

No. 51/14/2012-Insolvency Section  
Government of India  
Ministry of Corporate Affairs

5<sup>th</sup> floor, 'A' wing,  
Shastri Bhawan, New Delhi -110 001.  
Dated 27<sup>th</sup> March, 2012

To,

All Stakeholders

Subject : Draft Manual on the functioning of Official Liquidators.

Sir,

The Official Liquidators (OLs) are appointed under Section 448 of the Companies Act, 1956 and on winding up order being made in respect of company; Official Liquidator becomes Liquidator of the company under section 449 of the Companies Act, 1956.

2. In order to streamline the functioning of OLs and improving their efficiency and bringing uniformity in their working, this Ministry is considering preparing a Manual on the functioning of OLs. Various stakeholders from corporate sector, professionals such as Advocates, Company Secretaries, Chartered Accountants, Valuers etc. are connected with the functioning of the OLs. In addition, members of citizens, opinion makers, practitioners and theorists in the field of administrative and legal reformers may also be interested in these reforms

3. All are welcome to examine the draft Manual and furnish comments/suggestions to this Ministry within a period of one month through e-mail on the following e-mail address: -

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Yours faithfully,

(Jaikant Singh)  
Director

## PREAMBLE

Chapter VII of the Companies Act deals with winding up procedures to be followed for liquidating the affairs of the company. The present Companies (Court) Rules, 1959 framed by the Hon'ble Supreme Court of India supplement the winding procedures and it has the effect of an act of Parliament. It provides for every segment of liquidation exhaustively till dissolution of a company in liquidation. However, there are certain areas where various High Court issues instructions to carry out a certain function in a particular manner thus leading to variation from the procedure followed by one Official Liquidator to the another Official Liquidator in the same matter.

2. It has been the experience of many Official Liquidators that wherever there were no specific Rules for a particular act/incidence the Court exercised inherent powers vested in it under Rule 9 of Companies (Court) Rules, 1959. The objective of the inherent power is to enable the Winding up Court to give such directions or pass such orders as may be necessary for the end of justice or to prevent the abuse of process of the Court.

3. Part III of the Companies (Court) Rules, 1959 deals with winding up by Court. The role of the Official Liquidator commences only when he is delivered with a copy of the winding up order for a company or an order appointing him as Provisional Liquidator passed by the Winding up Court of the High Court. Till then, he has no role to play. Even before a company is ordered to be wound up on admission of a petition for winding up of a company by a Court, upon the application of the creditor or a contributory or the company, if the Court thinks fit, upon satisfying itself for appointment of a Provisional Liquidator, the Official Liquidator used to be appointed as Provisional Liquidator. Even though Rule 106 (2) specifies that the order appointing the Provisional Liquidator shall set out the restrictions and limitations on his powers, seldom the order specifies the same. Whether the power is so specified, he has to function accordingly. It is noted that

generally such orders are not specifying or limiting the powers of the Provisional Liquidator and therefore he has all the powers of the Liquidator of the company under liquidation.

4. Therefore, the triggering point for action on the part of the Official Liquidator is receipt of either an order appointing him as Provisional Liquidator or the Official Liquidator of a company. The Companies (Court) Rules, 1959 does not provide for the time within which the order appointing him as Provisional Liquidator or Official Liquidator is to be communicated to him by the Winding up Court (Registry). In a few cases the order of his appointment as Official Liquidator/Provisional Liquidator reaches him late and consequently he activities belatedly. In such cases, he can defend very well for non action on his part, if any.

5. Where the company is not the Petitioner, the Official Liquidator shall cause sealed copy of the order served upon the company by RPAD at the Registered Office of the company or any other office as may be available from the records of Registrar of Companies. If the Court has issued a direction to Official Liquidator to issue advertisement on the winding up of a company, he may do so. In the case of winding up orders passed pursuant to the recommendations of BIFR or its appellate body, invariably the Courts issue direction to the Official Liquidator to advertise the winding up order made on the BIFR's recommendation. The Official Liquidator may have to look to the secured creditors/ operating agency or Common Establishment Fund to fund the advertisement cost after obtaining the Court's order. This Manual has been attempted to guide the Official Liquidator to be conversant with various course of action to be taken in appropriate time in the best interest of the liquidation.

6. Though the Act says any transaction of transfer of property or payment made within 6 months or one year before commencement of the winding up as per Section 531/531A of the Act is invalid per se. The Court's

have examined the matter from various angles like whether the transaction is done in good faith and for valuable consideration, whether there is collusion between the company in liquidation and the purchaser whether the transaction is intended to deny the creditors the said assets etc,. If the preference is made under duress/force, (any legal proceeding threatening the functioning of the company /credibility /business /winding up to say a few instances of force) then the transaction is not held to be a fraudulent preference. The burden of proof is on the Liquidator to prove that there is a fraudulent preference attracting the provisions of Section 531/ 531A of the Act.

7. Likewise, the applicability of Section 531A has to be examined by utilizing the documents mentioned in the above Para and here it should be examined whether the property or delivery of goods etc. has been made in good faith for a valuable consideration and in the ordinary course of business. The burden of proof is on the Official Liquidator and he has to examine the matter on the basis of the facts of the case and in the light of the various judgments pronounced by the Hon'ble Courts. This has been brought out in the Manual.

8. In the matter of Official Liquidator taking misfeasance proceedings, the judgment of the Hon'ble Supreme Court of India in Official Liquidator Vs. Raghava Desikachar (1975) 45 Company cases and Official Liquidator Vs. P.A. Tendolkar (1973) 43 Company cases where it was held that the Official Liquidator has to establish the misfeasance/malfeasance/ fraud/siphoning of funds, etc. against each respondent directors on the basis of the documentary evidence. Though the above two case laws are very clear about the applicability of Sections 542 & 453, Official Liquidator may advance his case, if the Directors have not filed the SA and not handed over the books of account and records, as it is the basic responsibility of the Directors to have filed the Statement of Affairs and handed over the books of account and

records. If the Official Liquidator wants to use the above argument, he should have filed prosecution for non filing of the Statement of Affairs and non handing over of the books of account and records under Sections 454 and 468 respectively.

9. The Manual shall be in addition to the Companies (Court) Rules, 1959 and not a substitution and wherever there is conflict, the Companies (Court) Rules, 1959 shall prevail.

## **CHAPTER I**

### **PROCESS OF TAKING POSSESSION OF ASSETS**

#### **Pre-Possession Taking Exercise**

1. Immediately after receipt of order of winding up (i) Official Liquidator should write to the jurisdictional Postmaster for redirection of the letters addressed to the company in liquidation. The jurisdiction can be ascertained from the petition/records of ROC.

ii) On receipt of the order of the winding up or the order appointing OL as PL the Register of Liquidations maintained in F 142-A may be entered as required by the said form. The scrupulous maintenance of this register should be updated with some periodicity like every month/3 months/6 months according to the requirement and necessity which should be monitored by the Officer in charge of the section. The proper maintenance of this register will give all the information on the liquidation proceedings and will be very useful at the time dissolution of the company which may happen at a later date.

iii) Where the company is not the petitioner or the order of winding up is made *ex parte* the official liquidator shall cause a sealed copy of the order served upon the company by RPAD at the registered office of the company or

any other office as may be available from the Petition or if the records of the ROC has been verified on the basis of the address available in F 18. If the court has issued a direction to OL to issue advertisement on the winding up of a company he may do so. In the case of winding up orders passed pursuant to the recommendations of BIFR or its appellate body, invariably the courts issue a direction to the OL to advertise the winding up order made. In such cases the OL may have to look to the Secured creditors/operating agency or Common establishment fund to fund the advertisement cost and the same can be recouped from the assets of the company in liquidation later.

2) Before taking possession, the Liquidator should collect information on the affairs of the company particularly the location of the Registered Office, principal place of business, branches, details of the Directors for both current period and for the past three years i.e. name and addresses of the Directors. Details of other key personnel, Chief operating officer, Chief Executive officer and Chief finance officer, location of factories, works, yards, godowns, stores, details of agents and Statutory Auditors may also be ascertained. The above information may be obtained from the Petitioning creditor/Bankers/Auditors and records of the ROC office Like Balance sheet, Annual Return, F 32, F 18 and F.8 and F 17 for the latest three to 5 years. (c) Charges should be verified in detail and if the would up company is having several secured creditors and have many assets as revealed from the Balance sheet by preparing a statement in a broad sheet and full details from F 8 and 17 may be fed/filled in the statement. This exercise will reveal the details of the secured creditors, the securities etc., which will be helpful at the time of settling the Secured creditors. The details of the assets may also be verified with the help of the Fixed Assets Register which will be taken possession by OL in due course. (d) Inspection of the records of Registrar of Companies as provided u/s 457 (2) (ia) of the Act or from the MCA portal should be monitored at the level of officers to ensure all the required details are obtained in one go so that he is not required to repeat inspection of the documents with the Registrar of Companies. (e) Official Liquidator should

simultaneously make a request to the concerned Registrar of Companies to keep all the documents filed by the company up to date of winding up order in the document file and maintain separately to ensure no addition/deletion is done after passing of the winding up order. (f) Registrar of Companies should be requested to avoid destruction of documents of the companies in liquidation till dissolution is ordered notwithstanding the Companies (Preservation and Disposal of Records) Rules, 1966 and amended from time to time. **(The Ministry may be advised to amend the Companies (Preservation and Disposal of Records) Rules, 1956.**

3. After the above exercise (i) write to the banker(s) with whom the company is maintaining Current account of the company informing about the winding up order and advise the Banker/s to remit the amount if any in favour of the OL/PL immediately. (ii) If the company which is being wound up is a big industrial company then write to the Electricity authorities to disconnect high tension supply of electricity with immediate effect to avoid unnecessary electricity bill and for the information of the inventory taken regarding machinery etc at the time of giving connection or by latest available information. This can be done if the assets are taken possession immediately after the winding up so as to ensure the inventory by the electricity board can be taken before the ex directors and bankers (iii)(b) Request the Electricity board authorities to transfer the deposit account in favour of Official Liquidator and file claim for outstanding electricity bill. (iv) Write to Income Tax authorities requesting them to inform the tax liability of the company, if any under Section 178 of the IT Act of 1961 so that the Official Liquidator is able to keep the tax liabilities specified by the authorities as a secured claim as pronounced by the Hon'ble Supreme Court of India in (Imperial Chit Funds case) while settling the other claims. (v) Write to the Statutory Auditor and Advocate informing the winding up order and ensure that all the books of account/documents/court papers are delivered to the Official liquidator.

