Journal of Advanced Research in Accounting and Finance Management
Volume 2, Issue 1 - 2020, Pg. No. 20-37
Peer Reviewed Journal

Review Article

Winding up of A Company: An Overview

Sonali Sahoo

MBA Student, Department of Management Astha School of Management.

I N F O

E-mail Id:
sonalisahoo50753@gmail.com
Orcid Id:
https://orcid.org/0000-0003-3221-8939
How to cite this article:
Mirza F. Winding up of A Company: An Overview. *J Adv Res Acct Fin Mgmt* 2020; 2(1): 20-37.

Date of Submission: 2020-08-05
Date of Acceptance: 2020-08-15

A B S T R A C T

Winding up of an organization is characterized as a procedure by which the life of an organization is finished and its property directed to serve its individuals and loan bosses. In expressions of Professor Gower, "Ending up of an organization is the procedure whereby its life is finished and its Property is directed to assist its individuals and lenders. An Administrator, called an outlet is selected and he assumes responsibility for the organization, gathers its benefits, pays its obligations lastly conveys any surplus among the individuals as per their privileges."

According to Halsburry's Laws of England, "Winding up is a proceeding by means of which the dissolution of a company is brought about & in the course of which its assets are collected and realised; and applied in payment of its debts; and when these are satisfied, the remaining amount is applied for returning to its members the sums which they have contributed to the company in accordance with Articles of the Company." Winding up is a legal process.

Under the procedure, the life of the organization is finished and its property is regulated for the advantages of the individuals and loan bosses. An outlet is designated to understand the advantages and properties of the organization. After installments of the obligations, is any overflow of advantages is forgotten about they will be dispersed among the individuals as per their privileges. Twisting up doesn't really imply that the organization is bankrupt. A superbly dissolvable organization might be ended up by the endorsement of individuals in a regular gathering.There are differences between winding up and dissolution. At the end of winding up, the company will have no assets or liabilities. When the affairs of a company are completely wound up, the dissolution of the company takes place. On dissolution, the company's name is struck off the register of the companies and its legal personality as a corporation comes to an end.

Keywords: Winding Up, Liquidation, Bankruptcy, Insolvency, Dissolution

Winding Up A Registered Company and an Unregistered Company

Winding up of a company is defined as a process by which the life of a company is brought to an end and its property administered for the benefit of its members and creditors. An administrator, called the liquidator, is appointed and he takes control of the company, collects its assets, pays debts and finally distributes any surplus among the members in accordance with their rights. At the end of winding up, the company will have no assets or liabilities. When the affairs

of a company are completely wound up, the dissolution of the company takes place. On dissolution, the company's name is struck off the register of the companies and its legal personality as a corporation comes to an end.

The procedure for winding up differs depending upon whether the company is registered or unregistered. A company formed by registration under the Companies Act, 1956 is known as a registered company. It also includes an existing company, which had been formed and registered under any of the earlier Companies Acts.

In Pierce Leslie & Co. Ltd v. Violet Ouchterlony, 1969 SCR (3) 203 the Hon'ble supreme court held that winding up precedes the dissolution. There 'is no statutory provision vesting the properties of a dissolved company in a trustee or having the effect of abrogating; the law of escheat. The shareholders or creditors of a dissolved company cannot be regarded as its heirs and successors. On dissolution of a company, its properties, if any, vest in the government.

Winding Up A Registered Company

The Companies Act provides for two modes of winding up a registered company.

Grounds for Compulsory Winding Up or Winding up by the Tribunal:

1. If the company has, by a Special Resolution, resolved that the company be wound up by the Tribunal.
2. If default is made in delivering the statutory report to the Registrar or in holding the statutory meeting. A petition on this ground may be filed by the Registrar or a contributory before the expiry of 14 days after the last day on which the meeting ought to have been held. The Tribunal may instead of winding up, order the holding of statutory meeting or the delivery of statutory report.
3. If the company fails to commence its business within one year of its incorporation, or suspends its business for a whole year. The winding up on this ground is ordered only if there is no intention to carry on the business and the Tribunal's power in this situation is discretionary.
4. If the number of members is reduced below the statutory minimum i.e. Below seven in case of a public company and two in the case of a private company.
5. If the company is unable to pay its debts.
6. If the tribunal is of the opinion that it is just and equitable that the company should be wound up.
7. Tribunal may inquire into the revival and rehabilitation of sick units. It its revival is unlikely, the tribunal can order its winding up.
8. If the company has made a default in filing with the Registrar its balance sheet and profit and loss account or annual return for any five consecutive financial years.
9. If the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

IBA Health v. Info-Drive Systems (CA No. 8230/2010) - Kapadia C.J. begins his analysis by noting that the Company Court is not required in a winding-up proceeding to examine complex issues of law and fact, or resolve serious disputes between parties. The Supreme Court held that a Company Court cannot proceed with a winding-up petition if the respondent raises a "substantial" or "bona fide" dispute as to the existence of the debt.

The following observations are pertinent:

- A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle.
- It is settled law that if the creditor›s debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bona fide disputed debt.
- The solvency of a company cannot stand in the way of a winding-up petition if the company does indeed owe an unpaid debt to the creditor.
- The Company Court cannot be "maliciously" used as a "debt collecting agency", and that "an action may lie in appropriate Court in respect of the injury to reputation caused by maliciously and unreasonably commencing liquidation proceedings against a company and later dismissed when a proper defence is made out on substantial grounds." This judgment may ensure that a winding-up petition is scrutinised more carefully before it is admitted.

The petition for winding up to the Tribunal may be made by:

1. The company, in case of passing a special resolution for winding up.
2. A creditor, in case of a company's inability to pay debts.
3. A contributory or contributories, in case of a failure to hold a statutory meeting or to file a statutory report or in case of reduction of members below the statutory minimum.
4. The Registrar, on any ground provided prior approval

of the Central Government has been obtained.

5. A person authorised by the Central Government, in case of investigation into the business of the company where it appears from the report of the inspector that the affairs of the company have been conducted with intent to defraud its creditors, members or any other person.
6. The Central or State Government, if the company has acted against the sovereignty, integrity or security of India or against public order, decency, morality, etc.

In Amalgamated Commercial Traders (P) Ltd. V. A.C.K. Krishnaswami, (1965) 35 Company Cases 456 (SC), this Court held that "It is well-settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court."

The above mentioned decision was later followed by this Court in Madhusudan Gordhandas and Co. V. Madhu Woollen Industries Pvt. Ltd. 1971) 3 SCC 632. It was further stated that if the court is satisfied, that sufficient reasons exist in the petition for winding up, then it will pass a winding up order. Once the winding up order is passed, following consequences follow:

1. Court will send notice to an official liquidator, to take change of the company. He shall carry out the process of winding up, (sec. 444)
2. The winding up order, shall be applicable on all the creditors and contributories, whether they have filed the winding up petition or not.
3. The official liquidator is appointed by central Government (sec. 448).
4. The company shall relevant particulars, relating to, assets, cash in hand, bank balance, liabilities, particulars of creditors etc, to the official liquidator. (sec. 454).
5. The official liquidator shall within six months, from the date of winding up order, submit a preliminary report to the court regarding :

- Particulars of Capital
- Cash and negotiable securities
- Liabilities
- Movable and immovable properties
- Unpaid calls, and

6. An opinion, whether further inquiry is required or not (455).

In Vijay Industries v. NATL Technologies Ltd, (2009) 3 SCC 527, it was laid down that if the debt is bona fide disputed, there cannot be "neglect to pay" within the meaning of Section 433(1)(a) of the Companies Act, 1956. If there is no neglect, the deeming provision does not come into play and the winding up on the ground that the company is unable to pay its debts is not substantiated and non-payment of the amount of such a bona fide disputed debt cannot be termed as "neglect to pay" so as to incur the liability under Section 433(e) read with Section 434(1)(a) of the Companies Act, 1956. The Central Govt. Shall keep a cognizance over the functioning of official liquidator, and may require him to answer any inquiry. The official liquidator, usually a public accountant, must, of course, be a person wholly independent and outside the influence neither of the company, nor in any way connected with its business. In the course of the winding-up operation a liquidator usually consults with the shareholders and the creditors of the company, with the purpose of facilitating his task or proposing a compromise of arrangement between the parties.

