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JUDICIAL RESPONSE TO WINDING UP.

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By

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Twentieth Century, specially after the 1st. World War may be called the era of the Corporations and the Companies. The modern corporations and companies are social and economic institutions and are touching every aspect of our life. During this period, industry in Corporate form has moved so speedily and sharply that it has moved from periphery to the very centre of our social and economic existence. Indeed it is not inaccurate to say that we live in a corporate society. Incorporation is a process of giving life to a company, winding up is a method whereby its life is ended. In the battle between two rival groups, one in favour of survival and another in favour of the end, we have before us, a huge number of judicial pronouncements laying propositions either in favour of survival or in favour of the end.

Section 433 to 483 of Companies Act, 1956 deal with the winding-up of Companies by the court. The object of winding up or liquidation of a company including a banking company, is that the assets of the Company should be realized and debts paid in according to their rights. The company is not dissolved immediately at the commencement of winding up. The corporate status and powers continues. Winding up proceeds dissolution. All proceedings consequent upon winding up order are off-shoots of the order.

The company may be wound up by the court on any of the six grounds specified in Section 433 of the Act, but to investigate the judicial trend towards the winding

up I have analysed the cases chiefly with regard to three grounds mentioned here which, according to me, are the main grounds for seeking reliefs for winding up by the applicants in courts of law.

1. INABILITY TO PAY DEBTS :

This is the most common type of application for winding up. A company is liable to be wound up if it is unable to pay its debts.

Evidence of inability is serving a notice under Section 434 of the Act and after expiry of the statutory period of 3 weeks a presumption of inability arises. A creditor who cannot obtain payment of his debt is entitled as between himself and the company ex debite justitioe to an order if he brings his case within the Act. He is not bound to give time. It is not a discretionary matter with the court, when a debt is established and not satisfied, to say whether the company shall be wound up or not. But ex debite justitioe doctrine has undergone considerable changes in the recent years. The response of the courts to winding up is very slow. The application of this doctrine for winding up if applied strictly will lead to hardships. At the beginning or early stages of Company statutes, if a company could not carry on its business or was insolvent or unable to pay its debts, it had to go out of business and be wound up. In that stage of juristic development, it was not considered as a part of job of the courts to help a company in difficulties. In course of time it was found that winding up created many problems and hardships, that some of the companies, private and public, some times had to face temporary difficulties which even though they were acute in nature, could be overcome after passage of time provided the company could survive the stress in the meantime. One of the reasons of relaxation of rigid formulae of ordering winding up for failure to make immediate payment is the change of method of business and change in the financial structure of modern companies. Due to various reasons it is the trend in the modern companies today to carry on business with a large amount of borrowed capital than with its own fund. In such companies it is not possible to make immediate payment if large proportions of debts are suddenly recalled. In such circumstances, there is a normal reluctance of courts to take a rigid line and a normal inclination to grant time. In Central Bank of India or MCKenzies Ltd.

(1977) Comp cases 306) the case adjourned by mutual consent for time to time for five years. The Cases of S.A.Savings & Financing Co.Ltd. (Company Petition No.2 of 1981), Thakur Paper Mills Ltd.(Company petition no.4 of 1981) Bihar Cable & Wire Industries Ltd.(Company petition no.5 of 1981), P.Foam & proceducts (P)Ltd. (Company petition no.6 of 1981), Gears and Machinery Internrtional (P) Ltd .etc. are the cases which were presented for winding up more than 2 years ago in Patna High Court but none of the petitions have been admitted and the cases are being adjourned from time to time in the Court's anxities tokeep the companies existence. This is the trend of . courts in majority of the cases which are presented before the courts for winding up.

Second ground on which the Courts attempt to avoid winding up of the Companies is by initiating and encourating compromises and arrangen mts. The Courts are constantly facilitating schemes of compromises and arrangements. The Courts are constantly facilitating schemes of compromise or some other settlement of claim.

In the case of Indian Hardware Industries Ltd, Versus S.K.Gupta (1981) Comp cases 51 (Delhi) in a proceeding for winding up before Delhi High Court Scheme was suggested which was sanctioned by the C court. The court further directed for holding general meeting for the proper working of Scheme. it has been that a Scheme which is sanctioned by the Court in course of winding up proceeding is an alternative mode or substitute for the proceeding Under winding up and court may stay the winding up for the purpose of giving effect to the Scheme.

