



Role of liquidator in winding up process

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Abstract

When a company incurs heavy debt so as to render it infeasible to carry on the affairs a grave menace surfaces whereby the process of winding up becomes inevitable and, as such, the matters related to debts, obligations and surplus, if any be settled. It is to this end that the liquidator comes to play a pivotal role therein.

Keywords: liquidator, independent, high court

Introduction

As for the appointment of a liquidator there is no specific provision for an independent or third party save the official liquidator attached to the High Court. However, the Central Government is empowered to appoint one or even more assistant liquidators for the convenience of the official liquidator^[1]. The liquidator is an agent of the company for the purpose of winding up and all ancillary work related thereto. It goes without saying that a liquidator is there to bring about concord and balance between the company and creditors. He has to act in the interest of all the persons related with the company.

Section 275 provides for appointment of an official liquidator as provisional liquidator for the company. He is purely an officer of the court. No sooner is the winding up order passed, he becomes the official liquidator. It is essential to mention that a liquidator acts in the name of the company and not in his own name. He can, sometimes incur personal liability. It comes to happen that sometimes the share or the debts augment to this extent or the cost exceeds the assets of the company and in such cases the official liquidator incurs personal liability^[2].

Categories of liquidator

There are two types of liquidator:-

i) Official liquidator

As a matter of fact in cases of winding up via court (tribunal) section 275 provides for appointment of liquidator for the

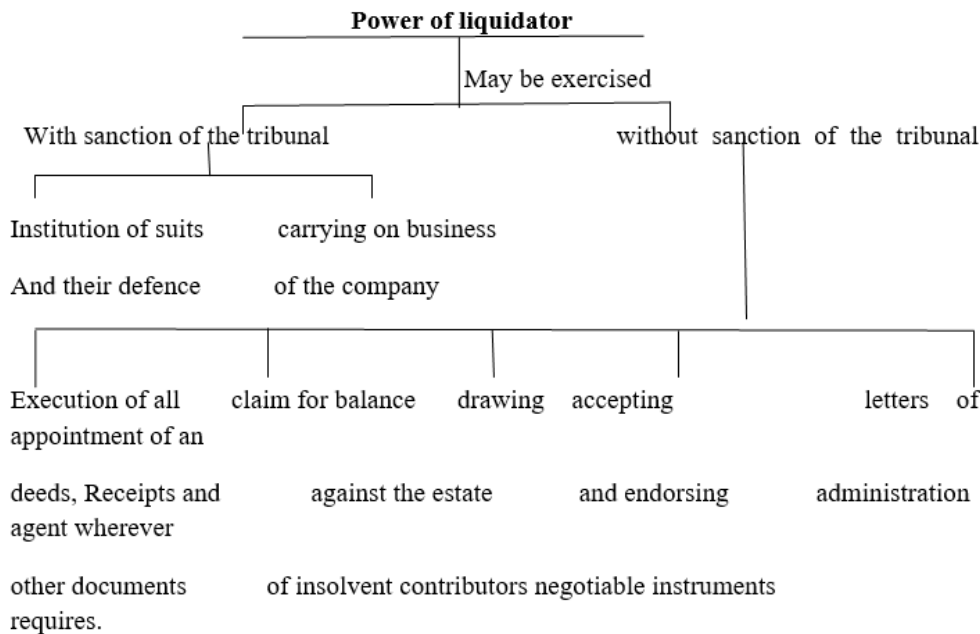
purposes of conducting the winding up proceedings. For that period he becomes the official liquidator and intimation to this effect is communicated to the company to present, its representation. However, it has been held by the Kerala H.C. that where there is any iota of doubt or apprehension that the said company is not intent to emerge true to the interest of the creditors and shareholders, it may ignore the necessity of giving an opportunity to the company for the representation^[3]. The official receiver of the district court is considered the official liquidator or any such person appointed by the central government shall be attached with the district court.

ii) Interim or provisional liquidator

There is no distinction between provisional liquidator and the one looking after the winding up proceedings. Both of them render the same duties and are at par (equal) as far as their jurisdictions are concerned. However, provisional liquidator is appointed by the tribunal on the demand of the creditor, or contributory or the company. In certain cases where no application is made to the company, the tribunal is free to dispense with the notice. It has been observed in catena of decision that a provisional liquidator is appointed by the tribunal when it becomes crystal clear that the affairs of the company cannot go on^[4].

