**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NOS.5505-5508 OF 2013**
**[Arising out of SLP (C) NO.12737-12740 OF 2008]**

M/s. Integrated Finance Co. Ltd. ...Appellant

**VERSUS**

Reserve Bank of India Etc. Etc. ...Respondents

**J U D G M E N T**

**SURINDER SINGH NIJJAR,J.**

**1.** Leave granted.

**2.** I.A. filed by Mr. B. Ramanna Kumar for substitution in place of Late Mr. N. Mani is allowed.

**3.** These appeals, arising out of S.L.P. (Civil) Nos. 12737-12740 of 2008, are directed against the common order and judgment dated 30th April 2008 passed by the Division Bench of the High Court of Judicature at Madras. Vide the aforesaid order, the order/judgment of the learned single judge dated 19th August

2006 passed in Company Petition No. 160 of 2005 was set aside.

**4.** The Company Petition No. 160 of 2005 was filed by the appellant company herein under Section 391 of the Companies Act, 1956 (hereinafter referred to as "the Companies Act"), seeking approval for the scheme of arrangement/compromise dated 10th August, 2005. The said agreement was entered into between the appellant company herein and its class of creditors, namely its deposit holders and bond holders. The learned Single Judge, vide order dated 19th August, 2006, was pleased to sanction the said scheme, albeit with some conditions. This order was challenged in the High Court by way of four original side appeals, which were allowed by the Division Bench vide the order dated 30th April, 2008 which has been challenged in this Court.



**Summary of Facts:**

**5.** The relevant facts giving rise to filing of the present appeals as narrated by the parties are as under:

**6.** The appellant herein was incorporated as a Non-Banking Finance Company (hereinafter referred to as a "NBFC") under the Companies Act in 1983, and was engaged *inter alia* in the business of hire-purchase and leasing. Over the years the appellant company has become one of the leading financial companies. It has 32 branches with over several hundred employees. The shares of the company are listed in two stock exchanges in India. It has 20,000 shareholders. Until 1995-1996, the appellant company was a profit making company and declared dividends to its shareholders continuously.

**7.** That the Reserve Bank of India (hereinafter referred to "RBI" or/and the "respondent no.1"), during 1997-2003, issued a series of circulars for regulating various activities of the Non Banking Financial Companies. The RBI also imposed certain conditions on these companies. The companies that did not comply with the aforesaid conditions were directed to stop accepting deposits from the investors and also to repay the deposits immediately.

**8.** In exercise of its powers under Section 45N of the Reserve

Bank of India Act 1934 (hereinafter "1934 Act"), the RBI inspected the books of accounts of the appellant company in 2005. The inspection report of the RBI disclosed the following violations of the provisions of the 1934 Act:

(i) On 31st March 2004, the Net Owned Fund (NOF) of the appellant company herein stood at negative (-) Rs.10666.06 lakh, which was in excess of the reported NOF at Rs.2194.00 lakh;

(ii) The credit exposure of the appellant company, as on 31st March 2004, to some of the companies was found to be in excess of 15% of its reported owned fund of Rs.2877.00 lakh as on September 30, 2003. Thus, it violated the provisions of Para 12 of the NBFC Prudential Norms (Reserve Bank) Directions, 1998 (hereinafter referred to as the Prudential Norms Directions).

(iii) The appellant company did not classify its assets in accordance with the asset classification norms stipulated by RBI and thereby, violated the provisions of Paragraph 7 of the Prudential Norms directions.

(iv) The Gross Non-Performing Assets of the appellant

company, assessed at Rs.15603.16 lakh, stood at a very high level and constituted 69.31% of the total credit exposures of the appellant company.

(v) The appellant company was found to have not made adequate provision in respect of its Non-Performing Assets. Resultantly, there was short provisioning to the extent of Rs.12575.33 lakhs. The aforesaid omission on part of the appellant violated the provisions of Paragraph 8 of the Prudential Norms Directions.

(vi) The appellant company was also found to be in violation of the provisions of Paragraph 10 of the Prudential Norms Directions because the NOF of the appellant company was negative and it did not maintain the minimum capital adequacy ratio.

**9.** Subsequently on 20th January, 2005, the RBI, in exercise of its powers under Section 45MB(1) of the Reserve Bank of India Act, 1934 issued a circular to the appellant company, prohibiting it from "*accepting deposits from any person, in any form whether by way of fresh deposits or renewal of the existing deposits or otherwise, until further orders.*" Further, the

appellant company was directed not to sell, transfer, create charge or mortgage, or deal in any manner with its properties, assets, without prior permission of the RBI. The said notice was also advertised in the Indian Express dated 20th January, 2005.

