, okay then we are having provisions from voluntary winding up provisions from section 484 to 520 okay. there are two types of voluntary winding up. okay so even if you observe uh under the voluntary winding up also there are two categories are there, so one is one member's voluntary members voluntary winding up. okay so what is this member's voluntary winding up when it can happen? Okay. the members voluntary winding up can happen when the company is solvent, that means we are having sufficient profits, i mean sufficient balance is there but the shareholders they have decided to go for winding up may be various circumstances. okay. as already we have discussed the company got incorporated for a fixed period the period is completed or else the company is created for a particular purpose the purpose is completed, okay or else the company is created when the company is created in the articles of association we have provided that on the occurrence of particular event you are supposed to close down the company. okay so in all these circumstances it's not that we are having the debt. okay so the debt is cleared or else we are having sufficient funds are there okay but the members they decided to close down the company.

So, even in the case of voluntary winding up also you are having two categories okay member's voluntary winding up, so when member's voluntary winding up will come when the company is insolvent. okay and it requires a declaration of solvency okay. So, in case of members members voluntary winding up as already we have discussed the board of directors are expected to give the declaration of solvency stating that the company is not having any liability or else the company is having sufficient funds to clear the liabilities okay then appointment of liquidator by the company. So, in case of members who are intervening up because you are deciding to liquidate the company and you are passing the resolution so at the time of passing the resolution only at the general meeting you are expected to appoint the liquidator also. okay. then the liquidator will report to the members here. okay. then another mode of winding up will be creditors voluntary winding up. Okay. So, sometimes even creditors also can go for winding up of the company.

So, when the company is insolvent even in this case also when the company is insolvent because please remember it is both the cases is voluntary winding up so that is why company is insolvent. sorry in case of members voluntary winding up company is solvent whereas in case of creditors voluntary winding up it is company is insolvent. okay so that means creditors are of the opinion that company is unable to pay the debts. Okay. In both the voluntary binding ups, okay one in one scenario company is solvent in another scenario company is insolvent. So, insolvent involves a meeting of the creditors. So, in case of creditors voluntary winding up, you are expected to conduct the creditors meeting. After conducting the creditors meeting, you are expected to pass the resolution at the creditors meeting.

Then, subsequent to that, you are supposed to file your petition before the tribunal. Then the creditors, like in the case of members voluntary winding up. Even in the case of creditors voluntarily winding up also, they are supposed to appoint the liquidator, ok. Then greater creditor involvement in oversight. If you observe section 500 to 509, especially in case of creditors voluntarily winding up, creditors will have a say, or else creditors will have a control over this winding up process.

Then winding up subject to court supervision. So, this is hybrid mode, where a voluntary winding up but under the supervision of court. so please remember it is also voluntary winding up but we are not doing ourselves, because in the first mode where the company is solvent when the members are going for winding up of the company the members are appointing the liquidator and the liquidator will report to the members. okay. so please observe the previous slide okay if you observe the fourth point in a heading. okay liquidator reports to the members, so in case of voluntary winding up there is members voluntary winding up okay the liquidator will report to the members. Whereas here, voluntary winding up, but this is not directly under the control of members, this is under the supervision of the court ok. So, please remember this is rarely used ok, nowadays it is rarely used and later phased out also ok.

So, because we are having another mode of winding up by the compulsory winding up by the tribunal ok, when the members voluntarily they themselves can do ok, generally we do not have the court supervision or otherwise you can go to the court of law if the circumstances demand, then court will give the order for winding up. ok. So, because already we are having the provisions for compulsory winding up also ok. So, because we are having voluntary winding up and compulsory winding up. So, under the compulsory winding up court will give the order and directly it will work under the court order. So, there is no requirement for us when we have decided that is members have decided to go for voluntary winding up, they need not to go to the supervision of court.

So, that's why it is rarely used and later it is also phased out okay. Then eventually companies act 2013 and the IBC also removed this category altogether okay so previously we used to have these provisions why? Because I mean the circumstances were different at that point of time but this provision was rarely used by the courts, why because if court wants to do, they can do it directly under the compulsory winding up okay. if the members can do, they can do under the voluntary winding up so there is no requirement of voluntary winding up plus code supervision. so that's, why eventually I can say under the companies act 2013 and even under the IBC also altogether it is totally removed now. let us look at the transition Okay, Companies Act 2013 initially included provisions relating to winding up.

Okay, so as you have observed previously Companies Act, 1956 we are having the provisions relating to winding up, but subsequently when Companies Act 2013 was there,

so we are having provisions relating to winding up, there is section 272 to 365, but please remember after notification of IBC, it was overhauled by the insolvency and bankruptcy code 2016. Now, we do not have all the provisions relating to winding up under the Companies Act. So, now winding up due to insolvency is governed by IBC. Other forms like statutory default, are under the Companies Act.