Needless to say that the tribunal is empowered to inhibit the power of the provisional liquidator and any such order of his being appointed or not being appointed, there is no recourse to the Supreme court and in the capacity of being an interlocutory order there is no such provision.

Power and duties of company liquidator



It is crystal clear that the powers of the liquidator are wide and have been endowed by the legislature enactment. The company liquidator shall take into his custody forthwith all such or any of the property or the claims where for he is entitled. For the sake of convenience we may categorise it under the following heads –

a) Those powers which are to be excised with the sanction of the court. There powers are expressly or impliedly to be excised with the leave of the tribunal. There can be no strait- jacket formula or criteria to make an estimate of the wide powers accorded by the enactment. But in *Dr. Sailendaranath sinha v. Jasoda dulal Adhikary*^[5] the court is observed that the powers of the liquidator proceeds with the sanction of the court (Now tribunal). The court has power to give directions to the liquidator for any proceedings. But if the liquidator took action without a direction of the court that action would not be illegal or invalidate a prosecution. Hence, if the liquidator has done any act without the sanction of the court (Now tribunal) would not be illegal.

In common parlance the company liquidator may sue or institute or defend any prosecution, suit, all legal proceedings in the name of and on behalf of the company.

- Create factors and situation for the enhancement of favourable conditions in the interest of the business of the company. However, such a measure is not to be for promoting the profit of the company. In *Ravidra Ishwardas Sethna v. Official liquidator*, High Court Bombay^[6], the Apex Court held that the liquidator has undoubtedly the power to carry on business of the company if in is necessary for the beneficial winding-up of the company. But this power can be exercised not yet the discretion of the liquidator but with the sanction of the Court.
- Execute and do any act or deed and receive receipts and

any such document related thereto in the name of and under the seal of the company.

- Sell the moveable and immoveable property and actionable claims of the company by way of public auction and private contract with intent to transfer such property or claim to any person or corporate body.

On the case of *Virendra singh Bhandari v. M Nandlal Bhandari & Sons*^[7] Madhya Pradesh High Court specified that - the property of the liquidator under liquidation will not be leased by the liquidator without the permission of tribunal. Liquidators will have to get permission of the tribunal while leasing the property because after the liquidation, the property is kept in the custody of the tribunal.

- Raising security of the assets any money or fund.
- Invite and settle all or any of the creditors, employee or any claimant. He is to even conduct the distribution of the companies Act 2013.
- Appoint, as per the requirement necessity, any pleader, advocate or attorney to assets him in the furtherance of his duties^[8]. In *Allahabad bank v. Bengal paper mills company ltd. & others*^[9] the apex court set aside the sale of assets and properties of winding up company in as much as the valuation of the properties was suspicious and there was not adequate publicity of the sale. The court observe that the interest of the unsecured creditors was of grave concern as compared to the reemployment of 1700 of the company.
- Execution of negotiable instrument, the company liquidator is empowered to drawn accept or endorse and negotiable instruments of the nature of cheque, promissory note or bill of exchange in the name of and on behalf of the company as if the same had been executed by the company during transaction^[10].
- Inspect the records and returns of the company on the files

of the registrar or any other authority.

- Sing, execute and verify all such deeds and documents as he deems fit for winding-up, distribution of assets, discharge of his duties and obligations in the capacity of company liquidator.

Not that the company liquidator is to become capricious or whimsical in rendering his duties & functions for he is subject to the virus of the tribunal or court. In *Home and Colonial Insurance Co. Ltd. (in re)* ^[11] the Chancery Court stated that the liquidator must be very careful in discharge of his duties. So high standard of care and diligence is required from a liquidator in winding-up a company. He is paid for his services. In every case of doubt or difficulty, he must submit the matter to the liquidating Court and option its guidance. In this case liquidator was held negligent in admitting a proof of large debt without taking legal advice or applying for directions, and hence, he was liable to pay compensation to the company.

b) Powers exercisable without the leave of the tribunal ^[12]

The following of the powers of the liquidators envisaged in sec. 290(1) of the companies Act, 2013 whereby he can exercise his powers without of the sanction of the court –