**10.** Thereafter, the appellant company started facing problems in running its operations because of the drop in its profitability. In order to overcome these problems, the appellant company proposed a Scheme of Compromise with its creditors, viz. the depositors and bond holders, which was approved by the Board of Directors of the appellant company on 19th May, 2005. The relevant part of the aforesaid scheme is as under:

"4 PAYMENTS TO FIXED DEPSOIT HOLDERS/BOND HOLDERS

4.1 The Company would settle all the deposit holders up to maturity value of Rs.20,000/- as and when it falls due.

4.2 The scheme would provide for the following.

(a) Conversion of all the deposit holders and bond holders into secured convertible debentures carrying on interest of 6% p.a. convertible into equity before the expiry of 1 year from the date of allotment with an option to the company to prepay the value of debentures before the due date of conversion. The conversion price will be determined taking into account the valuation laid down by SEBI guidelines.

(b) The debentures will be issued with periodical interest payment option to the deposit/ bond holders who are holding regular interest payment option presently and for those deposit/ bond holders holding payment of interest under cumulative option, interest will be added to the value of the debenture for conversion at the time of maturity.

(c) By virtue of this scheme, all the deposit holders and bond holders would become secured creditors in the books of IFCL at the first year. The Trustees for the Bonds would be the Debenture Trustees in the post scheme scenario and a Debenture Trust Deed charging the assets of Rs.125 crores of receivables, accrued interest, investments, assets and available stock on hire would also be made so as to comply with all the norms for the purpose of fully convertible debentures.

4.3. By virtue of the conversion, the outflow of the company would be a quarterly payment of interest depending upon the type of deposit/ bond held by the creditors. At the end of the tenure the debentures would either be redeemed or converted as equity shares at the given appropriate exit route as the Company is a listed company and a fairly large tradable market capitalization being available for the liquidation of these converted shares. The conversion of deposit holders/ bond holders into secured convertible debentures and thereafter into equity shares of the company will ensure their benefits since the company established new lines of business such as financial BPO and is in the process of expanding the same."

x x x

"4.6 The scheme is not offered to the Banks since the stock on hire pledged / hypothecated is about Rs.80 crores as against their dues of Rs.62 crores. Since none of the banks interest is prejudiced nor any of the assets charged to them, this scheme is not being offered to them and it is only the deposit holders and bond holders whose rights are being dealt with in the Scheme of Arrangement and compromise. Thus there is no direct or indirect interest of the Banks being prejudiced or affected.

5. Since this scheme does not envisage cash outflow at the first instance and does seek to convert the depositors and bond over a period of time into shareholders there is no requirement of fresh infusion of cash.

6. IMPLEMENTATION OF SCHEME

6.1 The Scheme if approved by the deposit holders and bond holders with such modifications, as may be assented by the Company, shall be submitted to this Hon'ble Court for confirmation and if confirmed, shall become binding with all deposit holders, bond holders and the Company. 6.2 On completion of the scheme, the Company shall have discharged all the liability to fixed deposit / bond holders.

7. EFFECT OF THE SCHEME

7.1 In view of the above Scheme being offered, all the parties agree

that:

a) with the terms of the Scheme all liabilities of the Deposit Holders and Bond holders shall be deemed as fully discharged.

b) No claims shall be raised by any deposit holders or bond holder to whom this Scheme is offered and

c) No claim can be made against any group companies of IFCL their associates or any other person, promoters, directors, past and present, in respect of matters relating to IFCL.

d) This scheme if approved and ordered by this Hon'ble Court shall be binding on the Company and all parties to the scheme."

**11.** The aforesaid scheme of compromise was presented under Section 391 of the Companies Act to the High Court. On 1st July 2005, the appellant company was permitted by the Ld. Single Judge, in Company Application Nos. 854 and 855 of 2005 in C.P.No.160 of 2005, to convene a meeting of its deposit holders at Chennai on 10th August 2005 at 2.30 p.m. for the purpose of considering the said scheme of compromise and, if thought fit, approving the same with or without modifications. Also, Mr. B. Ravi, a Practising Company Secretary, was directed to preside over the meeting. In the contingency of the failure of Mr. B. Ravi to preside over the meeting, Mr. George Kuruvilla, Managing Director of the appellant company was directed to step into the shoes of the former. The learned Single Judge also gave some other

directions in the aforesaid order to ensure that the relevant provisions of the Companies Act are complied with while conducting the said meeting.