4. Please verify whether the winding up order or the order appointing OL as PL has directed the Petitioning Creditor to deposit certain amount which is called as Initial deposit with the OL/PL to defray in connection with the initial liquidation proceedings. If the Initial deposit is not remitted by the Petitioning creditor write to him/her to deposit the said amount immediately. If not received move the Hon'ble Court for necessary directions to the petitioning creditor. This amount should be paid back to the Petitioner as soon as realising the assets of the company in liquidation with the orders of the Hon'ble court as is the practise in the said office.

4. If the winding up order has not ordered for the payment of Initial deposit by the petitioner or in the event of insufficiency of the funds in Initial deposits the Official Liquidator to meet the preliminary expenses, he may draw from the Common Establishment/Estate Fund. If there is no such account of if there is insufficiency of funds then the OL can approach the Regional Director for fund for releasing the funds from the Permanent Advance as provided under rule 292 of the CCR, 1959. For this purposes the OL may ensure that each he seeks funds under this fund for an emergency situation which may arise any time. This amount should be recouped as soon the assets of the company are realised to the said account.

#### **Taking Charge of Assets, Books and Papers of the Company, Opening and Maintenance of Liquidation Register**

1. If there is no secured creditor, give intimation to the directors for taking possession of the assets expeditiously and appoint security personnel to safeguard assets from the panel of the Security agencies. The funds may be secured creditor or from the Common Estate & Establishment Fund or from the Permanent advance as available under rule 292 of the CCR 1959. If the size of the company is small it is advisable to value the assets of the company on the date of taking possession itself appointing a valuar from the panel of the valuers available with the OL. The inventory and valuation of the assets may be done by the value in the presence of the Officials of OL and the ex directors or their representative. Simultaneously the OL may take



possession and inventorise the books of account/documents, records of the company. While inventorising the books it may be done on yearly basis and may go back wards so that the books and records for the latest 5 years are taken promptly to realise the debts and for taking further action in the liquidation proceedings The details of the assets taken possession thereto shall be entered into **THE REGISTER OF ASSETS IN FORM NO. 142-G. THE BOOKS OF ACCOUNTS AND OTHER REGISTERS/PAPERS MAY BE ENTERED IN F NO. 142T. THE DOCUMENTS LIKE TITEL DEEDS/COVENANTS AND ANY OTHER IMPORTANT DOCUMENTS SHOULD BE ENTERED IN F NO. 142 S.**

### **Meeting with Directors**

- (a) If the assets of the company which is order winding up is big and having various assets in many places the ex-directors may be called for a meeting to ascertain the state of affairs of the company in liquidation and also to get information regarding the assets and the situation of the books and records and papers. They may be impressed upon the necessity to file the Statement of Affairs as required under Section 454 of the Companies Act, 1956. Wherever required, they may be informed about Rule 129 of Companies (Court) Rules, 1959 that the expenses in preparing the Statement of Affairs will be reimbursed to them to encourage them to prepare the Statement of Affairs and file with the Official Liquidator. They may also be informed that it is adequate if the Statement of Affairs is prepared in the prescribed proforma or nearer to that. They may be informed of the consequences of not filing the Statement affairs like prosecution under rule 132 and criminal proceedings u/s 454(5A) and also they may also face adverse action ou/s 542/543 of the Act as and when filed.

## Meeting with secured Creditors

Official Liquidator should call for a meeting with secured creditors and to ascertain:

- (a) Whether they would like to stand outside the liquidation or within liquidation. The respective claim on the assets of the company in liquidation of each of the secured creditors so that claims and counter claims by among the secured creditors can be ascertained and recorded which will be useful while settling the secured creditors. This information can also be used to sell the assets in such a way and receive and keep the sale proceeds separately for each secured creditor or group of secured creditors in the OL's books and settle the claim of the secured creditors in a correct manner.
- (b) Whether they have filed any cases/suit before DRT and taken possession of the assets; whether they have taken possession of the books of account and records of the company also. Obtain the details for a thorough examination as to whether the action of the Secured creditor is correct or not. If not correct approach the DRT or its appellate forum or the Winding up court to set right the legal issues involved.
- (c) Whether they have a charge on book debts and if so they are writing to recover the dues and the details of quantum etc. All the above information may be furnished to the winding up court in the form of a detailed report and if necessary seek appropriate orders. Make the Secured creditor concerned as a respondent if any orders are to be obtained against them.

- (d) Whether they are willing to cooperate with Official Liquidator in valuing the assets with a registered Valuer and appoint security at their expense till the disposal of the assets concerned. They may be informed that the expenses defrayed in the above matters will be reimbursed from the sale proceeds as first charge on the assets of the company as post liquidation expenses.
  
- (e) The OL in consultation with the Secured creditor may fix the date of taking possession of the assets and books and records of the company. If the company is having many places or branches he may draw a schedule of taking possession of the assets and effects and intimate the same to all the secured creditors so as to ensure their presence at the time of taking possession. It is possible that the secured creditor/s may bring some experts who is conversant with the nature and value of the assets which will help the OL 's officials to take proper inventory. This will also help the secured creditors to know the status of the assets as on the date of taking possession and may encourage to cooperate with OL to expeditiously sell the assets.

**Meeting with the Statutory Authorities in case of seizure of the Assets and Records of Company Prior to the Order of Winding up or Appointment of Provisional Liquidator:**

It happens in case of NBFCs or Collective Investment Scheme (CISs) that the properties and all actionable claims, and records and such other books of accounts might have been seized by such authorities prior to the date of winding up order or appointment of the liquidator as a provisional liquidator in connection with certain investigation or taking action against the delinquent directors before the court of law

or otherwise. In such situations, there is ample scope for the Liquidator to collect vital information of the properties and status of actionable claims. Therefore, the Liquidator should co-ordinate with such authorities and also apprise the nature of liquidation proceedings including the limits of the investigation or launching the criminal proceedings against the company in liquidation and its ex directors. Apart from that, he can make use of investigation reports or conviction orders against the ex-directors in the misfeasance or any other appropriate proceedings.

### **Appointment of Security Agents**

- (a) It is advisable that each Official Liquidator office may maintain a Panel of reputed security agencies and the agencies may be appointed in a scientific and systematic manner wherever necessary, the consent of the secured creditors, if any should be taken before appointing the security agency as the expenses defrayed in that respect will be reimbursed by the Secured creditors which will be recouped to the secure creditor from the sale proceeds of the securities offered to the secured creditors. It may be ensured that such appointed agency shall furnish such undertaking and indemnity bond in case any property of the company has been lost due to the malafides of their guards or staff, then such agency shall reimburse the value of such property in addition to such action as may be contemplated by the Liquidator. The agency may further be advised to furnish an affidavit in a Non judicial stamp paper of value as per the State Govt.'s requirement that no loss or theft taken has place in the company during the month or if taken place, the same has been informed to the Official Liquidator under acknowledgement

immediately or within 24 hours of such occurrence along with their action taken report. Please advise the security agency to make the complaint to the police authorities also on the theft or the attempt theft on the premises of the company under winding up. After receipt of such affidavit from the agency, the Liquidator can release the month's salary to the Security agency. The liquidator may also consider in consultation with the Secured creditors as to whether the property taken into possession will require to be covered with insurance. If required, action may be taken accordingly with the permission of the High Court.

- (b) At the time of taking possession with or without Valuer due care may be taken by the OL's officers to reasonably assess the realizable value of the assets so that if the value of the assets is very low, the same can be brought for sale expeditiously so that the value of the assets does not deteriorate further and to save on the Security expenses the expenses to be incurred in safeguarding the assets.
- (c) Wherever possible, before taking possession file a report under Section 457 of the Companies Act, 1956 drawing powers as provided in the Section from the Winding up Court. While drawing the powers u/s 457 please ascertain the affairs of the company under liquidation.
- (d) Whenever the OL receives report regarding theft/attempted theft he may immediately depute his officials for spot inspection and ensure that proper complaint is made to the Police authorities by the Security agency itself. If no complaint is made by the Security Agency, OL's officials may make the complaint

with the police authorities. Try to ascertain the value of the items stolen and report to the winding up court immediately and seek directions, if any, in the matter.