When the creditors are all paid, or the capital of the company (if limited) is exhausted, the liquidator is to lay before the Court a complete account, show in the manner in which the operations have been conducted and the property of the company disposed of. The Court, upon exhibition of the said account, pronounces the dissolution of the company.

Stay Order

Where, the court has passed a winding up order, it may stay the proceedings of winding up, on an application filed by official liquidator, or creditor or any contributory. The general scheme of the Companies Act is that the Court should have complete control of all proceedings in winding up.

Voluntary Winding Up of A Registered Company

When a company is wound up by the members or the creditors without the intervention of Tribunal, it is called as voluntary winding up. It may take place by:

1. By passing an ordinary resolution in the general meeting if.

- the period fixed for the duration of the company by the articles has expired
- some event on the happening of which company is to be dissolved, has happened

2. By passing a special resolution to wind up voluntarily for any reason whatsoever.

Within 14 days of passing the resolution, whether ordinary or special, it must be advertised in the Official Gazette and also in some important newspaper circulating in the district of the registered office of the company. It was held in Neptune Assurance Co. Ltd. Vs Union Of India, 1973 SCR (2) 940, that in the Companies Act the expression "voluntary

winding up", means a winding up by a special resolution of a company to that effect. Similarly, the expression "winding up by the court" means winding up by an order of the Court in accordance with S. 433 of the Companies Act. The Companies Act (Section 484) provides for two methods for voluntary winding up:-

1. Members' voluntary winding up

It is possible in the case of solvent companies which are capable of paying their liabilities in full. There are two conditions for such winding up:

A. A declaration of solvency must be made by a majority of directors, or all of them if they are two in number. It will state that the company will be able to pay its debts in full in a specified period not exceeding three years from commencement of winding up. It shall be made five weeks preceding the date of resolution for winding up and filed with the Registrar. It shall be accompanied by a copy of the report of auditors on Profit & Loss Account and Balance Sheet, and also a statement of assets and liabilities upto the latest practicable date; and

B. Shareholders must pass an ordinary or special resolution for winding up of the company.

The provisions applicable to members' voluntary winding up are as follows:

1. Appointment of liquidator and fixation of his remuneration by the General Meeting.
2. Cessation of Board's power on appointment of liquidator except so far as may have been sanctioned by the General Meeting, or the liquidator.
3. Filling up of vacancy caused by death, resignation or otherwise in the office of liquidator by the general meeting subject to an arrangement with the creditors.
4. Sending the notice of appointment of liquidator to the Registrar.
5. Power of liquidator to accept shares or like interest as a consideration for the sale of business of the company provided special resolution has been passed to this effect.
6. Duty of liquidator to call creditors' meeting in case of insolvency of the company and place a statement of assets and liabilities before them.
7. Liquidator's duty to convene a General Meeting at the end of each year.
8. Liquidator's duty to make an account of winding up and lay the same before the final meeting.

The liquidator shall take the following steps, when affairs of the company are fully wound up: (497)

1. Call a general meeting of the members of the company, a lay before it, complete picture of accounts, wining up procedure and how the propertiesof company are disposed of.
2. The meeting shall be called by advertisement, specifying the time, place and object of the meeting.
3. The liquidator shall send to, the Registrar and official Liquidator copy of account, within one week of the meeting.
4. If from the report, official liquidator comes to the conclusion, that affairs of the company are not being carried in manner prejudicial to the interest of it's members, or public, then the company shall be deemed to be dissolved from the date of report to the court.
5. However, if official liquidator comes to a finding, that affair have been carried in a manner prejudicial to interest of member or public, then court may direct the liquidator to investigate furthers.

When can't a company commence a Members' Voluntary Winding Up Not every company can be wound up in a members' voluntary winding up. The first exception is insolvent companies. The company must be solvent at the time and the directors must have executed a Declaration of Solvency stating so and setting out the assets and liabilities.

The Act sets out 3 more exceptions:

A. if an application has been filed for the winding up of the company on the basis that the company is insolvent (whether it is or not).
B. the company has already been wound up by the Court. Once the Court has made that order, the directors and members lose the power to make any other appointment.
C. A third exception is where the company is the corporate trustee of a number of trusts, and one or more of these trusts are continuing.

The directors do not appoint the liquidators and the company is not wound up because of the meeting of directors. The directors will generally nominate liquidators to be appointed by the members, but the actual appointment of liquidators and the winding up occur by resolution of the members. The directors and members may also bypass the meeting process and pass resolutions without the need for the meeting, as long as all directors or members agree to the resolution being passed. They may do this by executing a certificate of resolutions which is passed when the last person executes the certificate.

The directors must have made proper inquiries and actually believe that the company is solvent (that it will be able to pay all of its creditors within 12 months after the commencement of the winding up). Only then can they resolve that the company is solvent and the Declaration of Solvency can be executed. Once the directors have executed that Declaration of Solvency and have resolved

to call a meeting of members to consider the appointment of liquidators, the declaration of solvency will be filed with ASIC and notices calling a meeting of the members will be issued to all members.

Creditor's Voluntary Winding Up

In Palmer's Company Precedents, Part 11, 1960 Edn., at p. 25, the following passage appears.

"A winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a company unable to pay its debts."

It is possible in the case of insolvent companies. It requires the holding of meetings of creditors besides those of the members right from the beginning of the process of voluntary winding up. It is the creditors who get the right to appoint liquidator and hence, the winding up proceedings are dominated by the creditors. In Pankaj Mehra v. State Of Maharashtra, 2000 100 compcas 417 SC it was laid down that once a petition for winding up is presented it is not a necessary concomitant that the winding up would follow. This position is made clear in Section 440(2) which says that "the court shall not make a winding up order on a petition presented to it under Sub-section (1), unless it is satisfied that the voluntary winding up or winding up subject to the supervision of the Court cannot be continued with due regard to the interests of the creditors or contributories or both." So a judicial exercise is called for to reach the satisfaction of the court that winding up has to be continued with due regard to the interest of the creditors or the contributors. Section 443 of the Companies Act is important in this context.

The provisions applicable to creditors' voluntary winding up are as follows:

1. The Board of Directors shall convene a meeting of creditors on the same day or the next day after the meeting at which winding up resolution is to be proposed. Notice of meeting shall be sent by post to the creditors simultaneously while sending notice to members. It shall also be advertised in the Official Gazette and also in two newspapers circulating in the place of registered office.
2. A statement of position of the company and a list of creditors along with list of their claims shall be placed before the meeting of creditors.
3. A copy of resolution passed at creditors' meeting shall be filed with Registrar within 30 days of its passing.
4. It shall be done at respective meetings of members and creditors. In case of difference, the nominee of creditors shall be the liquidator.
5. A five-member Committee of Inspection is appointed by creditors to supervise the work of liquidator.
6. Fixation of remuneration of liquidator by creditors or committee of inspection.
7. Cessation of board's powers on appointment of liquidator.

DEBT

The sub section above does not confer on any person a right to seek an order that a company shall be wound up. It confers power to the court to pass an order of winding up in appropriate cases, i.e. The remedy is discretionary and cannot be claimed as a matter of right. However, the right to petition, being a statutory right cannot be excluded by a clause in the articles of association. A company will not be wound up merely because it is unable to pay its debts so long as it can be revived or resurrected by a scheme or arrangement or it still has prospects of coming back to life.