**12.** However, before the meeting could be held on 10th August, 2008; Company Applications Nos. 1105 to 1110 of 2005 in C.P. No.160 of 2005 came to be preferred before the High Court. In the aforesaid Company Applications, some depositors of the appellant company *inter alia* sought the appointment of an "independent chairman," in place of the chairman appointed vide order dated 1st July 2005. The said applicants also made a prayer that police protection should be granted to them during the said meeting. The learned Single Judge while disposing of the aforesaid company applications, vide order dated 5th August, 2005, did not make any change pertaining to the Chairmanship of the originally appointed Mr. B. Ravi. However, Mr. R. Guruswamy, retired District Judge, was appointed as the observer for the said meeting. This appears to have been done for ensuring fair and free participation of all deposit holders/bond holders in the said meeting.

**13.** The scheduled meeting was conducted on 10th August, 2005, as per the orders of the learned Single Judge dated 1st July 2005 and 5th August, 2005. The report of the meeting was published in various newspapers indicating that the Scheme had been approved by majority of the bond holders and deposit holders. A report concerning the said meeting was filed before the learned Single Judge along with the Observer's report. Thereafter, a petition was preferred before the High Court under Section 391(2) of the Companies Act, seeking sanction for the said scheme of compromise. In the aforesaid proceedings, the Integrated Finance Company Depositors Association - an Association representing the depositors of the appellant company and several other depositors-filed their objections and raised several contentions regarding the validity of the said Scheme. The RBI also filed its objections. At the same time, certain other associations, representing the deposit holders, debenture holders also intervened in the aforesaid proceedings and supported the validity of the said scheme. Similarly, an association of the employees of the appellant company also intervened in the support of the Scheme. It is

also relevant to note here that the appellant company, during the pendency of the Company Petition No.160 of 2005, filed Company Applications Nos. 1409 & 1410 of 2005, *inter alia* to restrain the respondent Nos. 1 to 6 in such applications from initiating any proceeding either civil or criminal in nature against the Directors of the appellant company.

**14.** The learned Single Judge vide order dated 19th August, 2006 overruled all the objections put forward against or in objection to the said scheme and accorded approval to the same. While granting sanction the learned Single Judge made it clear that sanction of the said scheme "*will not exonerate or protect the Directors and those in charge of the affairs of the Company from any proceeding that may be contemplated either under the provisions of the Companies Act or under any other Act for any statutory violation.*"

**15.** The aforesaid order, as noticed earlier, was challenged before the Division Bench of the High Court by way of the following appeals:

O.S.A. No. 308 of 2006 was filed by the Reserve Bank of India;

O.S.A. No. 309 of 2006 was filed by the Integrated Finance Company Depositors Association; O.S.A. No. 312 of 2006 was filed by one M/s. Popular Kuries Limited; and O.S.A. No.91 of 2007 was filed by one Mrs. Elizabeth Antony.

While allowing the aforesaid appeals, the Division Bench set aside the judgment of the Learned single Judge vide common judgment/order dated 30th April, 2008. This judgment is under challenge before us.

**Submissions:**

**16.** We have heard the learned counsel on behalf of the parties.

**17.** Mr. Arvind P. Datar, learned senior counsel, appeared for the appellant company and assailed the validity of the impugned order. Mr. Iqbal Chagla, learned senior counsel, appeared for intervenors in I.A. Nos. 29-32 of 2009 in S.L.P. (C) Nos. 12737-12740 of 2008. Mr. Shyam Divan, learned senior counsel, appeared for the intervenors in I.A. Nos. 33-36 of 2009 in the aforesaid proceedings. Whereas Mr. Parag P. Tripathi, learned senior counsel, appeared for the Respondent/RBI and

Mr. V. Parkash, learned senior counsel appeared for respondent no.1/Integrated Finance Depositors Association in S.L.P.(C) No. 12738 of 2008.

**18.** Mr. Datar, learned senior counsel, submitted that the scheme of compromise of the appellant company has been approved by 1708 out of 2177 (79%) deposit holders and 5628 out of 7143 bond holders (77.73%), present and voting; which shows that it was approved by an enormous majority. According to him, the appellant company has complied with all the statutory requirements relating to the said scheme. This, he submits, is evident from the fact that neither the Single Judge nor the Division Bench of the High Court found any procedural irregularity in the arrangement of the said scheme. Thus according to Mr. Datar, the only issues that now require consideration are:

(i) "Whether the non-obstante clause in Section 45Q of the RBI Act, 1934 prohibits the High Court from sanctioning any scheme for the deposit holders of an NBFC?