**PRECAUTION AND ACTION TO BE TAKEN:**

1. Periodical assessment of the performance of the agencies be made;
2. Take the steps to weed out of the panel if the performance of the agency falls short of expectations;
3. Make a claim for indemnification if the agency is found responsible for any loss, damage, pilferage or otherwise caused deliberately to the detriment of the properties kept under their guard, and
4. In case the activities of the agency at the engaged place for guarding appears dubious, then take the assistance of the police to keep the extraneous vigil over the guards.

**CHAPTER II**

**STATEMENT OF AFFAIRS**

It is an important to ensure that the correct or near correct SA is filed by the ex directors who were directors as on the date of winding up or the appointment of OL as PL. This will facilitate the liquidator to effectively deal with the liquidation proceedings like taking possession of the assets/realising the assets include debts due to the company and settle all the creditors, secured as well as unsecured creditor and if possible the contributories. The SA should be filed along with the three copies of the Balance sheets for the latest three year available. This will help the OL to prima facie compare the amounts shown/disclosed in the SA and find out the difference between the amounts shown in the latest available balance sheet and the SA. This will also will help OL to find out whether the books of account are updated up to the date of winding up or the figures are supplied/mentioned at random to

satisfy OL. If necessary the ex directors may be advised to take the help of a Chartered Accountant and the expenses may be claimed from the liquidation as provided under rule 12 of CCR, 1959. After filing the SA, if necessary OL also may verify the genuineness of the amounts shown in the SA with the help of a Chartered accountant. For this purpose he may seek the order of the winding up court for paying the fees to the CA from the funds of liquidation.

(a) Immediately on winding up or appointment of Official Liquidator as Provisional Liquidator, issue notice to the persons mentioned in sub section (2) of Section 454 to submit and verify the Statement of Affairs. Form 55. Rules 124 to 131 of the Companies (Court) Rules, 1959 may be followed for this purpose. It may be borne in mind that the ex directors who are at the relevant date (date of winding up) where the Directors or any person mentioned in Section 454(2) of the Act. As regards the past Directors and other persons referred to in Section 454(2) Sub clause (a to d) the Official Liquidator should get the directions of the winding up Court before seeking the Statement of Affairs from them. For this, Official Liquidator has to establish before the winding up Court as to how the persons specified in clauses (a to d) to 454(2) are liable/responsible in furnishing the information or filing the Statement of Affairs as required under Section 454.

(b) Rule 129 of Companies (Court) Rules, 1959 provides for reimbursement of expenses incurred for preparing the Statement of Affairs by the Directors immediately after the winding up order is passed when the Official Liquidator considers that the Directors are delaying preparation of the Statement of Affairs for want of funds involved towards preparation of the Statement of Affairs. This provision should be utilized so as to get the Statement of Affairs if necessary and specifically requested by the ex directors as the SA is an important document and Official Liquidator must make all out efforts to get the same at the earliest possible time so that the same can be used for detecting the assets of the company, including

actionable claims so that expeditious action can be taken to process the same well before barred by limitation. Official Liquidator should impress upon the Directors about the rule and motivate the Directors to cooperate with the Official Liquidator rather than resorting to legal remedy under Section 454 of the Act. This does not necessarily mean that the legal proceedings need not be considered. It is better both the encouragement as mentioned above to file the SA and resort to legal action including criminal proceedings may be used simultaneously to ensure filing of the SA.

(c) Official Liquidator should ensure that all the ex-directors who were directors as on the date of winding up on appointment of Official Liquidator as Provisional Liquidator sign the Statement of Affairs, i.e. Form 57. If any Director has not signed the same, obtain affidavit of concurrence from the other ex-directors in Form 58 u/s 127 of the CCR, 1959. If any of the ex director is not willing to give the said affidavit in F 58 he may be advised to file a Separate SA and be informed that failure to do so will entail prosecution of the said director u/s 454 (5A) of the Act.

(d) On receipt of orders under Rule 132 from the winding up Court proceed against the Directors as non compliance of sub section 4 & 5 to Section 454 of the Act and launch criminal proceedings against the ex-directors. This exercise may or may not yield the Statement of Affairs. In these proceedings, Official Liquidator may face difficulty in sending the notices and therefore he should expedite the proceedings by seeking early non-bailable warrants to be issued so that the assistance of police authorities are available to the Official Liquidator in nabbing the Directors.

### **Scrutiny of Statement of Affairs**

(a) On receipt of the Statement of Affairs, it may be verified immediately to understand the affairs of the company as on the date of winding up and



initiate appropriate action which will result in realization of cash, bank balance, opening of files in respect of actionable claims, loans and advances made by the company in liquidation.

(b) If facts and instances of the case warrants, Official Liquidator should call for a meeting of the ex-directors who have prepared the Statement of Affairs to give further details/ clarifications. Cases where individual Directors has filed the Statement of Affairs, all such Statements may be verified to find out the discrepancies, if any, therein and call for explanation/ clarification from the Directors concerned to find out which Statement of Affairs reflects the correct or near correct position of the affairs of the company as on the date of winding up. If there are major discrepancies the call for further clarification/explanation from the director concerned. The correctness of the SA should also be ensured by the OL to ensure that the liquidation proceedings are conducted in a smooth manner.

#### **Possession and Inventory of Books of Account and records etc.**

(a) While taking possession of the assets inventory of the books of account and records should be taken and books & records for the latest eight years should be segregated and listed. Books & records means and includes Minutes of Board meetings, Annual General Body, Committee Minutes, Consultants file, bank book, cash book , investment records, ledger, vouchers whether manual or computerized, books with Auditor/ Company Law Consultants/ other Consultants, Statutory Authorities, etc.

(b) In respect of Nidhi/ benefit fund/ finance/Chit fund/kuri companies utmost care be taken to get the pro notes/hundis/Court case bundles/mortgaged documents and related files inventoried and shift it to the Office for immediate action i.e. well before the bar of limitation. In respect of

Chit Fund Companies take possession of the chit auction ledger and also the details of the deposits made with the Registrar of Chits as security deposits as required under the Chit Fund Act.

(c) Other than Nidhi and finance companies etc., the title deeds, investments, shares and other important documents should be taken possession and shifted to the Office.

(d) Files may be opened in respect of each individual cases and the BDR Register (Form 142 –I) may be entered with all necessary details.

(e) In respect of Court cases filed by the company in liquidation for recovery of its debt, the cases may be transferred to the winding up Court as provided under Section 446(3) of the Act.

(f) After such transfer, the cases may be conducted either by the Official Liquidator office or be entrusted to an Advocate from the Panel maintained by the OL or continue the same advocate with whom is the cases are entrusted as he will be conversant with the cases.

(g) The important documents like promissory notes, title deeds, shares, investments, hundi, etc. may be entered in the documents register in Form 142-S.

Availing of assistance of ex-directors for taking the books and records

(a) At the time of taking possession, the active help and assistance of the ex-directors or any of the Officers of the company in liquidation may be

taken so that important documents and papers are not left out which may cause loss to the company in liquidation and its creditors.

(b) If the ex-directors are not cooperating with the Official Liquidator in handing over the books & records and Official Liquidator also is not in a position to take possession of the books of account and records of the company, Official Liquidator may issue notice to the ex-directors in Form 99 asking them to hand over the same. If the ex-directors are not cooperating, then Official Liquidator may initiate action under Section 468 of the Act.

(c) On taking possession of books of account and records, Official Liquidator may verify whether all the books of account were handed over. If not call upon the ex-directors or responsible Officers of the company for handing over such of those book which in the opinion of Official Liquidator are necessary. If the Directors fail to cooperate, the Official Liquidator may invoke the provisions of Section 468 of the Act.

(d) Official Liquidator also should invoke Section 468 of the Act, if the ex-directors or officers of the company are not cooperating in discovering and taking possession of the assets.

### **Examination of Books & Records**

(a) Books and records may be scrutinized to ascertain whether any fraud, diversion, misuse of funds has been committed by the ex-directors as there is a tendency to commit frauds/diversion/siphoning of funds/properties from the company when the company was facing winding up proceedings.

(b) As soon as taking inventory of the books of account and records, the same may be entered or pasted in the Register viz. books register in Form 142-T.

(c) If Official Liquidator feels that the company has not written the books of account and records up to the date of winding up, he may use the provisions of Section 541 on the Companies Act, 1956.

(d) If the Official Liquidator is unable to take possession of the assets or books of account and records, he may invoke the provisions of Section 456 (1A) of the Act and request the Chief Presidency Magistrate or the District Magistrate to take possession of the properties and handover the same to Official Liquidator/Provisional Liquidator.

(e) Before invoking the aforesaid provision, it is necessary that Official Liquidator must ascertain as to where the assets are located so that he can request the jurisdictional magistrate to act as per Section 456 (1A) of the Act. If the situation of the asset is not ascertainable, Official Liquidator may necessarily rely on the ex-directors/ petitioning creditor/ secured creditors and any Officer of the company in liquidation.