A debt for a company must be determined or definite sum of money payable immediately or at a future date. A conditional or contingent liability is not a debt, unless the contingency or condition has already happened. Where a company acts as a guarantor for repayment of a loan, and the principle debtor has committed default, the amount guaranteed is a 'debt' in respect of which a petition for winding up will lie under this section. When a dividend is declared by the company, it becomes a debt due by the company and entitles the shareholder to apply under this section in case the company is unable to pay the amount of the dividend. A winding up petition cannot be sustained on the basis of a debt which became due before prior to the company's incorporation even if one of the objects of the company was to pay off the debt.

The scope of the meaning to be given to the phrase "unable to pay its debts" appearing in section 218(1)(e) of the Companies Act 1965 is explained by mcpherson in his book "The Law of Company Liquidation" (3rd Editon) at page 54 as follows:

The phrase "unable to pay its debts" is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the often near-impossible task of establishing the true financial position of the company and the weight of authority undoubtedly supports the view that the primary meaning to the phrase is insolvency in the commercial sense - that is inability to meet current demands irrespective of whether the company is possessed of assets which, if realised, would enable it to discharge its liabilities in full.

The court should not go in a winding-up petition into disputed questions of fact which cannot be sorted out without leading evidence. A claim for damages for breach of

contract is not in the category of a debt due. A petition filed by a secured creditor just to exert pressure on the company is liable to be dismissed. The machinery for winding up will not be allowed to be utilized merely as a means for realizing debts due from a company. A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by a company. However, the court can hardly exercise any discretion where the company is so hopelessly insolvent that there is absolutely no chance of resurrection. The company is not liable to be wound up if it is financially sound and refuses to pay the debts. Winding up is not an alternative to a civil suit.

The views of Indian courts are also not rigid on the issue of winding up under sub section (e) of Section 433, different views have been adopted by courts.

In National Textile Workers' Union vs PR Ramakrishnan, the Supreme Court, in order to avoid undue hardship on the part of the company, had held that the trade union could not present a petition for winding up. It cannot represent workers for this purpose, as they have an alternative remedy under the Industrial Disputes Act, 1947. However, in the case of M Satyanarayana vs Stiles India Ltd, the high court of Andhra Pradesh has held that the unpaid salary is also a debt.

In brief, it can be inferred that a winding up order with reference to Section 433(e) is an extreme remedy and therefore, is to be sparingly invoked. In Re Long Thai Sawmill (Miri) and (1974) 2 MLJ 227, the Privy Council pointed out that for a case to be brought within section 181 (1((a) at all, the complainant must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company possessed the majority of the voting power and, in reliance upon the power, made policy or executive decisions, with which the complainant did not agree, was not enough. There must be a visible departure from the standards of the fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made out.

The Procedure

1. Company in the general meeting [in which resolution for winding up is passed], and the creditors in their meeting, appoint liquidator. They may either agree on one liquidator, or if two names are suggested, then liquidator appointed by creditor shall act.
2. Any director, member or creditor may approach the court, for direction that; Liquidator appointed in general meeting shall act, or He shall act jointly with liquidator appointed by creditor, or Appointing official liquidator, or Some other person to be appointed as liquidator, 502(2).
3. The remuneration of liquidator shall be fixed by the creditors, or by the court (504).
4. On appointment of liquidator, all the power of Board of Directors shall cease (505).
5. In case, the winding up procedure, takes more than one year, then he will have to call a general meeting, and meeting of creditors, at the end of each year, and he shall present, a complete account of the procedure, and the status/ position of liquidation (505).

As soon as the affairs of the company are wound up, the liquidator shall call a final meeting of the company as well as that of the creditors through an advertisement in local newspapers as well as in the Official Gazette at least one month before the meeting and place the accounts before it. Within one week of meeting, liquidator shall send to Registrar a copy of accounts and a return of resolutions.

A sick or potentially sick company can file a petition for voluntary winding up of company. The company must seek clearance for closure from the government. A company referred to the Board of Financial and Industrial Reconstruction can be wound-up after the order is passed by the board. Once the amount of settlement (assets minus liabilities) is determined, the permission of RBI is taken to make the final settlement to the owners of the company. Distribution of property of company on voluntarily winding up [both members and creditors voluntarily winding up].

Once the company is fully wound up, and assets of the company sold or distributed, the proceedings collected are utilised to pay off the liabilities. The proceedings so collected shall be utilised to pay off the creditors in equal proportion. Thereafter any money or property left, may be distributed among members according to their rights and interests in the company.

Role of Company in Voluntary Liquidation

A - Member's Voluntary Winding Up

1. To convene a Board Meeting: To make a declaration of solvency in Form 149 under Rule 313 of Company Court Rules 1959. If Directors are of the opinion that company has no debts or will pay its debts within 3 years.
2. Declaration should be accompanied by Audited Balance Sheet and Profit & Loss account as on the nearest practicable date before declaration & Auditor's Report thereon.
3. Approval of draft declaration & affidavit as well as Authority to director to sign and deliver the declaration to Roc.
4. To approve draft Resolution to be passed in the Meeting of Shareholders.
5. To appoint liquidator (s) and fix their remuneration - Body corporate cannot be appointed, however, body corporate of professionals as approved by Central Govt. Can be appointed. CA firm can be appointed as

liquidator. The remuneration fixed by the members in meeting cannot be increased.

6. To fix date, time and venue for holding General Meeting & approve the draft notice and to issue notice for General Meeting. To hold General Meeting and pass Ordinary or Special Resolution as applicable.
7. To file the declaration duly verified by an affidavit before a Judicial Magistrate with concerned ROC before the date of General Meeting in e-form 62. (a) For winding up (b) For appointment of liquidator.
8. To forward copies of notices and proceedings of general meeting to Stock Exchange promptly (if applicable).
9. To file notice for the appointment of the liquidator within 10 days from the date of passing of Resolution of winding up to the Registrar of Companies (e-form 62) - The vacancy in the office of the liquidator will be filled by company in its general meeting and fresh notice will be given to ROC within 10 days of such appointment.
10. To submit a statement of affairs of the company in Form-57 duly verified by Affidavit in form-58 within 21 days of commencement of winding up to the liquidator. The Statement of Affairs primarily includes - Assets, liabilities and debts, Name, address and other particulars of creditors, secured and unsecured. In case of secured creditors the nature of security be mentioned.

Distinguish between 'Members' Voluntary Winding-up' and 'Creditors'

Members' voluntary winding-up can be resorted to by solvent companies and thus requires the filing of Declaration of Solvency by the Directors of the company with the Registrar. Creditors' winding-up, on the other hand, is resorted to by insolvent companies. In Members' voluntary winding-up there is no need to have creditors' meeting. But, in the case of creditors' voluntary winding-up, a meeting of the creditors must be called immediately after the meeting of the members.

Liquidator, in the case of members' winding-up, is appointed by the members. But in the case of creditors' voluntary winding-up, if the members and creditors nominate two different persons as liquidators, creditors' nominee shall become the liquidator. In the case of Creditor's voluntary winding-up, if the creditors so wish, a 'Committee of Inspection' may be appointed. In the case of Members' voluntary winding-up, there is no provision for any such Committee.

The remuneration of liquidator/(s) is fixed by the members in case of Members' voluntary winding-up (Section 490) whereas the same is to be fixed by the Committee of Inspection, if any, or by the creditors in case of Creditors' voluntary winding-up (Section 504). In Bowes v. Hope Life Insurance and Guarantee Co. And in Re General Company for Promotion of Land Credit it was stated that "a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it"; but nonetheless it is a form of equitable execution. Propriety does not affect the power but only its exercise. If so, it follows that in terms of cl. (d) of r. 1 of O.XL of the Code of Civil Procedure, a Receiver can file a petition for winding up of a company for the realisation of the properties, movable and immovable, including debts, of which he was appointed the Receiver.