(ii) Whether the petitioner had failed to disclose the RBI

letter dated 18th January, 2005 before the learned Company Judge as per the provisions of Section 391(1) of the Companies Act, 1956?"

**19.** According to Mr. Chagla, the crucial issue which arises for the consideration of this court is as to whether Section 391 of the Companies Act does not apply to NBFCs in view of Section 45QA of the RBI Act. He also supplemented the second issue, as framed by Mr. Datar, by submitting that this Court has to determine that; whether non-disclosure of the letter dated 18th January, 2005 violates the provisions of Section 391(2) and/or Section 393 of the Companies Act. These submissions are reiterated by Mr. Shyam Divan, learned senior counsel.



**20.** Mr. Datar has further submitted that a scheme under Sections 391 to 394 is an exception to the rule that a contract can be novated only with the consent of the individual parties. The resolution passed by the requisite majority sanctioning the scheme in question, which gets sanction from the Court will be binding equally on the dissenting minority. In this context, the

learned counsel relied upon **J.K. (Bombay) Private Ltd.** Vs. **New Kaiser-i-hind Spinning and Weaving Co. Ltd. & Ors. Etc.**[1] and **Administrator of the Specified Undertaking of the Unit Trust of India & Anr.** Vs. **Garware Polyester Ltd.**[2] Mr. Shyam Divan, while explaining the scope of Sections 391-394 of the Companies Act, has drawn our attention to the principle of novation, which allows the parties to a contract to rework or re-agree the terms of the contract. He submits that this principle is recognised in Section 62 of the Contract Act, 1872. Further, Code of Civil Procedure, 1908 allows compromise during the pendency of the proceedings, (See Order 23, CPC); and also by adjustment of a decree (Order 21 Rule 2, CPC). Relying on the provisions contained in Section 22 of the Sick Industrial Companies Act, 1982 and Section 402 of the Companies Act, Mr. Divan has submitted that Chapter V of the Companies Act provides another statutory method of varying contracts. The Chapter V allows even solemn contractual obligations to be varied by a particular class of similarly placed members/creditors, provided there is requisite majority. The learned senior counsel argued that a Scheme under Sections 391-394 of the Companies Act is not merely a commercial

[1] (1969) 2 SCR 866, AIR 1970 SC 1041
[2] (2005) 10 SCC 682

agreement, but it is statutorily binding on all members and creditors of a company.

**21.** Mr. Datar, Mr. Chagla and Mr. Divan have unanimously submitted that Section 45QA of the RBI Act is not a bar to Scheme under Sections 391-394 of Companies Act. The learned senior counsel advanced the following reasons for substantiating the said submission:

*First*, the RBI Act and the Companies Act must be read in their own spheres since both operate in different fields, altogether. *Second*, Section 45QA of RBI Act and Sections 391-394 of the Companies Act can be read harmoniously and there is no inconsistency between the said provisions. *Third,* the legislature did not intend to exclude the application of Sections 391-394 of the Companies Act in relation to the NBFCs.



**22.** Elaborating these propositions*,* it was submitted that the RBI Act and the Companies Act operate in distinct and different fields, altogether. Mr. Chagla argued that the RBI Act is regulatory in nature and is enacted to regulate the operation of the Banking Companies and NBFCs. The RBI Act is merely

supplementary to the Companies Act and does not supplant it. To support the said submission, Mr. Datar relied upon Bennion, *Interpretation of Statues,* s. 288 on "Textual Conflicts." Reliance is also placed on **Haridas Exports** Vs. **All India Float Glass Manufacturers' Assn. & Ors.**[3] Mr. Datar further pointed out that the special provisions relating to a scheme under the Companies Act will prevail over a special statue, if the special statute has no provisions to deal with the said matter. He relied upon the principle of law laid down in **ICICI Bank Ltd.** Vs. **SIDCO Leathers Ltd. & Ors.**[4] In this context, Mr. Chagla relied upon the judgments of this court reported in **Aswini Kumar Ghose & Anr.** Vs. **Arabinda Ghose & Anr.**[5] and **Madhav Rao Jivaji Rao Scindia** Vs. **Union of India & Anr.**[6] Further, the RBI Act, according to Mr. Chagla, is not a complete code by itself.