(f) Official Liquidator may verify the Statement of Affairs and books and records for sundry/trade debtors and loans and advances made by the company.

### **Filing of Preliminary Report**

(a) On receipt of the Statement of Affairs filed under Section 454 of the Act and not later than six months from the date of the winding up order or unless the Court has ordered that no Statement of Affairs need be submitted, after the receipt of that order, Official Liquidator should file a preliminary

report giving details as provided under Section 455 and Rule 135 of the Companies (Court) Rules, 1959.

(b) Official Liquidator may also file further reports as provided in the Section and for the purpose stated therein.

(c) In the event of non-filing of the Statement of Affairs within six months of the winding up or appointing Official Liquidator as Provisional Liquidator, Official Liquidator should positively file a preliminary report and the information may be culled out from the latest Balance Sheet and records available with the ROC concerned. The filing of Preliminary Report as provided under Section 455 is mandatory, even if the Statement of Affairs was not filed and action has been initiated for non-filing of Statement of Affairs under Section 454 of the Act.

### **Limitation for recovery of debts/ claims**

(a) When books and records are not available and no Statement of Affairs of the company has been filed by the ex-directors, based on the latest Balance Sheet, the records like sales register, general ledger and cash register may be perused to ascertain the trade/sundry debtors. Where the debts involved are numerous and form substantial portion of the assets OL may take the help of a chartered accountant in ascertaining the debts along with the documentary evidence which will be useful if the OL files application u/s 446 of the Act. After ascertaining the debtors, Official Liquidator must immediately examine the limitation applicable to each case as per the Limitation Act, 1963 taking into account the extension of one year provided by Section 458A of the Act.

(b) While working out the limitation, various decisions given by the High Court concerned may be borne in mind.

(c) Generally, the limitation will start running from the date of contract of the debt and subsequent confirmation of debt, as the case may be up to the date of commencement of winding up.

(d) The limitation stops from commencement of winding up to date of winding up and start running again after the date of winding up (not appointment of Official Liquidator as Provisional Liquidator).

(e) After working out the 3 years as mentioned above, the extension of time provided by Section 458A may be added (This is the system followed in Office of Official Liquidator, Madras). This limitation so worked out in respect of all the cases should be mentioned in the BDR Register on the wrapper of the file so that the application under Section 446 can be filed within the period of limitation.

(f) Immediately on working out the limitation as mentioned above, Official Liquidator should issue notice to the debtors concerned for payment of the amount to Official Liquidator along with the contracted rate of interest as available from the bills, invoice etc.

(g) If no response is received, Official Liquidator may file application under Section 446 of the Act against the debtors and guarantors/sureties as the case may be within the limitation period.

(h) Whenever a debtor file is opened, necessary entry may be made in the book debts register maintained under Rule 142-I.

(i) Wherever the company has filed civil suit against the debtors, the same may be got transferred to the winding up Court and proceeded further.

(j) The same action may be followed in respect of loans and advances made by the companies.

**PRECAUTION AND ACTION TO BE TAKEN:**

- Advice the staff not to take into possession without checking the status of computers and their working condition;
- Not to rely on the statement given by any of the ex-director (s) that all the accounts or other transactions have been stored in the computers taken possession by the Official Liquidator; In case of such statement, then collect the information whether they have complied with the provisions of Information Technology Act, 2000 and its allied rules and guidelines for protection of such data and the provisions of the Companies Act, 1956 and such other relevant laws, rules and guidelines.
- If not, it is not necessary for the Official Liquidator to shoulder the burden of proof since it rests on the other side to prove it and also fix the responsibility on them for destruction of evidence or not maintaining the statutory records and books of accounts.

## CHAPTER III

### MAINTENANCE OF REGISTERS BY THE OFFICIAL LIQUIDATOR

The Official Liquidator shall maintain the following books of accounts, so far as may be applicable, in respect of the company (s) under winding up as per the provisions of the Companies (Court) Rules, 1959 as prescribed hereunder-

1. Register of Liquidations in Form No. 142-A.
2. Central Cash Book in Form No. 142-B.
3. Cash Book in Form No. 142-C.
4. General Ledger in Form No. 142-D.
5. Cashier's Cash Book in Form No. 142-E
6. Bank Ledger in Form No. 142-F.
7. Register of Assets in Form No. 142-G.
8. Securities and Investment Register in Form No. 142-H.
9. Register of Book Debts and Outstanding in Form No. 142-I.
17. Tenants Ledger in Form No. 142-J.
11. Suits Register in Form No. 142-K.
12. Decree Register in Form No. 142-L.
13. Sales Register in Form No. 142-M.
14. Register of Claims and Dividends in Form No. 142-N.
15. Contributories Ledger in Form No. 142-O.



16. Dividends Paid Register in Form No. 142-P.
  17. Commission Register in Form No. 142-Q.
  18. Suspense Register in Form No. 142-R.
  19. Documents Register in Form No. 142-S.
  20. Books Register in Form No. 142-T.
21. Register of unclaimed dividends and undistributed assets, deposited into the companies liquidation account in the Bank, in Form No. 142-U and
22. A Record Book for each company in which shall be entered all minutes of proceedings and the resolutions passed at any meeting of the creditors or contributories or of the Committee of Inspection, the substance of all orders passed by the Court in the liquidation proceedings, and all such matters other than matters of account as may be necessary to furnish a correct view of the administration of the company's affairs.
- (1) In maintaining the registers and books mentioned above, the Company Liquidator shall follow the instructions contained in the respective forms prescribed for the said books and registers.
- (2) The Company Liquidator shall, in addition to the Registers and Books prescribed above, maintain such other books as may be necessary for the proper and efficient working of his office and accounting of transactions entered into by him in relation to the company.

(3) Where the accounts of the company are incomplete, the Company Liquidator shall, with all convenient speed, as soon as the order for winding-up is made, have them completed and brought up-to-date.

(4) (i) Where the Company Liquidator is authorised to carry on the business of the company he shall keep separate books of account in respect of such business and such books shall, as far as possible, be in conformity with the books already kept by the company in the course of its business. The Company Liquidator shall incorporate in the winding up Cash Book and in the company's Cash Book, the total weekly amounts of the receipts and payments on such trading account.

(ii) The trading account shall from time to time not less than once in every month, be verified by affidavit, and the Company Liquidator shall thereupon submit such account to the Advisory Committee (if any) or such member thereof as may be appointed by the Committee for that purpose, who shall examine and certify the same.

(5) The Company Liquidator shall keep proper vouchers for all payments made or expenses incurred by him. The vouchers shall be serially numbered."

#### **PRACTICAL PROBLEMS TO OVERCOME:**

It is aware that maintaining such registers with continuous updating is a difficult task. In this regard, the task of updating the registers should exclusively be entrusted to one or two persons depending upon the workload of the concerned office. The person entrusted with such job should collect all

the developments taken place in respect of each company in liquidation from respective sections and thereafter to be maintained in soft copy. Every week end, the details ought to be updated in respective registers without fail.

## **CHAPTER IV**

### **PROCESS OF THE ASSETS FOR SALE**

#### **Valuation of Assets**

(a) It is advisable that the valuation of the assets may be taken up at the time of taking possession itself to expedite the liquidation proceedings. If the inventory of the assets has been taken by the Official Liquidator's officials or the inventory is provided by the Valuer, immediately the details of the assets may be entered or for convenience sake may be pasted in the Register of Assets in Form 142-G. (d). If no valuation is done, then a Registered Valuer or Valuers may be appointed from the Panel available with the Official Liquidator or Income-tax/Wealth Tax approved Valuers with the approval of the Court.

It is advisable for the Official Liquidators to instruct the valuer to submit valuation report in three sets in a sealed cover to the Official Liquidator so as to enable him to place the said report in sealed covers as received from the valuers. After receipt of the valuation report/s it should be placed before the winding up court by way of filing a company application wherein all the secured creditors be arrayed as respondents so as to inform them of sale proceedings and to submit their comments/opinion on the valuation report. After the opening of the valuation report in the winding up court the court in its wisdom fix the upset price/EMD and any other conditions for the sale of the assets through tender or public auction or by both the above methods. Generally the Secured creditor will go along with the winding up court as the sale process is transparent and as widely published as possible.

(b) In some cases, the Secured Creditor Bank/FI might have taken possession of the assets through DRT proceedings and in possession of the same before the winding up Order is passed. In such cases, Official

Liquidator will not be able to take possession of the asset and the Official Liquidator may request the secured creditor concerned to furnish the details of DRT proceedings and also request the secured creditor to hand over the books of account and records for the purpose of realizing the trade/sundry debtors and then inform the winding up Court also of the facts and seek orders for realization of debtors and intimate recovery proceedings.

(c) In some cases, the Secured Creditor Bank/FI might have taken possession of the assets of the company under Section 13 of the SARFEASI Act, 2002. In those cases, Official Liquidator may obtain the details from the Bank/FI and submit a report to the winding up Court informing about the proceedings before DRT and seek a direction to intervene in the DRT proceedings to represent the workmen.