Winding Up Subject to Supervision of Court

1. Winding up subject to supervision of court, is different from "Winding up by court."
2. Here the court can only supervise the winding up procedure. Resolution for winding up, is passed by members in the general meeting. It is only for some specific reasons, that court may supervise the winding up proceedings. The court may put up some special terms and conditions also.
3. However, liberty is granted to creditors, contributories or other to apply to court for some relief. (522) Where a Company is being wound up voluntarily, any person who would have been entitled to petition for compulsory winding up may petition instead for the voluntary winding up to be continued subject to the supervision of court.
4. The Petitioner must prove that voluntary winding up cannot continue with fairness to all concerned parties.
5. Court may then appoint an additional Liquidator or continue with the existing Liquidator to give security.
6. The Liquidator must file with the Registrar every three months a report of the progress of the liquidation - The court may also appoint liquidators, in addition to already appointed, or remove any such liquidator. The court may also appoint the official liquidator, as a liquidator to fill up the vacancy.
7. Liquidator is entitled to do all such things and acts, as he thinks best in the interest of company. He shall enjoy the same powers, as if the company is being wound-up voluntarily.
8. The court also may exercise powers to enforce calls made by the liquidators, and such other powers, as if an order has been made for winding up the company altogether by court.

Winding up an Unregistered Company

According to the Companies Act, an unregistered company includes any partnership, association, or company consisting of more than seven persons at the time when petition for winding up is presented. But it will not cover the following:

- A railway company incorporated by an Act of Parliament or other Indian law or any Act of the British Parliament

- A company registered under the Companies Act, 1956
- A company registered under any previous company laws
- An illegal association formed against the provisions of the Act

However, a foreign company carrying on business in India can be wound up as an unregistered company even if it has been dissolved or has ceased to exist under the laws of the country of its incorporation. The provisions relating to winding up of an unregistered company:

1. Such a company can be wound up by the Tribunal but never voluntarily.
2. Circumstances in which unregistered company may be wound up are as follows.

- If the company has been dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs.
- If the company is unable to pay its debts.
- If the Tribunal regards it as just and equitable to wind up the company.
- Contributory means a person who is liable to contribute to the assets of a company in the event of its being wound up. Every person shall be considered a contributory if he is liable to pay any of the following amounts - Any debt or liability of the company; Any sum for adjustment of rights of members among themselves; Any cost, charges and expenses of winding up; on the making of winding up order, any legal proceeding can be filed only with the leave of the Tribunal.

Locus Standi of a contributory to bring a petition for winding up

Recently, the Supreme Court of India in Severn Trent Inc. V. Chloro Controls (India) Pvt. Ltd. [(2008) 4 SCC 130] dealt with an interesting point of law related to the locus standi of a contributory to file a petition for winding up. The issue before the Supreme Court called for an interpretation of Section 439(4)(b) of the Companies Act, 1956. Under this Section, a contributory is not entitled to present a petition for winding up unless the shares in respect of which he is a contributory, or some of them, (a) were originally allotted to him; or (b) were held by him and registered in his name for a certain period; or (c) devolved on him through the death of a former holder. Severn Trent did not dispute that category (a) was inapplicable in the case; but argued that it should be held to have conformed to categories (b) and (c).

Essentially, the contention was that the requirement of the shares having to be "registered in his name" was not a mandatory requirement, and could be waived in certain circumstances. Otherwise, a company (particularly in cases where two groups of shareholders are severely hostile to each other) could prevent a contributory from bringing a petition for winding up by simply refusing to register the shares in the name of the contributory. Alternatively, Severn Trent argued that the shares could be deemed to have devolved upon it through the "death" of the former holder. After the merger between Capital Control (Delaware) and Severn Trent, the former had effectively met its "civil death", and its shares had then devolved upon the latter.

The Court held that the plain language of Section 439 could not be modified or read down; and to come under category (b), it was essential that the shares should be held by the contributory and registered in his name. Section 439(4) was held to be a complete code in this respect, leaving no room for equitable considerations to be used to allow a petition in cases where a strict reading of the provisions would not allow one. Court stated, "… if there is omission, default or illegal action on the part of the Company in not registering the name of the contributory even though he/ it can be said to be a contributory by holding the shares… the law provides a remedy."

This case is significant because it is perhaps the only clear Supreme Court decision on the issue of locus standi of a contributory to bring a petition for winding up. The case now conclusively settles that Section 439(4) is an exhaustive code on the subject of winding up by contributories; and in order to present a petition for winding up, a contributory must be able to bring itself within the wordings of the categories mentioned in Section 439(4)(b); with all the categories being construed according to a strict literal meaning.

- Act requiring special majority
- Wrongdoers in control
- Individual membership rights
- Oppression and Mismanagement

A mere apprehension that the minority shareholders will be oppressed in future is not sufficient to invoke this section - Krishna Prasad v. Andhra Bank Ltd.

In Ramashankar Prasad v. Sindri Iron Foundry (P) Ltd it was held that a position under s.397 would be maintainable even if the oppression was of a short duration and of a singular conduct if its effects persisted indefinitely. It is well-settled that the directors could not utilise the fiduciary powers over the shares purely for the purpose of destroying an existing majority or creating a new majority. If the power to issue further shares was exercised by the directors, not for the benefit of the company, but simply and solely for the purpose of consolidating and improving their voting power to the exclusion of the existing majority shareholders, such use of the power could not be allowed, it being a power of fiduciary nature delegated by the company to the Board of Directors to be used for the benefit of the company.

Once the new Companies Act is enacted, companies are supposed to be more vigilant in complying with the

corporate regulations and they may have to very often face litigation by the creditors and members before the National Company Law Tribunal. As per the clauses in the new Companies Bill, 2010, the National Company Law Tribunal can entertain applications from any member/s and creditor/s to order investigation into the affairs of the Company.

On the same footing, the National Company Law Tribunal can entertain applications raising the issues of oppression and mismanagement even if the members are not holding a qualified percentage of shareholding to file the application. Now, under section 399 of the Companies Act, 1956, members holding 10% shares or any hundred members can file an application under section 397/398 of Companies Act, 1956 and the Company Law Board can pass any orders under section 397/398 of the Companies Act, 1956 in order to put an end to the matters complained of or in order to regulate the affairs of the Company. Once the new Companies Act comes into existence, then, even the members holding only 5% shares can file an application under section 397/398 of the Companies Act, 1956 along with an application asking for exemption from holding the requisite percentage of shares to seek relief on the ground of oppression and mismanagement.

However, when it comes to creditor or creditors right to get a relief against the Company directly without investigation, due care is taken in the Act and the National Company Law Tribunal can only pass certain specific orders like restraining to act based on the resolution etc.

Meaning of Oppression

In a company, the majority of shareholders always have an edge over the minority. The law has not defined oppression for purposes of this section, and it is left to Courts to decide on the facts of each case whether there "oppression" under section 397 has been committed or not. Although the word 'oppressive is not defined, it is possible, by way of illustration, to figure a situation in which majority shareholders, by an abuse of their predominant voting power, are' treating the company and its affairs as if they were their own property' to the prejudice of the minority share-holders.

In a landmark case of Elder v. Elder and Watson Ltd., (1952) S.L.T. 112 Lord Cooper, the term 'oppression' was defined in the following words, "the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to the company is entitled to rely." In simple words, oppression can be explained as, not complying with the accepted standard of integrity and fair play that a company is expected to follow.

It also includes showing disregard to the interests of the minority shareholders. An unfair behavior is considered as oppression if it persists for long. Oppression means exercise of power in an unjust manner. In Scottish Co-operative Whole Sale Society Ltd. V. Meyer, (1958) 3 All ER 66 (HL) it was held that oppression is the lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members or to public interest.