**23.** Mr. Datar also pointed out that the RBI Act will apply for the regulation of collection of deposits, for minimum net owned funds, terms of deposits, etc. but will not apply to cases of scheme under the Companies Act which are not barred by the

[3] (2002) 6 SCC 600
[4] (2006) 10 SCC 452
[5] AIR 1952 SC 369
[6] (1971) 1 SCC 85

former. The latter will continue to apply in the circumstances where matters relating to running of a company are concerned, like the provisions relating to schemes and arrangements of the company. Thus, it was submitted that RBI Act has no application in matters covered by the Sections 391-394 of the Companies Act and therefore, Section 45QA of the RBI Act is not a bar to scheme under Sections 391-394 of Companies Act.

**24.** *Secondly,* it was submitted that since there is no inconsistency between Section 45QA of the RBI Act and Sections 391-394 of the Companies Act, it will not be applicable in the present case because of the non-obstante clause contained in Part IIIB of the RBI Act. Mr. Divan has submitted that the ambit of Sections 391-394 of Companies Act is very wide. In fact, arrangements with debenture holders involving (i) extension of time of payment; (ii) accepting cash payment of lesser face value; and (iii) exchanging debentures for shares have been accepted since the late 1800's (**See *Charlesworth's Company Law, 18th Edition, Pg. 772***). On the other hand, Chapter IIIB of the RBI Act contains whole set of detailed provisions pertaining to regulation of NBFCs. Mr. Chagla added that the object of the

1997 amendment to the RBI Act which added section 45Q indicates that a remedy was to be granted to deposit holders for approaching the Company Law Board for repayment of deposits held by a NBFC when the same are not repaid in accordance with the terms and conditions of the deposit. However, the jurisdiction of the Company Law Board is not exclusive and the jurisdiction of a civil court or, for that matter, of a company court is not ousted. Reliance was placed upon the law laid down in **Dhulabhai Etc.** Vs. **State of Madhya Pradesh & Anr.**[7]

**25.** Further, learned senior counsel relied heavily on the principles laid down by this court in relation to the interpretation of a non-obstante clause to argue that the Section 45QA is neither applicable in the facts and circumstances of the case nor is it a bar to a Scheme under Sections 391-394 of the Companies Act. Mr. Datar relied upon the case of **JIK Industries Limited & Ors.** Vs. **Amarlal V. Jumani & Anr,**[8] wherein it was held that "*under the scheme of the modern legislation, non-obstante clause has a contextual and limited application*." Reliance was also placed upon the case of **R.S.**

[7] AIR 1969 SC 78
[8] (2012) 3 SCC 255

**Raghunath** Vs. **State of Karnataka & Anr.**[9] wherein it was held that "there should be a clear inconsistency between the two enactments before giving an overriding effect to the non-obstante clause. But the non-obstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the non-obstante clause cannot cut down the construction and restrict the scope of its operation."

It was also submitted that the Court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another. Such intention of the legislature is to be gathered from the enacting part of the section. The counsel relied upon **A.G. Vardarajulu & Anr.** Vs. **State of T.N. & Ors.**[10]

**26.** It was further argued by Mr. Chagla that Part IIIB was introduced in the RBI Act by Amendment Act of 1963. The Statement of Objects and Reasons of the said Amendment Act indicates that it was not intended to override the provisions of

[9] (1992) 1 SCC 335
[10] (1998) 4 SCC 231

the Companies Act. Since the legislative intention behind such insertion was to regulate the functioning of NBFCs in general and to prohibit multiple partnership firms from taking deposits from the general public, in particular; it cannot be interpreted in the manner so as to exclude the application of Sections 391-394 of the Companies Act. According to Mr. Chagla, Section 45QA simply states in general terms that every loan shall be repaid in accordance with the terms and conditions of such loan. This provision does not prohibit a depositor from agreeing to accept the full amount of principal without interest or an amount less than the full amount of principal or to accept in kind rather than in cash. In other words, novation of the contract entered into between the company and the depositor is not prohibited.



**27.** Further, it was submitted that the provision of Section 45QA is *pari materia* if not identical with Section 58A of the Companies Act. Schemes under Section 391 of the Companies Act are presented and approved by the Company Court in respect of deposits under Section 58A of the Companies Act. Premising on the aforesaid submission, Mr. Datar argued that if

a scheme of arrangement is not prohibited under the latter section it cannot be prohibited under the former, i.e., section 45QA of the RBI Act. This submission has also been reiterated and elaborated by Mr. Chagla.