(d) In both the above cases, Official Liquidator should keep in mind the provisions of Section 529A of the Act for which he is responsible. Both the DRT Act and the SARFEASI Act, 2002 enables the OL to represent the workmen creditors in the said proceedings. Hence the OL should vigorously follow up the cases before the respective forums to realise the workmen creditors.

e) Presently the Hon'ble Supreme Court of India has pronounced that the dues to the Provident Fund authorities take precedence over the dues of the Secured creditors' claim. The Judgement may be gone through to understand the implications with reference to Section 529A of the Act. This judgement should be understood clearly so that the difficulties in settling the workmen creditors by the OL should be brought to the notice of the winding up court for necessary orders. This matter has been dealt with under the settlement of claims also.

### **Sale of Assets:**

## **Mode of Sale**

Provisions of Section 457(1) (c) of the Act require sale of movable and immovable properties and actionable claims of the property.

- (a) By public auction (or)
- (b) By Private contract

Rule 273 of the Companies (Court) Rules, 1959 prescribe that sale shall be by public auction or by inviting sealed tenders or in such manner as the Judge may direct. This Rule also prescribes every sale shall be held by the Official Liquidator or if the Judge so directs by an agent or auctioneer approved by the Court. The Central Government PSU "MSTC" is dealing with e-auctions. Taking into account of the feedback, it would be better in the event of failure to attract the bidders in spite of extensive advertisements published in the newspapers, are given to "MSTC". This will help to reach wider prospective purchases. After waiting some period like one month if the OL receives offers through MSTC this may be placed before the winding up court again. The prospective buyers may be called on the orders of the Court and advised to participate in public auction before the winding up court. This e-auction may also be tried on a regular basis prior to giving advertisement in newspapers. The secured creditors may be requested to bring buyers as they have some experience before the DRT and SARFAESI forums.

From the provisions of Section 457 (1)(c) and Rule 272 to 274, the following position emerges:

- (a) Every sale shall be made by Official Liquidator with the previous sanction of the Court.
- (b) Every sale shall be subject to confirmation of the Court.
- (c) Official Liquidator can sell the assets as a whole or in parts.

(d) Sale shall be held by the Official Liquidator if the Court so direct by an agent or auctioneer approved by the Court. This is done in case of movable assets consisting of small heterogeneous lots which could not be sold by giving extensive advertisement in the newspapers due to the cost-realisation factors. The court appointed/approved auctioneer will take all the steps including valuation of the assets and sale of assets in lots or lot by sending notices to the individual purchasers known to him. At the time of the auction sale and officer of the OL and the Secured creditors should be present. The sale can be confirmed on the spot by the officer of OL and the delivery effected immediately after receipt of the amount.

(e) Sale shall be subject to such terms, if any, approved by the Court.

(f) Sale shall be public auction, by inviting tender, by private contract or by tender auction method.

If it is leasehold property, Please ensure that the valuation is done for the unexpired period of lease only, after examining the lease documents and whether any leaseholder has claimed the asset by filing an application in the winding up Court. If it is on hire purchase assets, the nature of hire purchase may be examined to see whether it is actual hire purchase or a financial transaction. In this connection please refer the Judgement of Hon'ble High Court of Madras in the case of OL of Manasubha & Co., Pvt., Ltd., vs. The Commissioner of Police, Madras (1968) 38 Com Cases 884 (Mad)

(c) If the valuation has been done at the time of taking possession, an application may be made to the Court seeking order to sell the movable/immovable/other assets.

(d) If no valuation is done, then a Registered Valuer or Valuers may be appointed from the Panel available with the Official Liquidator or Income-tax/Wealth Tax approved Valuers with the approval of the Court.

(e) No assets should be brought for sale without valuation of assets as held by the Hon'ble Supreme Court of India.

(f) Assets may be offered for sale unit-wise or lot wise as determined by the winding up Court and an application may be made to the court seeking order to that effect.

(g) Sealed valuation report may be tendered along with the application to the winding up Court so as to fix the upset/reserve price and Earnest Money Deposit to be unit-wise or lot wise separately for movable/ immovable/other assets, as the case may be. In the same application, Official Liquidator may seek the orders to publish advertisement in Newspapers inviting sealed tenders for public auction before the winding up Court.

(h) In the tender form issued, generally it is mentioned that the assets are sold on "as is where is and whatever there is basis".

(i) The tender form should clearly indicate that non receipt of full sale consideration/withdrawal of offer by the successful bidder Earnest Money Deposit would be forfeited and the expenses in respect of the sale conducted like advertisement charges would be recovered.

(j) For enforcing the above clause, orders of the Court should be sought with notice to the successful bidder who has failed to remit the sale consideration/desiring to withdraw the offer.

(k) On confirmation of sale by the winding up Court and on receipt of full sale consideration within the time stipulated by the Court, the property/assets may be delivered to the purchaser and sale deed wherever required may be executed.

(l) If there is a delay in payment by the purchaser, he may be advised to seek condonation from the winding up Court and seek orders for delivery of property subject to such conditions as the Court may deem fit. In such cases, Official Liquidator should plead for interest at the prevailing rate.

(m) Execution of Sale Deed may be carried out with the approval of the Court on receipt of full purchase price at the cost of the purchaser.

(n) Title Deeds may be handed over with the approval of the Court on as is where basis is. On sale of the immovable property i.e. land, building and the machineries embedded to the earth, Official Liquidator may seek the orders of the winding up Court to appoint a Chartered Accountant empanelled in his Office to advise him as to whether any capital gains tax is payable to the Income-tax Department.

(o) Official Liquidator may invest the sale proceeds which attracts the capital gain tax on sale of the immovable property in the Capital Gains Tax avoidance bonds, if it is not required immediately with the permission of the winding up Court. Before doing OL may pay off the expenses like advertisement, valuation cost and security expenses with the sanction of the Court.

### **Earnest Money Deposit (EMD)**



(a) A report seeking confirmation of sale should be put up within seven days or within such time as ordered by the winding up court from the date of opening of the bidding if the sale is by tender process and done by OL as ordered by the winding up court.

(b) Earnest Money Deposit of only highest bidder may be retained and others' may be returned. If the EMD itself is high it should be deposited in Fixed Deposit Account in a Bank on the same day or next day. The interest earned on the same should be retained by the Official Liquidator as income. Biggest successful bidder's failure to pay the balance purchase price will result in forfeiture of the Earnest Money Deposit. Even if the Court permits repayment of purchase price, the EMD and interest on EMD will be Official Liquidator's income.

(c) In case an increased offer or a new offer is received after bidding is over, with or without EMD the Official Liquidator should bring it to the notice of the Court about the receipt of such offers and they may be asked to bid in the open Court before the Company Judge for final decision. The OL should give notice to the existing successful bidder and the Secured creditors if necessary may be given notice so as to give opportunity to the stake holders in the sale of the assets.

(e) The EMD of the unsuccessful bidders should not be retained by OL and should be returned to the said bidders. If the same is to be retained OL may seek the orders of the winding up court

(f) No Earnest Money Deposit should be retained by the Official Liquidator without depositing in the Bank for crediting to Official Liquidator's PD Account. The Earnest Money Deposit need not be credited to Official Liquidator's PD till the sale is confirmed by the winding up court as its return

if deposited in the OL's PD account will take considerable time to return. Wherever the practice is to retain the EMD amount of the unsuccessful bidders and deposit it in the PD account, and pay the unsuccessful bidder when he seeks the amount may be examined as this will amount to enrichment of the liquidation funds at the cost of others. If necessary the OL may seek standing directions of the winding up court to quickly return the EMD to the unsuccessful bidders i.e., after confirmation of sale for which the EMD was made.

(g) If the sale price is to be paid by instalments, Official Liquidator should ensure receipt of such instalments in time unless approved otherwise by the Court.

## **CHAPTER V**

### **INVITATION, ADJUDICATION OR SETTLEMENT OF CLAIMS AND DISTRIBUTION OF DIVIDEND**

Priority/order in which the debts are payable in a winding up is provided in section 528 to 530 of the Companies Act. Rule 139, 147 to 179 (debts and claims against company) 232, 275 to 280, 286,290,335 provide for the procedure to be adopted in calling for claim, adjudication of claims settlement of list of creditors and payment and payment of further interest, remittance of unclaimed dividend in companies liquidation account. In addition the provisions of sections Provisions of sections 467(1), 457(1), 460, 474, 546, 555(1)(a) of Act are also relevant to deal with claims. The official liquidator is required to maintain the following records for recording the claims received and dividends paid and dividends unclaimed.

1. Register of claims and Dividends in Form No.142-N,

2. Dividend paid Register in Form No. 142-P
3. Register of unclaimed dividends and undistributed assets, deposited in the companies liquidator account in form NO.142 U.

For distribution of assets among the creditors of the company it is essential for the liquidator to call for claims and settle the list of creditors following the due procedure prescribed under the Court Rules mentioned above.

### **Invitation of claims: Proof of Debt**

#### **TIME LIMIT WITHIN WHICH INVITAION OF CLAIMS FROM CREDITORS SHOULD BE MADE**

- Rule 139(1) of the Companies (Court) Rules 1959 mandates that " As soon as practicable after the winding-up order is made and, in any event, not later than seven days after the filing of his preliminary report under sub-section (1) of section 455, the Official Liquidator shall take out summons for directions with regard to the settlement of the list of contributors and list of creditors ....., including the fixing of dates for the settlement of the list of settlement of contributors and for filing of proofs by the creditors of the company in respect of their debts and their claim for the priority if any.