The remedy under s. 397 is an alternative to winding up. The interests of the company are paramount in moulding the relief. Where each side is equally strong, and one is unable to oppress the other, there may be a deadlock but not oppression. It is not a case for winding up. Under section 397 the members of a company who comply with the conditions of Section 399 can make an application to the Court for relief under Section 402 of the Act if the affairs of a company are being conducted in a manner oppressive to any member or members including any one or more of those applying. The Court has power to make such orders under section 397 read with section 402 as it thinks fit, if it comes to the conclusion that:

A. the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive of any member or members; In N.R.Murty v. Industrial Development Corporation of Orissa, it was observed that the concept of "public interest" takes the company outside the conventional sphere of being a concern in which the shareholders alone are interested. It emphasizes the idea of the company functioning for the public good.
B. However, it is important to note that it is difficult to sustain an application under section 397on the ground of being prejudicial to public interest as the condition in clause(b)of subsection(2) cannot be satisfied in such case, as conducting the affairs of a company in a manner prejudicial to public interest cannot be a just and equitable ground for ordering the winding up of the company, unless it should be considered illegal or opposed to public policy.

Clause(h) to section 433 provides for winding up if the company has acted against the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality. It has been held that proceedings by a company against a government company for recovery of huge amounts due from it have been held to be enforcement of contractual rights and not an act against public interest-Maharashtra Power Development Corporation Limited v. Dabhal Power Company. In the same case, the Bombay high court, on appeal, observed that to invoke section 397 proof has to be established that the affairs of a company are being conducted in a manner prejudicial to public interest or in a manner oppressive to the complainant.

According to the dictionary meaning, oppression is any act exercised in a manner burdensome, harsh and wrongful. Oppression under section 210 (the corresponding section of the English Companies Act of 1948 [sections 459-461 of the Act of 1985]may take various forms. The term 'oppression' is not specifically defined in the Companies Act. Its interpretation may be extracted from the judicial pronouncements of case-laws. However, inefficient management will not amount to oppression though it may amount to mismanagement under section 398. Nor will oppression not relating to the company's affairs but directed towards a third person come under this section Kanika Mukherji v. Rameshwar dayaldubey. Where a majority of members exercise their rights as shareholders in the conduct of the company's affairs, the fact that there is oppression, lapse or impropriety on the part of an officer not pertaining to or unconnected with the exercise of voting rights by a majority of shareholders, will not justify invocation of jurisdiction under section 397-Chaturgun Ram Maurya v. U.P. Builders(p) Ltd.

Oppression may take different forms and need not necessarily be for obtaining pecuniary benefit. It may be due to a desire to obtain power and control, or be merely vindictive. In Re, H R Harmer Ltd. Where no private Agreement or understanding among members of a pvt. Company as to appointment of directors is provable, the fact that the majority shareholders appointed all directors does not amount to oppression VM Rao v. Rajeshwari. Unwise, inefficient or careless conduct of a director in the performance of his duties cannot give rise to a claim for relief under s.397. The person complaining of oppression must show that he has been constrained to submit to conduct which lacks in probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as a shareholder S.P.Jain v. Kalinga Tubes. The facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, and hat to wind up the company would unfairly prejudice the petitioners.

Section 397

This section gives the provision to apply to Tribunal (substituted for 'Company Law Board' by the Companies Second Amendment Act, 2002) for relief in cases of oppression. Subsection (1) of section 397 states that any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including anyone or more of themselves) may apply to the Tribunal for an order under this section, provided such members have a right so to apply under section 399.

The 'affairs of the company are being conducted' suggests prima facie a continuing process and is wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company, whether de facto or de jure. Subsection (2) of section 397 has 2 clauses:

- Clause (a) of subsection (2) states that if, on any application under subsection (1), the Tribunal is of the opinion that the company's affair are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members, the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.
- Clause (b) of subsection (2) says that if, on any application under subsection (1), the Tribunal is of opinion that to wind-up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up, then the Tribunal may with a view to bringing to an end the matters complained of, make such order as it thinks fit.

Prejudicial To Public Interest

The words "In a manner prejudicial to public interest" were inserted in section 397 and also in section 398 and section 408, by the Companies Amendment Act of 1963. The insertion of these words provides for the court or the Central Government to have jurisdiction to interfere in cases where even though there may be no prejudice to any shareholders but yet may be prejudicial to public interest.

The meaning of 'Public Interest' is an elusive abstraction, meaning general social welfare or 'regard for social good' and implying 'interest of the general public in matters where regard for the social good is of the first moment'. In State of Bihar v. Kameshwar Singh, it was observed that the expression is not capable of precise definition and has not a rigid meaning, and is elastic and takes its colour from the statute in which it occurs, the concept varying with the time andstate of society and its needs. The expression cannot be considered in vacuo but must be decided on the facts and circumstances.

In N.R.Murty v. Industrial Development Corporation of Orissa, it was observed that the concept of "public interest" takes the company outside the conventional sphere of being a concern in which the shareholders alone are interested. It emphasizes the idea of the company functioning for the public good. However, it is important to note that it is difficult to sustain an application under section 397on the ground of being prejudicial to public interest as the condition in clause(b) of subsection(2) cannot be satisfied in such case, as conducting the affairs of a company in a manner prejudicial to public interest cannot be a just

and equitable ground for ordering the winding up of the company, unless it should be considered illegal or opposed to public policy.

Clause(h) to section 433 provides for winding up if the company has acted against the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality. It has been held that proceedings by a company against a government company for recovery of huge amounts due from it have been held to be enforcement of contractual rights and not an act against public interest.

Relief under Section 397 Not Available under the following situations:

- Where there are minor acts of mismanagement e.g. Where passengers traveling without tickets on a company's buses were not checked or where the petrol consumption by a transport company was excessive. Negligence & inefficiency, even assuming that these are proved, do not amount to oppression or mismanagement as contemplated by the act - Mohta Bros. Vs Calcutta Landing & Shipping Limited
- Where a shareholder holding 30% of shares of a company is denied access to or inspection of books of accounts of the company. This is because this right is recognized by the Companies Act - Lalita Rajya Laxmi Vs. India Motor Company.

Acts held as Oppressive

Looking to the various judicial pronouncements, some of the acts amounting to oppression may be summarised as under:-

- Not calling a general meeting and keeping shareholders in dark
- Non-maintenance of statutory records and not conducting affairs of the company in accordance with the Companies Act
- Depriving a member of the right to dividend
- Refusal to register transmission under will
- Issue of further shares benefiting a section of shareholders
- Failure to distribute the amount of compensation received on nationalisation of business of company among members, where required to be so distributed

Acts held as not Oppressive

- An unwise, inefficient or careless conduct of director
- Non-holding of the meeting of the directors
- Not declaring dividends when company is making losses
- Denial of inspection of books to a shareholder
- Lack of details in notice of a meeting
- Non-maintenance/Non-filing of records
- Increasing the voting rights of the shares held by the management

The Supreme Court in Daleant Carrington Investment (P) Ltd. V. P.K. Prathapan, held that increase of share capital of a company for the sole purpose of gaining control of the company, where the majority shareholder is reduced to minority, would amount to oppression. The director holds a fiduciary position and could not on his own issue shares to himself. In such cases the oppressor would not be given an opportunity to buy put the oppressed.

Who can Apply

Section 397 of the Companies Act states the members of a company shall have the right to apply under Section 397 or 398 of the Companies Act. According to Section 399 where the company is with the share capital, the application must be signed by at least 100 members of the company or by one tenth of the total number of its members, whichever is less, or by any member, or members holding one-tenth of the issued share capital of the company. Where the company is without share capital, the application has to be signed by one-fifth of the total number of its members. A single member cannot present a petition under section 397 of the Companies Act. The legal representative of a deceased member whose name is again on the register of members is entitled to petition under Section 397 and 398 of the Companies Act.

Under Section 399(4) of the Companies Act, the Central Government if the circumstances exist authorizes any member or members of the company to apply to the tribunal and the requirement cited above, may be waived. The consent of the requisite no. Of members is required at the time of filing the application and if some of the members withdraw their consent, it would in no way make any effect in the application. The other members can very well continue with the proceedings.