In Vasant Investment Corporation Ltd. V.O.L., Colaba Land Mills Co.Ltd.,(1981) Comp.Cases 20 (Bom) the Bombay High Court has held that the court is given wide powers under section 391 of the Act to frame a Scheme for the revival of a company. Section 391 is a complete code under which the court can sanction a scheme containing all the alteration required in the structure of the company for the purpose of carrying out, The Scheme except reduction of share capital. In the aforesaid case Bombay High Court sanctioned the Scheme and stayed the winding up proceeding.

In Misri Lal Dharam Chand (P)Ltd. v.Patnaik Mines (P)Ltd., (1978) Comp Cases 494 (Orissa) winging up application was presented by an unpaid creditor before

the Orissa High Court. Amount had not been paid by the Company to the Creditor for over two years after statutory demand. Company sincerely trying to revive its business after a boad set back. The court held that in peculiar circumstances of the cases, it was appropriate in the interest of justice and keeping the interest of creditors in view, to direct winding up of the Company but to stay the order for 6 months to enable the Company to pay up the dues to the petitioner. If the dues are not satisfied within that time the winding up application would proceed in accordance with law.

And finally, the Supreme Court in S.K.Gupt V.K.P.J Jain (1979) Court cases 342 has held that the purpose underlying Section 392 of the Act is to provide for effective working of the Scheme of Compromise or arrangement once sanctioned over which the court must exercise continuous supervision and if over a period, there should arise obstacles, difficulties or impediment, to remove them again, not for any other purpose but for the proper working of the Scheme. To effecutate this purpose power of widest amplitude has been conferred on the High Court- and this is a basic departure from the Scheme of the U.K. Act in which provision analogous to S.392 is absent. The only limitation on the power of court is that all such directions that the court may consider appropriate to give to modify the scheme, must be for the proper working of the compromise or arrangement.

The Supreme Court in the aforesaid cas has futher held that unlike Section 391, Section 392 does not specify that a member or creditor or in the case of Company being wound up, its liquidator, can alone more the court Under Section 392. On the other hand, the Legislature uses the expression "any person interested in the affairs of the Company" which has wider denotation than a member or creditor or liquidators of a Company. In fact, the ambit of the power to act Under Section 392(3) can be gauged from the fact that the court can suo moto take action as contemplated Under section 392 (1) or it may act on the application of any person interested in the affairs of the company. If the court can sumoto act it is immaterial as to who drew attention of the court to a situation which neessitated courts' intervention, Where power is conferrred on the Court to take action on its own motion, information emanating from whatever

source which calls for courts' attention can as well be obtained from any person moving an application drawing attention of the court to a situation where it must act without questioning his credentials. This proponent has widened the ambit of compromise or arrangement in cases of winding up.

BONAFIDE DISPUTED DEBT :

Bonafide disputed debt is the most common defence on behalf of the companies against winding up application on the ground of companies inability to pay the debts. Most of the applications on this ground are rejected on this defence. Where a debt is bonafide disputed, non-payment of it cannot be treated as recklessness or neglect within the meaning of this action. In such a case the courts generally act on the principle that a winding up petition is not to be used as a machinery to try a common law action, and that a petition for a winding up order to enforce payment of a debt which is bonafide dispute is an abuse of the process of the court.

In the case of *Sir Kameshwar Singh* (23 CWN 844) the court held if the company is solvent and there are materials before the court that the debt is bonafide disputed the winding up application must be treated as an abuse of process of court.

In *re Bharat Vegetable Products*, 56 CWN 29 the court held that if dispute as to a large part of the debt makes the debt bonafide disputed then an application for winding up based on such a debt is not maintainable.

In *Ram Kumar Agrawala V. Buxar Oil & Rice Mills Ltd.* (AIR 1960 Cal. 764) The Calcutta High Court has gone further ahead and has held that a dispute which cannot be resolved on affidavits should not be subject matter of winding up application and a winding up order cannot be made on applications.

In *Amalgamated Commercial Trading Co. Ltd. V. Krishna Swami* (35 Comp. Cases 456) in an application for winding up based on declaration of dividend it was a good defence for the company to submit that they were advised by lawyers that the declaration