Section 455 (1) of the Act mandates the official liquidator to submit a preliminary report as soon as practicable after the receipt of statement of affairs under section 454 and not later than six months from the date of the order or such extended period as may be allowed by the court. Section 474 empower the court to fix a time or times within which creditors to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts or claims are proved. Therefore **from the date of winding up order within six months** the official liquidator is required to invite claims from the creditors of the company by fixing the date within which the claims are to be filed before the official liquidator as envisaged in Rule 147 of the Companies (Court)

Rules 1959 unless the time mentioned above is extended by the Court. Therefore invariably Official Liquidators should apply to the court in this regard as mandated in the above said provisions and Rules. If O.L. could not comply with the above time limit envisaged he shall seek extension of time to invite claims from the creditors adducing sufficient reasons. Considering the provisions of section 529 of the Act where in a liquidation workmen are there official liquidator should not postpone invitation of claims by seeking extension of time

- A notice by advertisement shall be given as per form No.63 at least 14 days before the date fixed for proving the debt in newspaper in the English language and one issue of a daily newspaper in the regional language circulating in the state or union territory concerned as per Rule 148. However if the creditors are spread over in several parts of the state/country it is advisable to give notice by advertisement depending upon the size and possible location of the creditors to give wide publicity in order to meet the interest of natural justice after taking appropriate orders from the court explaining the reasons.
- As provided under Rule 148(2), Official Liquidator has to give notice to every person mentioned in the statement of Affairs as a creditor/preferential creditor and who claims to be a creditor/ preferential creditor who has not proved his debt ie. File his proof of debt in form No.66 and in the absence of statement of affairs as ascertained from the books of account and records. Where the address of the creditors is not given in the Statement of Affairs and it is also not possible or not available from the books of account and records to ascertain the address of the creditors then Official Liquidator may seek the orders of the winding up Court to dispense with the issue of individual notices to the creditors.
- Debts that can be proved in winding up. – In every winding up all debts payable on a contingency, and all claims against the company, present or

future certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company (Section 528)

- Every creditor is required to prove his debt unless judge in any particular case directs that any creditors or class of creditors shall be admitted without proof. (Rule 149).
- A debt may be proved by delivering or sending by post to the liquidator, an affidavit verifying the debt in form 66. furnishing statement of account showing the particulars of debt and specify the vouchers if any by which the same can be substantiated, state whether the creditor is a secured creditor or preferential creditor, particulars of security/preferential claim as the case may be. (Rule 150/151)
- If any creditor files his proof of debt in form 66 even without inviting claims same shall be serially numbered, number recorded on the face of claim and docket sheet. Then necessary entries, details shall be made in the register maintained in form No. 142 N. An intimation **should** be sent the claimants as to the registration of their claim and the claim No. allotted to the claimant concerned **with the advise to quote the claim number for any future correspondence.** *In case of claim made by any other person under the authority of the creditor only the details of creditor should be entered in the claim register. In this regard due care should be taken while entering the details in the register*

#### **Adjudication of claims and filing list of creditors**

- **Within three months from the date fixed for filing claims** under Rule 147 or within such extended time O.L. shall file a certificate in form No. 71 list of creditors containing the details as per Rule 167. Therefore the O.L. should complete the examination of claims and pass orders and file list of creditors within the period mentioned above i.e three months for the date (cut off date) fixed for filing list of creditors, unless the time is extended by the Court. Rule 167 also contemplate that the proofs, with the memorandum of admission or rejection of the same in whole or in

part, as the case may be, endorsed thereon, shall be filed in Court along with the certificate.

- *It is not necessary for the O.L to call for further evidence/proof invariably and mechanically sending such notice should be avoided. Debts can be proved by filing affidavit of proof of debt in form 66.(Rule 149,150, 151). After examining the affidavit of proof of debt submitted in form 66 and the evidence enclosed therein if O.L decides further proof is required he can call for the same.*
- The liquidator may call for the production of the vouchers if any referred to in the affidavit of proof or require further evidence in support of the debt. If he require further evidence or requires that the creditor should attend the investigation in person he shall fix a date and time at which the creditor is required to attend or to produce further evidence and send a notice to such creditor in form No.68 by prepaid registered post giving not less than 7 days time from the date of receipt of the same. (Rule 159). As a matter of routine O.L. need not call every creditor to produce further proof or appear in person and only in cases where he require further proof he shall call for the same and the affidavit in form 66 itself is proof of debt.
- As per Rule 153 of the Companies (Court) Rules 1959 where a creditor seeks to prove in respect of a bill of exchange, promissory note or other negotiable instruments or security of a like nature on which the company is liable, such bill of exchange, note, instrument or security shall be produced before he liquidator and be marked by him before the proof is admitted.
- For the purpose of his duties in relation to the admission of proof of debts the O.L. may administer oaths and take affidavits. (Rule 161)
- If a debt is barred by limitation on the date of winding up order Official Liquidator shall not admit the claim.

- When any rent or other payment falls due at sated period it shall be dealt with in terms of Rule 157.
- In respect of all the creditors the contracted rate of interest should be allowed up to the date of winding up only. No interest need be allowed to the claimant if no interest is contracted or agreed upon in writing.
- During the course of investigation of the claims, Official Liquidator may require the presence of such person to attend and produce documents to the Official Liquidator. Any non compliance on the part of such person may be reported to the Court for appropriate orders (Rule 160).
- After adjudicating the claims of various creditors the notice of admission, rejection of the proof either wholly or in part shall be communicated to the creditor concerned by post in the Form prescribed, i.e. Form No. 70 & 69 respectively. Rejection of proof wholly or in part shall be communicated by registered post and admission of proof shall be communicated by certificate of posting. However in case of claimants who have appeared in person or through agent and the acceptance of proof has been communicated to him in writing it is not necessary to send notice of admission. Where the O.L. rejects the proof wholly or in part he shall state grounds of rejection this should be self explanatory. (Rule 163)
- In view of requirement of Rule 163 in case liquidator rejects the claim wholly or in part he shall state the grounds of rejection in form 69 and notice of admission shall be in form 70. In case claim is rejected in part then contents of form No.69 and 70 may be clubbed clearly furnishing the grounds of rejection prefer appeal, if so desired by him as provided under Rule 164 of the Companies (Court) Rules, 1959. Grounds/reasons of rejection should be self explanatory.
- *In a recent decision of a High Court it was held in case of admission of claim also detailed order should be passed .However form 70 prescribed do not require detailed order. This change in the trend required to be taken note of.*

- While intimating the admission of claim, it may be mentioned under what category i.e. 529A/secured/preferential/unsecured may be indicated along with the amount admitted.
- If the claim is admitted under two or three categories above, the same may be indicated with reasons for such treatment.
- *Order passed by the official liquidator on the claims is appealable. Section 460((6) read with Rule 164 of the Companies (Court) Rules 1959 permit the creditor to file an appeal against the decision of the official liquidator. Form No.69 contain a statement " subject to the power of the court to extend the time, no application to reverse or vary my decision in rejecting your proof will be entertained after the expiration of 21 days from the date of the service of this notice." However O.L cannot entertain any objection and it should be only by way of appeal in terms of Rule 164. Therefore in order to educate the claimants it may also be mentioned "Objection if any by way of appeal to Honourable High Court should be preferred in terms of Rule 164 of the Companies (Court) Rules 1959 within the time mentioned above."*
- *It has also been held any other creditor can file an appeal against the order of the O.L it need not necessarily by the creditor whose claim is admitted or rejected in whole/part. It may be noted that Rule 165 of the Companies (Court) Rules laid down procedure for intervention by any creditor with respect to appeal filed by a creditor whose claim is rejected.*
- The list as certified by the OL and filed in the Court shall be the list of creditors of the company and shall not be added to or varied except under the orders of the Court and in accordance with such order. Where an order is made adding to or varying the list of creditors, the O.L. shall amend the list in accordance with such order. (Rule 168) Simultaneous entries also should be made in the register maintained in form 142N.



- If any creditor fails to file proof of his debt with the liquidator within the time specified in the advertisement referred to in Rule 148, such creditor may apply to the Court for relief, and the court may, thereupon, adjudicate upon the debt or direct the liquidator to do so. (Rule 177)
- Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the liquidator available for distribution of dividend, any dividend or dividends he has failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before this debt was proved by reason that he has not participated thereon. Effect of section 474 read with this Rule is that the claimants who have approached the court under Rule 177 and obtained relief and filed the proof of debt shall be entitled to receive past dividend out of the funds in the hand of O.L. that were not applied towards any further dividend and he cannot disturb only the distribution of dividend already declared. This does not mean he has to forego the dividends already declared and paid/being paid to creditors before he is permitted to file his proof of debt by the court under Rule 177.
- Rule 179 provides for payment of interest in the event of surplus after payment of all the creditors, from the date of winding up till the date of payment to the creditors @ 4%, after adjusting against the said amount, the dividends declared as on the date of declaration of each dividend.
- As per Rule 158 a creditor may prove for a debt not payable at the date of the winding up order as if it were payable presently and may receive dividends equally with the other creditors, deducting only there out a rebate of interest at the rate of four percent per annum computed from the date of declaration of dividend in the time when the debt would have become payable according to the terms on which it was contracted.