- Execute & seal documents can the deeds on behalf of the company.
- Inspects the records & returns of the company or the files of the Registrar of the companies for free.
- Prove his claim in the insolvency of any contributory and receive pecuniary benefits or dividends.
- Drawn, accept and endorse any bill of exchange and promissory note on behalf of the company.
- Take out letters of administration in his official name in cases of deceased contributory.
- Appoint agent in furtherance of all such duties and functions where for he is authorised.
- May file income tax returns, he being the principal officer of the company ^[13].
- Sale of property by auction or a private contract. The liquidator can sale the moveable or immovable property and the actionable claims of the property by public auction or private contract. In the said process he is empowered to transfer the whole or part of thereof to any person or body corporate. Every sale such conducted by the official liquidator or an agent (as directed by the judge), subject to such terms and conditions as the court deems fit under the circumstances of the case. It is not worthy that the official liquidator cannot recourse to the sale proceedings without the directions of the court. It is for the court to give directions only when a summons has been served upon the petitioner creditor for he must have an opportunity of being heard and in this way the principle of natural justice are to be kept in consideration. If the court does not afford such an opportunity to the aggrieved petitioner, any such direction the effect of sale proceedings shall be null and void ^[14].

Removal and replacement of liquidator section 276

Section 276 of the 2013 Act provides the grounds on which the tribunal may remove the provisional liquidator or the company liquidator as liquidator of the company. The ground on that the tribunal may remove the liquidator of the company on any of the following grounds, namely;

- a- Misconduct;
- b- Fraud or misfeasance;
- c- Professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;
- d- Inability to act as provisional liquidator or as the case may be, company liquidator;
- e- Conflict of interest or lack of independence during the term of his appointment that would justify removal.

Section 276 of the 2013 Act brings accountability in the functioning of company liquidators. In addition to the continuing obligation to disclose any grounds which could lead to a conflict of interest or lack of independence, section 276 of the 2013 Act sets out specific grounds in assessing not only the integrity of the company liquidator, but also his or her professional competence. The importance of section 276 of the 2013 Act cannot be emphasize enough, and the effectiveness and credibility in the functioning of the company liquidators will depend on the effective implementation of this section. The reference to company liquidator under section 275(1) and section 360(2) of the 2013 Act includes the official liquidator. Section 276 of the 2013 Act, it is submitted, would also bring the functioning of the official liquidator in the winding up of companies within the purview of the specific obligations and responsibilities laid out in this section of the 2013 Act.

To hand over the report by the liquidator to tribunal

Under the section 281 & 288 of the companies Act, 2013 provided the manner and procedure to hand over the report by the liquidator to the tribunal.

As the section 281 of 2013 Act, company liquidator files a report on affairs of the company, which has to be done within 60 days of winding-up, which concludes the all asset, liabilities, debts owed for the company, capital details of contributors dues, unpaid, intellectual property, contracts holding details, case filed for/against and other information that court may consider necessary to include.

As mentioned under section 281(2)_ of 2013 company Act, to include their report information for company's up gradation and his commencement, that whether any fraud information of the company or any in the management.

Section 281 of the 2013 Act departs from section 455 of 1956 Act, in providing a more decisive and time bound sequence for the filing of the report and the steps to be taken pursuant to the information provided in the report. The utility of the report of the liquidator after winding up cannot be overstated. The report provides the course of action for the winding up of the company, and section 281 lists specific items of information required to be included and sets specific timeline for provision of the report under this section 281 of the 2013 Act also provides that the company liquidator shall make a report on

the viability of the business of the company or the steps which, in his opinion, are necessary for maximising the value of the assets of the company.

Section 288 provide that the company liquidator shall make quarterly reports to the tribunal with respect to the progress of the winding up of the company. Section 288 of the 2013 Act mandates the company liquidator to make periodical reports to the tribunal, which should be filed at least once a quarter, with respect to the progress of the winding up. The form and manner of the report will be as prescribed.

The clause further provides that the tribunal has the powers to review its orders on the application of the company liquidator and make modifications to previous orders passed.

Conclusion

On the basis of above, we can say that the liquidator is an agent of the company and a trustee for the body of the creditors of the company. The liquidator is an agent of the company for the purpose of the winding-up. In this charge of his duties he looks into the interest of the creditors, contributories and the company during the proceeding of winding-up the liquidator is an officer of the tribunal but thereby he does not become the representative of the tribunal, which was held in *Ram Lal Raja Ram v. G.D. Mehrotra & Co.*(AIR 1958 All 447(1958) 28 Comp Cas 587:ILR(1958) 1 All 549.) in this case it has been also stated that he is representative of the company only which is being wound-up, with a status recognised by the statute and powers and functions which are not identical with those of the court.

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