Section 397 is of wide amplitude and that the court can grant appropriate relief even if no case of oppression is made out. Conditions for Granting Reliefs:

1. There must be "oppression"- The Punjab and Haryana High Court in Mohan Lal Chandmall v. Punjab Co. Ltd has held that an attempt to deprive a member of his ordinary membership rights amounts to "oppression". Imposing of more new and risky objects upon unwilling minority shareholders may in some circumstances amount to "oppression". However, minor acts of mismanagement cannot be regarded as "oppression". The Court will not allow that the remedy under Section 397 becomes a vexatious source of litigation.[6] But an unreasonable refusal to accept a transfer of shares held as sufficient ground to pass an order under Section 397 of the Companies Act, 1956.[7] Thus to constitute oppression there must be unfair abuse of the powers and impairments of the confidence on the part of the majority of shareholders.

2. Facts must justify winding up- It is well settled that the remedy of winding up is an extreme remedy. No relief of winding up can be granted on the ground that the directors of the company have misappropriated the company's fund, as such act of the directors does not fall in the category of oppression or mismanagement. To obtain remedy under Section 397 of the Companies Act, the petitioner must show the existence of facts which would justify the winding up order on just and equitable ground.
3. The oppression must be continued in nature – It is settled position that a single act of oppression or mismanagement is sufficient to invoke Section 397 or 398 of the Companies Act. No relief under either of the section can be granted if the act complained of is a solitary action of the majority. Hence, an isolated action of oppression is not sufficient to obtain relief under Section 397 or 398 of the Act. Thus to prove oppression continuation of the past acts relating to the present acts is the relevant factor, otherwise a single act of oppression is not capable to yield relief.
4. The petitioners must show fairness in their conduct- It is settled legal principle that the person who seeks remedy must come with clean hands. The members complaining must show fairness in their conduct. For ex-Mere declaration of low dividend which does not affect the value of the shares of the petitioner ,was neither oppression nor mismanagement in the eyes of law.
5. Oppression and mismanagement should be specifically pleaded- It is settled law that , in case of oppression a member has to specifically plead on five facts: what is the alleged act of oppression; who committed the act of oppression; how it is oppressive; whether it is in the affairs of the company and whether the company is a party to the commission of the act of oppression.

This provision has been the subject-matter of discussion in various cases of the Supreme Court. In Needle Industries case the Supreme Court held that even if the company petition fails to succeed and the complainant does not make out a case of oppression, the court is not powerless to do substantial justice between the parties. The Indian shareholders to pay the holding company a fair premium on the shares which were part of the rights issue in which the holding company could not participate as the notice did not reach them on time. This direction was issued to meet the ends of justice though the Court clarified that said direction was not the price of oppression, as there is no finding that the Indian shareholders were guilty of oppression.

Meaning of Mismanagement

Generally if the affairs of a company are being running by the Board in a manner which is prejudicial to the interest of the company or to the public it is said to be mismanaged. In Re, Albert David (1964) CWN 163, 172 it was held that if a company was being run by the Board in their own interest overriding the wishes and interest of the majority of shareholders is deemed to be mismanagement. Courts have also ruled that erosion of a company's substratum, abuse of fiduciary duties, and misuse of funds are all instances of mismanagement that come within the ambit of section 398. A requisite number of members (as laid down in sec. 399) may apply to the Company Law Board/ Tribunal for an order under this section and the Company Law Board/ Tribunal may grant relief. This section states that:

1. Any members of a company who complain:

- That the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company
- That a material change not being a change brought about by, or in the interests of, any creditors including debenture-holders, or any class of shareholders, of the company has taken place in the management or control of the company whether by an alteration in its Board of Directors, or manager or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company, may apply to the Company Law Board/ Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

1. If, on any application under sub-section (1), the Company Law Board/ Tribunal is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Company Law Board/ Tribunal may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

Section 398 has two facets

1. The first is the positive acts done by the management which result in prejudice being caused to the company;
2. Secondly, even where no action at all is taken by the management, such non-action results in prejudice being caused to the company. The non-conduct may arise for a variety of reasons including serious disputes amongst the Board of directors of the company which results in a complete deadlock or stalemate. In cases

falling under section 398(1)(b), action can be taken to prevent even likelihood of injury in future either to the interest of the company or to public interest.

Acts held as Mismanagement

1. Where there is serious infighting between directors.
2. Where Board of Directors is not legal and the illegality is being continued.
3. Where bank account(s) was/were operated by unauthorised person(s).
4. Where directors take no serious action to recover amounts embezzled.
5. Continuation in office after expiry of term of directors.
6. Sale of assets at low price and without compliance with the Act - Sale of assets at low price and without compliance with the Act—In Re Malayalam Plantations (India) Ltd. One of the estates of a tea and rubber plantations company was sold by the director at a low price to another tea plantation company without complying with the requirements of s.293(1) which demands approval by shareholder and without giving adequate notice under section 173 and relevant information giving delivery of possession before general body meeting and accepting consideration in instalment. It was held to be mismanagement.
7. Violation of Memorandum.
8. Violation of statutory provisions and those of Articles.
9. Company doomed to trade unprofitably - Where a set of properly appointed directors were not permitted to join or function as director, the court said that the complaint of such appointees could be regarded as a symptom of mismanagement and entertained a petition under section 398 for providing appropriate relief.—Ador-Samia Ltd. V. Indocan Engineering Systems Ltd(1999).

In Re Clive Mills Company Ltd., the court said –It is not only in the case of fraud, but in case of all other allegations relating to mismanagement, misappropriation or other improper conduct with which a party is charged in applications under sections 397 and 398 of the Act, full particulars must be set out in order to enable the party charged to understand what he is charged with, and also to enable him to answer such charges.

Acts held as not Mismanagement

1. Building up of reserves or non-declaration of dividend especially when it does not result in devaluation of shares.
2. Merely because company incurs loss, mismanagement can't be alleged.
3. Arrangement with creditors in company's bonafide interest.
4. Removal of director and termination of works manager's services.

Scope of Provisions

Dealing with the scope of the provisions dealing with the 'oppression and mismanagement' under Companies Act, 1956, the Hon'ble Bombay High Court in Mauli Chand Sharma and another Vs. Union of India, (1977) 47 Com Cases 92,has held that:

"chapter II of the Act, which includes section 255, deals with corporate management of the company through directors in normal circumstances, while Chapter VI, which contains sections 397, 398 and 402, deals with emergent situations or extraordinary circumstances where the normal corporate management has failed and has run into oppression or mismanagement and steps are required to be taken to prevent oppression and/or mismanagement in the conduct of the affairs of the company. In the context of this scheme having regard to the object that is sought to be achieved by sections 397 and 398 read with sections 402, the powers of the court under can not be read as subject to the provisions contained in the other chapters which deal with normal corporate management of a company. Further, an analysis of the sections contained in Chapter VI of the Act will also indicate that the powers of the court under sections 397 and 398 read with section 402 can not be read as being subject to the other provisions contained in sections dealing with usual corporate management of a company in normal circumstances.

The topic or subjects dealt with by sections 397 and 398 are such that it becomes impossible to read any such restriction or limitation on the powers of the court acting under section 402. Without prejudice to the generality of the powers conferred on the court under these sections, section 402 proceeds to indicate what types of orders the court could pass. Under clause (a) of section 402, the court's order may provide for the regulation of the conduct of the company's affairs in future and under clause (g) the courts order may provide for any other matter for which in the opinion of the court it is just and equitable that provision should be made.

An examination of the aforesaid sections brings out two aspects; first, the very wide nature of the power conferred on the court, and secondly, the object that is sought to be achieved by the exercise of such power, with the result that the only limitation that could be impliedly read on the exercise of the empower would be that nexus must exist between the order that may be passed thereunder and the object sought to be achieved by those sections and beyond this limitation which arises by necessary implication it is difficult to read any other restriction or limitation on the exercise of the court's power.