- The 4% interest should be worked out from the date of winding up till the date of 1<sup>st</sup> dividend, 2<sup>nd</sup> dividend and so on and not to be worked out from the date of winding up till the final dividend.
- Same interest should be paid to the secured creditors also provided they stood inside the liquidation. When the secured creditors stood outside the liquidation and preferred to realize his debt on his own, then he is not entitled for the balance amount, if any and also not eligible for any interest under Rule 179 of Companies (Court) Rules, 1959.

#### **Declaration and payment of dividend**

- *Rule 275 to 280 provide for declaration, payment of **dividend** to creditors and returns of capital in a winding –up by court.*
- To pay any class of creditors, Official Liquidator may have to make an application to the Court for sanction depending upon the availability of funds with the Liquidator. (Section 546 (1)) *Liquidator shall declare dividend only with the sanction of the Court (Rule 275)*
- In the case of deceased claimants (individuals) if the amount payable is more than 500, then the legal heirs of the deceased claimants may be advised to get the Succession Certificate from the appropriate authority like the jurisdictional lower Court designated by the State Government concerned or the Administrator General. The offices of the Official Liquidators at Chennai and Hyderabad, are obtaining orders from the court to dispense with the requirement of Succession Certificate and permission to rely on a family certificate given by MRO or equivalent authority of revenue department. The same procedure may be followed in respect of the deceased contributory for return of capital.

- Rule 276 require OL to give notice of declaration of dividend not less than one month prior to the date fixed **for payment** thereof. The notice shall be given by advertisement as per form 137 in such newspapers as the Judge shall direct and also by sending by prepaid letter post under certificate of posting to every person whose name appears in the list of creditors as on the date of declaration of dividend.
- Section 555 (1) provides that dividends payable to any creditor which had remained unpaid for six months after the date on which they were declared shall forthwith pay the said money into the public account of India in the Reserve Bank of India which functions are now handled by Punjab National Bank in a separate account to be known as the Companies Liquidation Account.
- Considering requirement of the provisions of the Act and Rules mentioned above before moving an application to the court for sanction for declaration of dividend O.L. should prepare necessary data and arrangement to comply with the requirements of sending notice and upon receipt of notice and receipt duly discharged as per form 138 should be in a position to make payment forth with. Hence excluding preparation period and one month stated above **order fixing date of declaration/payment** of dividend should be obtained from the court while seeking orders for payment of dividend.
- While sending intimation in form 138 as required under Rule 276 the date up to which dividend will be payable be mentioned in such a way that payment/realisation of cheque if any issued do not fall after six month from the date of declaration and while issuing cheque date on before which payable should be calculated as six months from the date of declaration of dividend so that provisions of section 555 can be complied with scrupulously and no payment should go from bank after six months from the date of declaration of dividend in other words O.L

*should not issue any cheque which is payable after six months from the date of declaration of dividend.*

- *While taking out an application for sanction of the court for payment to creditors O.L. should make payer for (a) sanction for payment, (b) permission to fix the date of declaration from particular date (taking into consideration aspects mentioned above), (c) permission to make advertisement in news papers and meet the cost of the same, (d) to send the individual notices to creditors by speed post or courier and meet the cost of the same (e) if case O.L. decides to use outside agency for preparing necessary data to prepare dividend notices and cheque permission for the same and to meet the cost of the same.*
- *Rule 277 permit a person to whom dividend is payable lodge with the Official Liquidator an authority in writing to pay such dividend to another person named therein. Such authority shall be in form No.139.*
- *Dividend payable may at the request and risks of the persons to whom they are payable be sent by registered post or money order (Rule 178)*
- *Official Liquidator may prepare necessary data and make use of computer facilities in preparation of notice to be sent to creditors about declaration of dividend, preparation of covers and posting the same, preparation of cheque on receipt of notice with receipt from the creditor.*
- *It would be better to keep a separate inward register for receiving the notices duly discharged from the creditors, and placing the same with the dealing hand for examination of the same and issue of cheque.*
- *While sending the cheque for signature to the officer concerned entries should be made in the dividend paid register and cross reference should be given in the claims and dividends register*

*without any default. In this regard responsibility should be fixed on the person dealing with the matter and officer concerned for compliance.*

- *For making fast payment creditors while submitting dividend notice along with receipt in form 138 may be asked to furnish necessary particulars from their bank as may be required for making payment through ECS clearance so that O.L. can make payment through the bank fast. For this purpose necessary format may be designed in consultation with the bank and sent along with the dividend notice.*
- *As regards payment to legal heirs for the money less than Rs.500 without legal heir certificate etc O.L. after satisfying with the claimant's right title to receive the dividend apply to the court for sanction payment of such dividend to the claimant without the production of a succession certificate. (Rule 280) The O.L shall make payment upon sanction of the court after getting personal indemnity bond.*
- *Making necessary data entry for preparation of notice of declaration of dividend can be out sourced and sent by courier or speed post to ensure timely delivery of notice to the parties. Since the mode of certificate of posting has been done away with by the postal authorities, sending of notice of declaration of dividend as stated above may be done and suitable order from the court shall also be obtained in this regard while making an application for declaration of dividend.*

***Avoidance of making payment and registering duplicate claim.***

- *No efforts should be spared to find out and eliminate duplicate claims. Generally based on verification of documents produced for the claim made and the records of the company/or statement of affairs claims are considered. In such cases cross reference should be marked in the company records/statement*

*of affairs and this practice will help in eliminating the duplicate claim.*

- *Now a days computer has come as a good aid, therefore all the claim details should be entered in the computer as per the claim register and thereafter a search should be made to find out the claims made with identical names, father names and nature of claim.*
- *Invariably dealing hand write on the face of the claim application or in the note submitted for the admission of claim a search has been made with the entries made in the register maintained under Rule 142 N and this claim is not found to be duplicate. This process should be done even while registering the claim. There is no fool proof method to find out and eliminate the duplicate claim as with what differences in the details claims will be made for the second or third time either inadvertently or purposefully cannot be said with certainty. But it is necessary to make use of available infrastructure and devices, scientific methods to identify and avoid admission of duplicate claim and making payment for duplicate claim. This does not mean every claim made should be viewed with suspicion. The idea is to impress due diligence should be exercised in this regard.*

### **Adjudication of workmen claims**

- In respect of workmen creditors, if the recognized trade union file Form 67 giving details of the workmen, their dues severally, the same be accepted and entered in the Claim Register.

- Official Liquidator may issue enquiry notice in the case of industrial/manufacturing companies to the workmen creditors and the secured creditors of all kind who have filed their claims with the Official Liquidator.
  
- If the claim is filed by the trade union, then notice may be sent to the union to help the Official Liquidator to adjudicate the claim of the workmen.
  
- In the enquiry notice, the workmen creditors/ union and the secured creditors who have filed his claim may be advised to tender the original documents in support of their claims. The original documents may be examined with the available information with the Official Liquidator like Statement of Affairs, books of account and records and any other documents which can be relied upon by the Official Liquidator and settle the claims.
  - After the enquiry of the workmen creditors i.e. workmen, etc. their claims may be adjudicated upon by the Official Liquidator keeping in mind the industrial dispute act, gratuity act, PF act, factories act, etc. and any award passed by the labour, Tribunal or any other relevant legal forum. Generally, the PF, if claimed by the workmen is not paid to the workmen but paid only to the PF Department, who is the proper authority to pay the PF dues.

### **Secured Creditors claim**

- (a) Whether the secured creditor /bank/FI have chosen to stand outside the winding up proceedings and desirous of realizing the assets through DRT proceedings, though the assets are in the possession of the Official Liquidator, they may not file claim with the Official Liquidator and may approach the Official Liquidator for payment of their dues as ordered by DRT. Official Liquidator have to work out the proportion of the workmen creditors dues and secured creditors dues keeping the cut off date as the winding up date, as provided under 529A of the Act, 1956. If the secured creditors fail to file their claim, Official Liquidator cannot ignore their claim. Cases where the secured creditors through DRT sell the assets of the company and in that case Official Liquidator may have to bring to the notice of DRT and secured creditors, the provisions of 529A of the Act and the judgment of the Hon'ble Supreme Court of India in the case of Allahabad Bank Vs. Canara Bank for passing on the workmen portion from the sale proceeds to him for disbursement.
- (b) In respect of secured creditor banks/FIs, the evidence tendered by them may be accepted and as provided under the Banker's Book Evidence Act. In their case, penal interest, liquidated damages and expenses of various kinds are not generally allowable.
- (c) In this case, please verify the sale proceeds realized on the securities offered to the secured creditor and if the realization is less than the amount claimed/admitted, then adjudicate the claim secured and unsecured/ordinary claim.
- (d) If no amount is realized from the security offered to the secured creditor and then admits him as unsecured or ordinary creditor.



- (e) Secured creditor standing outside the liquidation also mean realizing the debt through DRT proceedings or under SARFAESI Act.