**28.** It was further submitted that wherever the applicability of Section 391 of the Companies Act was excluded by the legislature, it was done so expressly. To illustrate, Learned Senior counsel relied upon Section 38 of the Banking Regulation Act, 1949 which provides that Section 391 of the companies Act will not be applicable in winding up of a banking company by High Court. It was further submitted that the legislative intent cannot be interpreted in the manner which will discriminate against the depositors of NBFCs as against the depositors of public limited companies and depositors of banking companies. Section 391 of the Companies Act can be availed of in case a NBFC is going into liquidation but if the interpretation given in the impugned order is accepted, the same provision would not be available for revival of the same company. This, it was argued, would lead to an anomalous situation. In the light of the aforesaid, it was collectively argued

by the learned senior counsel that the non-obstante clause in Section 45Q of the RBI Act, 1934 does not prohibit the High Court from sanctioning any scheme for the deposit holders of an NBFC. Therefore, the Division Bench of the High Court committed a serious jurisdictional error in setting aside the order of the learned Single Judge.

**29.** The second issue framed by the learned senior counsel for the appellant company and intervenors is that whether non-disclosure of the letter/notice dated 18th January, 2005 issued by the RBI to the appellant is violative of the provisions of Section 391(2) and/or Section 393 of the Companies Act? Mr. Datar has submitted that the said letter dated 18th January, 2005 was widely advertised by the RBI in various newspapers, including the *Indian Express* dated 20th January 2005. And, therefore, the contents of this letter were in the public domain. It was also argued that facts that are inconsequential for the approval of the scheme need not be disclosed. The counsel relied upon **Bharti Mobinet Limited, Bharti Telenet Limited and Bharti Cellular Limited** Vs. **DSS Enterprises Pvt. Ltd.**[11]

[11] 111(2004) DLT 554

**30.** The learned counsel further submitted that even otherwise the disclosure under the proviso to Section 391(2) of the Companies Act is to be made only before the Court that sanctions the scheme and not to the creditors or the shareholders with whom the scheme is entered into. The counsel relied upon **Hindustan Lever Employees' Union** Vs. **Hindustan Lever Ltd. & Ors.**[12] and **In re: HCL Infosystems Limited, HCL Infinet Limited and HCL Technologies Limited.**[13]

**31.** Mr. Chagla was at pains to emphasise that Section 391(2) of the Companies Act requires a company to disclose to the Court all material facts relating to the company "such as the latest financial position of the company, the latest Auditor's Report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under the Sections 235 to 251, and the like" (emphasis supplied by the learned senior counsel). He argued that the order of the RBI dated 18th January, 2005 is not akin to the provisions of Sections 235 to 251 of the Companies Act. Thus, it was argued that the Division Bench erroneously held that the appellant

[12] 1995 Supp (1) SCC 499
[13] (2004)121CompCas861(Delhi)

company should have disclosed the letter/order issued by the RBI before the creditors.

**Respondents' Submissions**

**32.** Mr. Tirpathi, learned senior counsel, appearing for the RBI submits that the Division Bench of the High Court has correctly interpreted the provisions of Chapter IIIB of the RBI Act. He emphasised that an amendment was required to strengthen the regulatory mechanism in relation to the NBFCs. The said Chapter IIIB has evolved an elaborate scheme of regulations, enabling the RBI even to seek winding up of a NBFC in appropriate circumstances. Section 45Q of the RBI Act provides that Chapter IIIB thereof shall override any other law inconsistent therewith. Section 45QA gives a statutory right which cannot be waived by anyone. Under this provision, every deposit accepted by NBFC has to be renewed and repaid in accordance with the terms and conditions of such deposit. No subsequent agreement can permit the conditions to be waived of or varied. Section 45QA(2) enables NBFCs to seek extension in time for repayment before the Company Law Board. There is no other provision in Chapter IIIB which can dilute the effect of Section 45QA. The High Court, according to

Mr. Tirpathi, has rightly held that the scheme in question of the appellant company is not in compliance with Chapter IIIB and, therefore, cannot be approved.