Further, section 397 and 398 are intended to avoid winding up of the company if possible and keep it going while at

the same time relieving in minority shareholders from acts of oppression and mismanagement or preventing its affairs being conducted in a manner prejudicial to public interest and, if that be the objective, the court must have power to interfere with he normal corporate management of the company, and to supplant the entire corporate management, or rather, mismanagement, by resorting to non-corporate management which may take the form of appointing an administrator or a special officer or a committee of advisers, etc., who would be in charge of the company".

The scope of the Section 397 is well explained by the Supreme Court in Shanti Prasad Jain V. Kalinga Tubes Limited' (1965) 35 Com cases 351 in which it was held that it is not enough to show that there is just and equitable cause for winding up the company through that must be shown as a preliminary to the application of Section 397. It must be further shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority in the management of company's affairs and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder.

Simultaneous Jurisdiction

Explaining a to how the shareholders are entitled to approach Civil Court or Arbitrator at times and as to how the CLB too has power to look into the issue, the Court in CDS Financial Services (Mauritius) Limited Vs. BPL Communications Limited and others, (2004) 121 Comp Cases 375, has held that:

"when there is no express provision excluding the jurisdiction of the civil courts, such exclusion can be implied only in cases where a right itself is created and the machinery of enforcement of such right is also provided by the statute. If the right is traceable to the general law of contracts or it is a common law right, it can be enforced through the civil court, even though the forum under the statute also will have jurisdiction to enforce that right.

Sections 397, 398 and 408 of the Companies Act, 1956, do not confer exclusive jurisdiction on the company court to grant reliefs against oppression and mismanagement. The scope of these sections is to provide a convenient remedy for minority shareholders under certain conditions and the provisions therein are not intended to exclude all other remedies".

Arbitration and Relief Under Section 397 or 398

It has been held by Delhi High Court In re: Kare Pvt. Ltd. (1977) 47 Com cases (276) that a provision in the articles of association of a company for reference of a disputes between the company and its directors, between the directors or between any members of the company or between the company and any person cannot oust the jurisdiction of the Court to try a petition by a member for winding up of the company under Section 433 or a petition against oppression and mismanagement under Section 397 or 398. Those sections confer statutory rights on the shareholders of the company and any provision repugnant to such rights is rendered void by Section 9(g) of the Companies Act. The Court cannot stay such petitioners under Arbitration Act.

In 'Prime Century City Developments Pvt. Ltd. V. Ansal Buildwell Ltd. - [2003] 113 CC 68 – it was held that the existence of an arbitration clause cannot oust the jurisdiction of the Company court exercising its discretionary powers under Sections 433 and 434 of the Act.

In 'Manavendra Chitnis V. Leela Chitnis Studios P. Litd., -[1985] 58 CC 113 – it was held that "merely because there is an arbitration clause or an arbitration proceeding, or for that matter an award, the court's jurisdiction under Sections 397 and 398 of the Companies Act, 1956, cannot stand fettered. On the other hand, the matter which can form the subject-matter of a petition under Sections 397 and 398 cannot be the subject-matter of arbitration, for an arbitrator can have no powers such as are conferred on the court by sections such as Section 402. Furthermore, the scope of a petition for setting aside the award and the petition under ss.397 and 398 are wholly different."

Right To Complain Mismanagement

The following members of a company shall have the right to apply as above:

- in the case of a company having a share capital, not less than one hundred members of the company or not less than one tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares
- in the case of a company not having a share capital, not less than one-fifth of the total number of its members.
- Where any share or shares are held by two or more persons jointly, they shall be counted only as one number

- Where any members of a company, are entitled to make an application, any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them
- The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorize any member or members of the company to apply to the Company Law Board, notwithstanding that the above requirements for application are not fulfilled
- The Central Government may, before authorizing any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the Court dealing with the application may order such member or members to pay to any other person or persons who are parties to the application
- If the managing director or any other director, or the manager, of a company or any other person, who has not been impleaded as a respondent to any application applies to be added as a respondent thereto, the Company Law Board may, if it is satisfied that there is sufficient cause for doing so, direct that he may be added as a respondent accordingly

In Maharani Lalita Rajya Lakshmi M.P. v. Indian Motor Co. (Hazaribagh) Ltd, reported in AIR 1962 Calcutta 127 cited by Mr. S. B. Mookerjee, learned Sr. Advocate said that refusal to give access to or inspection of the books of account of the company was not oppression as a shareholder had no such right. Allowing such inspection, would, according to the court, be asking the directors to do something they were not obliged to do in law and granting something to the shareholders which they were not obliged to receive. That exposition of law is, in my opinion, very relevant to adjudge whether a company can be compelled to disclose the documents asked for in this case.

Notice to be given to Central Government of application

The Company Law Board must give notice of every application made to it as above to the Central government, and shall take into consideration the representations, if any, made to it by that Government before passing a final order.

Right of Central Government to apply

The Central Government may itself apply to the Company law Board for an order, or because an application to be made to the Company Law Board for such an order by any person authorized be it in this behalf.

Powers of Tribunal

Under Section 402 of the Companies Act ,1956 the powers of the Tribunal under Sections 397 and 398 are very wide. These are:

A. the regulation of the conduct of the company's affairs in future
B. the purchase of the shares or interests of any members of the company by other members thereof or by the company
C. in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital
D. the termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other namely - the managing director; any other director and the manager

Upon such terms and conditions as may, in the opinion of the Company Law Board, be just and equitable in all the circumstances of the case ;the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned; the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference. Any other matter for which in the opinion of the Company Law Board it is just and equitable that provision should be made.

Effect of Alteration of Memorandum or Articles of Company by Order

Where an order makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any permitted in the order, to make without the leave of the Company Law Board, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles. The alterations made by the order shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act.

A certified copy of every order altering or giving leave to alter, a company's memorandum or articles, must within thirty days after the making thereof, be filed by the company with the Registrar who shall registrar the same. If default is made in complying with the above provisions, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

Powers of Central Government To Prevent Oppression or Mismanagement

The Central Government may appoint such number of persons as the Company Law Board may, by order in writing, specify as being necessary to effectively safeguard the interests of the Company or its shareholders or public interests, to act as directors thereof for such period not exceeding 3 years on any one occasion as it deems fit if the Company Law Board.

On a reference being made to it by the Central Government ; or on an application of not less than one hundred members of the company or of members of the company holding not less than one-tenth of the total voting power therein, is satisfied, after such inquiry as it deems fit to make, that it is necessary to make the appointment or appointments in order to prevent the affairs of the company being conducted either in a manner which is oppressive to any members of the company or in a manner which is prejudicial to the interests of the company or to public interest.

However, in lieu of passing order as aforesaid, the Company Law Board may, if the company has not availed itself of the option given to it of proportional representation to minority shareholders on the Board of the company, direct the company to amend its articles in the manner provided section 265 and make fresh appointments of directors in pursuance of the articles as so amended within such time as may be specified in that behalf by the Company Law Board.

In case the Central Government passes such an order it may, if thinks fit, direct that until new directors are appointed in pursuance of the order aforesaid, not more than two members of the company specified by the Company law Board shall hold office as additional directors of the company. The Central Government shall appoint such additional directors on such directions. The person appointed as a director by the Central Government in accordance with the above provisions, need not hold any qualification shares or need to retire by rotation. However, his office as director may be terminated at any time by the Central Government and another person appointed in his place.

No change in the constitution of the Board of Directors can take place after an additional director is appointed by the Central Government in accordance with these provisions unless approved by the Company Law Board. The Central Government in such cases may also issue such directions to the company as it may consider necessary or appropriate in regard to its affairs.