So, if any due to insolvency, then under the IBC section 7, 9, 10, so you can go for the petition or application under the IBC. then in the subsequent lessons we are going to discuss how to file a petition, who can initiate the proceedings, all these things we are going to discuss in the subsequent lessons. So, there we are going to discuss in detail but right now under the Companies Act 2013, we do not have the provisions relating to winding up due to insolvency. Then Companies Act 1956, right now it is totally repealed as we know that because right now, we are having Companies Act 2013.

So, 1956 is totally repealed.

So, let us discuss few case laws. Supreme Court in the case of Madan Lal Fakir Chand Dudhediya Vs. Sri Chendiyo Sugar Mills Limited. So, in this case it was held that a company may be wound up if there is a deadlock in the management. So, please remember this is actually under the Companies Act 2013, but it can be referred under the Companies Act 1956 also. Whenever there is a deadlock is there in the management or loss of substratum.

Maybe you can imagine in one company there are four directors are there. So, four directors divided into two groups, two in each group. Ok, so then obviously the deadlock is there, ok so, in such circumstances maybe you can go for winding up of the company. In another case law, Mohanlal versus Grain Chambers Limited, so in this case law it was held that failure to repay even after statute notice is prima facie evidence so if you observe, ok in the previous list we have discussed that inability to pay the debts is also one of the ground for winding up. ok so whenever there is a failure is there by the company even after receiving the strategic notice okay so that can be ground for compulsory widening up under the legislation. okay

then in Swiss Ribbons private limited versus Union of India, actually it is the case law under the IBC regime but, happend the IBC regime of prioritizing the resolution over the liquidation. okay so it emphasized that Code is a complete mechanism replacing the earliest scattered provisions under the Companies Act. So, if you observe Companies Act 1956, so the provisions were scattered.

So, there are so many provisions relating to winding up. But right now, if you observe IBC, it emphasizes the resolution. So, we are going to discuss more about this in the subsequent lessons. So, the major aim of IBC is to resolve the company and rehabilitate the company and arrive at the resolution plan. If there is a failure to arrive at the

resolution plan or if you are unable to approve any resolution plan or if you are unable to. I mean if you are rejecting the resolution plan there is COC, then only the tribunal will give the order for liquidation. ok so there is a mechanism that was that is adopted under the IBC ok so that's why in this judgment it was emphasized that previously we used to have the provisions scattered provisions ok so under various sections but right now under IBC ok this we are having concentration ok concentrated provisions were there section 7, 9, 10 so where you can find repetition and IBC's constitutional validity was upheld in this judgment.

Then, in another judgment, K. Shashidhar versus Indian Overseas Bank, even this is also under the IBC regime only. So, in this case, it was held that NCLT and NCLAT cannot question the COC's commercial wisdom. Okay, so critical for determining whether liquidation follows or not. So, in this judgment it was held that NCLT, NCLAT cannot question this COC's commercial wisdom. So, the same principles used to be followed even under the Companies Act 1956.

Okay, may not be as it is, but same provisions used to be followed and same provisions were carried out, carried forward even under the IBC regime also. So, in another case law, Innoventive Industries Limited Versus ICICI bank, this was also under the IBC regime only. So, once a default is established, CIRP must be admitted. So, highlighted shift from inability to pay the debts under the 1956 Act to default. So, if you observe, one of the grounds for winding up under the Companies Act 1956 is inability to pay.

So, there is a difference between the inability to pay and the default. So, please remember, under the IBC, it is default, it is not inability. So, previously, it used to be inability to pay. So, whenever there is a default is a directly ok. So, there is a shift is there from the inability to pay under the 1956 act to default under the IBC ok. So, that is how the mechanism how you are how and when you are going to go for winding up was transformed from I can say 1956 act to 2013.

from 2013 act to IBC insolvency in bankruptcy code ok. So, let us recap what we have discussed today. So, we have discussed the insolvency provisions under the Companies Act 1956, then we have discussed about the modes of winding up and the grounds of winding up. Then these things are basis for the next lessons for us and who can file a petition for winding up then we have discussed about commencement of winding up. So, when you in case of voluntary winding up when you pass the resolution at the general meeting ok. So, the date of resolution is deemed to be commencement of date of commencement of the winding up ok.

then we have discussed provisions relating to appointment of liquidator. Then we have discussed about the winding up subject to supervision code supervision okay so it is uh it is voluntary winding up only but subject to code supervision but right now we don't have

such concept. okay so with this we have completed an overview of liquidation provisions under the liquidation and winding up provisions under companies act 1956.

Thank you.