**33.** Countering the submissions of the appellants with regard to the interpretation of non-obstante clause contained in Section 45QA, Mr. Tirpathi submitted that the provisions contained in Chapter IIIB have to prevail over the provisions of the Companies Act. He relies on the judgment of this Court in **Tata Motors Limited** Vs. **Pharmaceutical Products of India Limited & Anr.**[14]

**34.** Mr. V. Prakash, learned senior counsel, appearing on behalf of the respondent No.1 / Integrated Finance Depositors Association in S.L.P. (C) No. 12738 of 2008, submitted that the provisions contained in Section 45QA(1) of the RBI Act are mandatory and cannot be diluted. Elaborating on the factual circumstances, learned senior counsel submitted that the appellant company lead a very aggressive advertising campaign which was aimed to make the general populace believe that it was supported by leading companies such as

[14] (2008) 7 SCC 619

MRF Ltd., Malayala Manorama, etc for soliciting deposits from public in Kerala. And then suddenly to the shock of the public, the order dated 18th January, 2005 was published in the newspapers, which prohibited the appellant from accepting or renewing any further deposits but the appellant continued to accept deposits even after said notice. The learned senior counsel further submitted that the scheme of arrangement presented before the Company Law Board was not bonafide; it failed to disclose various directions issued by the RBI restricting the functioning of the appellant as a NBFC. The High Court has correctly held that the scheme proposed by the appellant is not bonafide and is in fact contrary to public policy.

**35.** We have considered the submissions made by the learned counsel for the parties. We may here briefly notice the conclusions that have been arrived by the High Court:

**Findings of the High Court**

**36.** Whilst examining the scope of Sections 391 to 393 of the Companies Act, the High Court relied on the analysis of the

aforesaid sections as rendered by this Court in the case of **Miheer H. Mafatlal** Vs. **Mafatlal Industries Ltd.**[15] The analysis given in the aforesaid judgment are as under:-

"28-A. 1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(*a*) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391(2).

3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(*a*) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).

5. That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a

[15] (1997) 1 SCC 579

commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."

**37.** The High Court notices the well settled legal positions that whilst examining the scheme under Sections 391-393 of the Companies Act neither the Company Court nor the Appellate Court ought not to go into the nitty-gritty of the various suggestions in the scheme. The High Court recognised that it is difficult for the Company Court or the Appellate Court to consider the financial wisdom of a particular proposal. This is so as the Courts do not have the necessary expertise to examine the commercial wisdom of the scheme of arrangements, especially when it is approved by an overwhelming majority of the bond holders and depositors. The Court is not expected to substitute its own wisdom for that of the stakeholders, who give consent to a particular scheme. The High Court also holds that, by or otherwise, a scheme is

ordinarily beyond the jurisdiction of the Company Court and the Appellate Court except in those *rare* cases where one can see that the scheme itself is on the face of it so unreasonable that no man of ordinary prudence can accept it. The High Court concludes that "*in the facts of the present case, we do not think that we can characterise the Scheme as so outrageously improper as to invite the wrath of the Court."* The High Court rejected the submission of some of the deposit holders that meetings for approving the scheme should have been held within the State of Kerala.

**38.** Upon examination of the question as to whether the company should have disclosed the aspects arising out of the order dated 18th January, 2005 to enable the depositors and the bond holders to take an informed decision. The High Court has concluded that the company is guilty of such non-disclosure.

**39.** On the interpretation of the provisions of Section 45 of the RBI Act, the Division Bench has concluded that by virtue of non-obstante clause in Section 45Q of the RBI Act, Chapter IIIB of the RBI Act will prevail over Sections 391-393 of the Companies Act. It is held that the provision contained in

Section 45QA which is intended to protect the depositors must have primacy over any other law inconsistent with such provision. It is further held that the scheme of arrangement of compromise even if presented by a NBFC would have to conform to the provisions contained in the Chapter IIIB of the RBI Act. The Division Bench also concluded that not only the scheme is contrary to the specific provisions contained in Chapter IIIB of the RBI Act; it is also against public policy. With these observations the Division Bench had declined to approve the scheme and set aside the order passed by the Company Court.

**40.** In our opinion, the aforesaid conclusions of the High Court do not require any interference. Even according to the appellant since its incorporation in 1983, the appellant had grown into a gigantic NBFC; it had 20,000 shareholders. Its shares were listed in two Stock Exchanges in India. Till 1995-1996, it was a profit making company and declared dividends to its shareholders continuously.