### **Adjudication of Preferential Creditors**

- (a) In respect of 530 preferential creditors like Government claims, necessary evidence may be sought from the Government authority keeping in mind that the Government dues should be confined to all revenues, taxes, cesses and rates due from the company only which have become due and payable within the 12 months, next before the date of winding up should be treat them as preferential claim. The balance claim should be treated as an ordinary/unsecured claim.
- (b) Any other claim from the Government Department should be treated as an ordinary claim only.
- (c) In respect of unsecured creditors, the proof /documents relied upon them should be sought and added to the claim Petition. If the claim is based on returned cheque/Promissory Note/Fixed deposit receipt, etc., then the original document should be insisted and added to the claim Petition.

## **CHAPTER VI**

### **Settling the list of contributories**

Provisions of section 426, 428, 429, 430,431, 432 of the Act and Rule 180 to 196 of the Companies (Court) Rules 1959 explains as to who is contributory, what is his liability, who are the contributories in case of death of member, in case of insolvency of member, in case of winding up of a body corporate who is a member. Provisions of section 455, 454, 467, 555 of the Act and Rule 139, 275 to 280, 286 of the Companies (Court) Rules

1959 explains when the list of contributories are to be settled, and how return of capital to be made and Register to be maintained in form 142-O - contributories Ledger.

Rule 139(1) of the Companies (Court) Rules 1959 mandates that " As soon as practicable after the winding-up order is made and, in any event, not later than seven days after the filing of his preliminary report under sub-section (1) of section 455, the Official Liquidator shall take out summons for directions with regard to the settlement of the list of contributors including the fixing of dates for the settlement of the list of settlement of contributors

Preliminary report should be submitted as soon as practicable after the receipt of statement of affairs under section 454 and not later than six months from the date of the winding order or such extended period as may be allowed by the court. Section 467 also empower the court to settle or dispense the list of contributories This power of the court to settle the list of contributories is exercised by the O.L. as laid down in Rule 180 to 186 of the Companies (Court) Rules, 1959. Therefore within six months from the date of winding up order Official Liquidator is required to take steps to settle the list of contributories unless the court dispense with the same or extend the time.

Rule 180 to 134 prescribe the procedure for settlement of list of contributories.

- First O.L. should prepare a provisional list of contributories in form 76 as contemplated under **Rule 180** so that it can be filed with the court not latter than 21 days after the date of the order of the court on the application for directions referred to in Rule 139 of the Companies (Court) Rules 1959.
- O.L should obtain the order of the court as contemplated under Rule 139 of the Companies (Court) Rules 1959 fixing the date of settlement of list of contributories. The date fixed for settlement of list of contributories should be not be latter than one month from the date of filing of the provisional list.

- A notice is to be given to every person included in the provisional list in Form 77 and should be sent so as to reach the person in the ordinary course not later than 14 days before the date fixed for the settlement.
- Therefore O.L. will be left with only 13 to 15 days only to send the notice contemplated in **Rule 181** after the date of filing provisional list of contributories.
- The person who posted the notices should swear an affidavit in form No.78 relating to the despatch thereof and the affidavit shall be filed with the proceedings in the court.
- Any transfer of shares in the company or alteration in the status of its members, made after the commencement of winding up, shall unless the court otherwise orders, be void as per section 536 (2) of the Act. Therefore this aspect should be kept in mind while settling the list of contributories.
- On the date fixed for the settlement of list the O.L. should hear any person who objects to being settled as a contributory. The list so settled by the O.L after hearing objections if any shall be the final list of contributories. **Rule 182.**
- Within 7 days from the date of settlement of list of contributories the O.L. should file a certificate of the final list of contributories in court in form No.79. (Rule 183)
- After filing the certificate the O.L. shall send a notice to each contributory mentioned in the final list in form No.80 by Registered post at the address mentioned in the list informing the person within 21 days from the date of service of notice on the contributory he must file an application to the court for removal of his name from the list or for a variation of the list.
- An affidavit of despatch of notice to contributories shall be sworn by the person who despatched the notice and filed in court within 14 days

of filing of the list by the O.L. his certificate of list of contributories (Form 79) as per Rule 183. This affidavit shall be in form 81.

- Therefore meticulous plan and preparation should be made to comply with the requirements of these rules within the time schedule. It is advised to prepare time chart and action plan and monitoring at the level of an officer for scrupulous compliance.
- *The official liquidator is also permitted to add to the list of contributories by a supplemental list or lists in form 82. (Rule 185), in the same manner as the settlement of original list.*
- O.L. may apply to the court for rectification of the final list of contributories if he found latter improperly or mistake excluded or omitted any person or character in which or number of shares or for any other particular content in the final list of contributories and court may order to rectify or vary the list.
- Rule 186 read 188 permit variation of list of contributories as finally settled. If any person not making an application within 21 days from the date of service of notice on him the settlement of list he can get the delay condoned by the court and then make an application. Order rectifying the register of members and varying the list shall be served on the Registrar of Companies within 14 days from the order by the applicant. (please see form 84 – form of order) . If the order relates to variation of list only and then filing with ROC is not necessary.
- Section 475 – read with Rule 275, 278 to 280 deals with the payment to contributories.
- Section 475 red with Rule 275 return of capital to the contributory shall be declared by O.L. only with the sanction of the court.
- Rule 279 provides that with every order of the court by which OL is authorised to make a return to contributories of the company should contain the list as per the details required in form 140. While making an application for obtaining order for return of capital O.L should

prepare details as per form 140 and file along with the application so that it will form part of order.

- Pursuant to the order of the court O.L. should send notice to each of the contributories in form 141 by ordinary post under certificate of posting. While applying for payment the person should produce the notice in entirety long with share certificate. . This notice contains intimation to the contributory the amount payable to him, receipt and authority for delivery.
- Cross entry should be made in the register of contributories while making payment.
- In respect of payment of dividend as well as return of capital to the contributories, the account opened by the Official Liquidator can be kept open for 6 months from the declaration of dividend and after expiry of the six months; it should be remitted to the Government account along with the list of the unpaid claimant/contributories in Form 142- U and filed with the Registrar of Companies concerned as provided under Section 555 of the Companies Act.
- *Considering requirement of the provisions of the Act and Rules mentioned above before moving an application to the court for sanction for declaration of dividend O.L. should prepare necessary data and arrangement to comply with the requirements of sending notice and upon receipt of notice and receipt as per form 141 should be in a position to make payment forth with and hence excluding preparation period order fixing date of declaration of return of capital should be obtained from the court. Hence while sending intimation in form 141 as required under Rule 279 the date up to which return of capital will be payable be fixed and while issuing cheque date on before which payable should be calculated as six months from the date of declaration of return of capital so that provisions of section 555 can be complied with scrupulously and no payment should go from bank after six months from the date of declaration of return of*

*capital. O.L should not issue any cheque which is payable after six months from the date of declaration of return of capital.*

- *Official Liquidator may prepare necessary data and make use of computer facilities in preparation of notice to be sent to creditors about declaration of dividend, preparation of covers and posting the same, preparation of cheque on receipt of notice with receipt from the creditor.*
- *Maintain a separate inward register for receiving the notices duly discharged from the contributories, and place the same with the dealing hand meant for examination of the same and issue of cheque.*

*Payment of debt due by contributory:*

Section 426,429,469, 470, 473,479,480 of the Act and Rule 235 to 242 of the Companies (Court) Rules 1959 prescribe the procedure for making calls by the O.L. in a winding up by the court. Only with the order of the court calls can be made by the Official Liquidator on the contributories. On verification of the balance and annual return if all the shares are fully paid and then the contributories are not liable to make any further payment.

## **CHAPTER VII**

### **MISCELLANEOUS PROCEEDINGS OF LIQUIDATION**

**PRIVATE EXAMINATION:**

Section 477 of the Act empower the court to summon any Officer or person known or suspected to have in his possession any property or books or papers of the company or known or suspected to be indebted to the company or any person whom the court deems capable of giving information concerning the promotion, formation, trade dealings property, books or

papers, or affairs of the company. This provision is a complete code in conducting the private examination.

If the person examined admits his indebtedness or admit his possession any property belong to the company court may order payment or delivery of the property and such order of the court may be executed as decree. This will be a useful tool where official liquidator has some information about the indebtedness of any person or possession of property of the company in the absence of complete records.

If the debtors are from any particular area instead of summoning them to Company Court O.L can satisfy the court to issued commission to District Judge within whose jurisdiction such person resides for the examination of such person or make an order for his examination by interrogation.

Rules 243 to 249 prescribe the detailed procedure in this regard. Order on the application form examination may be made ex parte However if application is made by any person other than official liquidator then notice should be given to O.L. Therefore each of the person who is to be examined need not be given notice. When summons is issued to the person along with the summons amount for reasonable expenses as fixed by the court or registrar of the court should also be sent/paid. When application is made by the official liquidator it shall be accompanied by a statement signed by him setting forth the facts on which the application is based.

### **Public examination of the Directors**

- Section 475 provides When the O.L. has made a report to the court (*report contemplated u/s.455(2) of the Act*) stating that in his opinion fraud has been committed by any person in the promotion or formation of the company or by any officer of the company in relation to the company since its formation the court is empowered after considering the report to direct the person or office appear for public examination.

- Provisions of section 478 (1) to (11) and Rule 249 to 258 of the Company's (Court) Rules 1959 deal with the procedure for public examination.
- O.L. shall take part in the public examination, any creditor or contributory may also take part in the public examination.