Misuse of Provisions

Even now, some complain that the provisions of oppression and mismanagement are getting misused and a frivolous litigation is often filed creating enormous problems to the Company or the majority shareholders in the Company. We all know the legal position under section 397/398 of the Companies Act, 1956 and the changes from to time. The changes in the legal position under section 397/398 of the Companies Act, 1956 are as follows:

1. Initially, the members are supposed to establish a strict case against the Company for getting relief. It is also known that the oppression alleged should be 'harsh and burdensome etc.
2. According to me, earlier, the interpretation of section 397/398 of the Companies Act, 1956 was infavour of the majority shareholders in the Company and technicalities were often get emphasized. There are findings that the disputed facts can not be decided by CLB, there is a proposition with regard to 'consent' under section 399 and there is so much emphasis on the issue of 'continuity of the alleged acts' and also limitations on the powers of CLB has also been frequently highlighted.
3. Now, there is no much emphasis on technicalities under section 397/398 of the Companies Act, 1956 and the majority is asked to reply to the allegations in the Petition even if the majority feels that there is nothing in the Petition and it is motivated one.
4. The CLB can pass orders under section 397/398 of the Companies Act, 1956 even when there is no oppression and mismanagement in 'stricto senso'.
5. When it comes to appeal against the CLB's order under section 10 (F) of Companies Act, 1956, in the past, much emphasis was laid on 'substantial question of law'.
6. Now, it is settled that perversity becomes the 'question of law' and as such if the order passed by the Company Law Board under section 397/398 of the Companies Act, 1956 is contrary to facts or misinterpretation of law to the facts, then, appeal is very much maintainable under section 10(F).

There are two views when it comes to interfering with the functioning or internal management of the Company. There is a view that nothing happens if liberal interpretation is placed by the adjudicating authority and if the majority in the Company or the Company is asked to supply the demanded information or the copies of the documents. There is another view that the Company maintains secrecy in view of its business interests or in the interests of the shareholders and as such, there should be a strong prima facie case against the Company or the majority in the Company while passing any interim relief under section 397/398 of Companies Act, 1956. These different views on interpreting section 397/398 of the Companies Act, 1956 continues to be there and it will also be continued even after the new Companies Act is enacted.

What normally now happens is that the CLB may easily

entertain an application under section 397/398 of the Companies Act, 1956 and without going into the merits of the case, the CLB may ask the majority to supply the information sought by the minority shareholders or the applicants under section 397/398 of the Companies Act, 1956. Not agreeing with such proceeding and liberal process under section 397/398 of the Companies Act, 1956, the Calcutta High Court in AI Champdany Industries v. Blancatex A. G, CDJ 2011 Cal HC 557, was pleased to observe as follows: "Regulation 24 of the said regulations provide the powers to the board to order production of documents, as enumerated above. The qualification for filing an application under Section 397 and 398 of the Act is one tenth of the number of shareholders or 100 members whichever are less or by shareholders representing not less than one tenth of the issued share capital of the company provided that the applicants have paid the entire call amount.

When a Section 397 and 398 proceeding is admitted and heard by examination of witnesses, it becomes a proceeding in rem, as I have said before. Once the proceedings partake of that character the court or the Company Law Board, after satisfying itself that there is a prima facie case can direct the company or persons in control of it to produce documents mentioned in regulation 24 of the Company Law Board Regulation 1991. It should do so only upon such conviction, because the qualification to file this kind of an application is 10% of the shareholders or 100 members whichever is less and shareholders having 10% of the value of shareholding.

Then in that case each and every minority group of shareholders can by filing an application under Section 397, 398 compel the company to disclose its affairs to them, contrary to the other provisions of the Companies Act. Such order in my opinion can only be passed after the prima facie case is established.

Consent

An application under section 397/398 of the Companies Act, 1956 can be representative application too. It need not always be representative as any one or two shareholders can possess more than 10% shareholding in the Company. When it is representative, the members should give their 'consent' for approaching the Company Law Board under section 397/398 of the Companies Act, 1956. Many applications are usually filed in respect of closely held companies or family companies and a group is normally led by a prominent member in the group who will take all decisions on-behalf of the group. Under these circumstances, there may not be any problems with 'consent'.

However, where many members join together and consent for filing an application under section 397/398 of the Companies Act, 1956, then, there will be complications. Because an application under section 397/398 of the Companies Act, 1956 can lead to disastrous consequences in the Company at times. Hon'ble Delhi High Court in Omni India Limited and Others Vs. Balbir Singh, 1989 66 Comp Cas 903 Delhi, was pleased to observe as follows: "Examined in the light of these meanings and keeping in view the purpose for enacting section 399, we have no doubt, that the expression "consent in writing" used in section 399(3) means conscious approval of the action proposed to be taken by the persons to whom the consent has been given. We are also of the view that the writing itself should indicate that the persons who have signed the consent letters have applied their minds to the question before them and on application of minds have given consent for a certain action. Under section 402 of the Act, the court, on an application under sections 397-398 and without prejudice to the generalities of the powers of the court, can grant several types of reliefs.

If the Respondents in the application raise the issue pertaining to the consent in their reply statement or even orally before the Board at the initial stage, then, the petitioning members can convince the Board that all the members have applied their minds to the application. Even in the absence of any allegation and the consequent reply from the applicants, in my view, the Board can insist the applicants to address the issue.

In Pramod Kumar Mittal Vs. Andhra Steel Corporation Ltd, 1985 (58) CC 772, was pleased to observe as follows:

"We are further of the opinion that a section 397 application is a representative application in the sense that it is on behalf of 10% of the shareholders which is required to maintain such an application and if those shareholders who had given their consent come to oppose or make any application before the court, they have sufficient locus standi to be heard by the court and as such, in an appropriate case like the present, one has a right to be added as parties in their own names. In this case, inasmuch as Promode Kumar Mittal and other appellants were supporting Mohanlal Mittal in the application under section 397 before the court and inasmuch as Mohanlal Mittal was no longer prosecuting the section 397 application or opposing a particular transaction during the pendency of section 397 application of the Companies Act, we are of the opinion that the present appellants were entitled to be added as parties and not acceding to that prayer, the learned judge was in error.

Conclusion

Be that as it may, giving a prohibitive significance to area 397/398 of the Companies Act, 1956 isn't in light of a legitimate concern for the minority investors. It is likewise similarly obvious that the negligible suit abusing segment

397/398 of the Companies Act, 1956 is to be disheartened at the underlying stage itself thinking about the market elements and the effect.

The CLB can absolutely investigate the finished up procedures, at the same time, can not give an alternate finding on a similar issue closed by a Competent Court.

The Petitioners moving toward the CLB can allude to the finished up procedures; in any case, the applicants will most likely be unable to get a help with the comparative or same complaints brought up in the closed procedures.

Regardless of pendency of any procedures between the lion's share and the minority, the CLB can engage an appeal under segment 397/398 of the Act and the CLB will accept a suitable choice with regards to the issue of award of help or the practicality of a request under those conditions.

References

1. Pennington's Company Law, 5th Edition, 839.
2. Barsha Dixit, Winding Up of Company, Vinod and Kothari Company, ISBN: 6734-00234.
3. Galway & Salt Hill Tramways Co., In re [1918] 1 IR 62/521 LG 93.
4. New Kerala Chits & Traders (P.) Ltd. v. Official Liquidator [1981] 51 Comp. Cas. 601 (Ker.).
5. Gadadhar Dixit v. Utkal Flour Mills (P.) Ltd. [1989] 66 Comp. Cas. 188 (Ori.); Kiritbhai R. Patel v. Lavina Construction & Finance Ltd. [1999] 20 SCL 158
6. (McPherson 1964)
7. Ibid 4
8. [(1882) 20 Ch D 169]
9. (1901) 10 Bom LR 107]
10. AIR 1933 Mad 16]
11. Re Orissa Trunks & Enamel Works Ltd. (1973) 43 Comp. Cas. 503
12. Companies Act, 2013;An Analysis of Winding up under the IBC, 2016
13. S.272, Companies Act, 2013
14. S357
15. S 273Companies Act, 2013
16. 274
17. 277
18. 281
19. S 282
20. under section 282 of
21. 283
22. section 288of
23. 296
24. Section 299
25. 302
26. (section 344)
27. 347