**41.** The RBI issued a series of circulars during 1997-2003

regulating the activities of NBFCs, strict restrictions were placed on the NBFCs for accepting deposits. The Companies which did not comply with the aforesaid directions were directed to stop accepting deposits and to repay the same immediately. It is also an accepted case of the company that the RBI, in exercise of its power under Section 45N, inspected the Books of Accounts of the appellant company in 2005. The inspection report disclosed the violations of the RBI Act, 1934, committed by the company which we have noticed in the earlier part of the judgment. It is also accepted that on 18th January, 2005, RBI in exercise of its powers under Section 45MB(1) of the RBI Act, issued a circular to the appellant company prohibiting it from "accepting deposits from any person, in any form whether by way of fresh deposits or renewal of the existing deposits or otherwise until further orders." The appellant company was also directed not to sell, transfer, create charge of mortgage or deal in any manner with its properties, assets, without prior permission of the RBI. It is also accepted that the aforesaid notice was advertised in the Indian Express on 20th January, 2005. The Notice highlights the purpose of the notice as **"Integrated Finance Company Limited, Chennai prohibition**

**for accepting of deposits and alienation of assets".** The appellant claimed that NBFC started facing problems in running its operations as a direct consequence of the restrictions and the publicity generated by the notice dated 18th/20th January, 2005. Since the company was facing severe problems in running its operations because of the drop in its profitability, it proposed a scheme of compromise with its creditors, viz. the depositors and bond holders. This scheme was approved by the Board of Directors of the appellant company on 19th May, 2005. We have reproduced earlier the salient features of the scheme, which was presented to the Company Court under Section 391 of the Companies Act in the High Court of Madras.

**Our Conclusions:**

**42.** The primary issue that arises before us is as to whether such a scheme of arrangements could have been presented in view of the provisions contained in Chapter IIIB of the RBI Act. Even if it could be presented, could it be sanctioned without complying with the provisions contained in Section 45QA of the RBI Act? The learned counsel for the appellant submitted that the High Court has in terms concluded that the scheme cannot be characterised "as so outrageously improper as to invite the

wrath of the Court." The High Court also rightly concluded that the Company Court is not expected to substitute its own wisdom for that of the stakeholders. The High Court has also found that all the procedural requirements for sanctioning a scheme under Sections 391-394 have been complied with. The High Court also accepts that an overwhelming majority of the deposit holders have approved this scheme, yet the relief was not been granted to the appellant on the grounds that the scheme does not comply with the provisions contained in Chapter IIIB of the RBI Act.

**43.** We are unable to accept the submission of the learned counsel that Section 45QA of the RBI Act is not a bar to a scheme under Sections 391-394 of the Companies Act. Under Section 391 of the Companies Act, whilst approving the scheme, the Company Court does not act as a rubber stamp. The Companies Act has to be satisfied that the concerned meetings of the creditors have been duly held. It has to be satisfied that in the concerned meetings, the creditors or members of any class have been provided with relevant material to enable them to take an informed decision as to whether the scheme is just and fair. The Court is also required

to conclude that the proposed scheme of compromise or arrangement is not violative of any provision of law and is not contrary to public policy. Furthermore, the Court has to be satisfied that members or class of members or creditors who may be in majority are acting bonafide and have not coerced the minority into agreement. Above all, the Court has to be satisfied that the scheme is fair and reasonable from the point of view of a prudent man of business taking commercial decisions, which are beneficial to the class represented by them. [**See Miheer H. Mafatlal (supra)**] It is true that whilst sanctioning the scheme, the Company Court is not required to act as a *Super-Auditor*. No doubt whilst considering the proposal for approval, the Company Judge is not required to examine the scheme in the way of a *carping critic, a hair-splitting expert, a meticulous accountant or a fastidious Counsel*. However at the same time, the Court is not bound to superficially add its seal of approval to the scheme merely because it received the approval of the requisite majority at the meeting held for that purpose. The Court is required to see that all legal requirements have been complied with. At the same time, the Court has to ensure that the scheme of arrangement

is not a camouflage for a purpose other than the ostensible reasons. [**See Administrator of the Specified Undertaking of the Unit Trust of India (supra), Para 32**]. If any of the aforesaid requirements appear to be found wanting in the scheme, the Court can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same. (**See Miheer H. Mafatlal (supra)**]

**44.** In view of the aforesaid, it needs to be considered as to whether a scheme which does not comply with the provisions of Section 45QA of the RBI Act can be sanctioned. The High Court on a careful consideration of the entire matter has concluded that the scheme must fail as it does not comply with the provisions contained in Section 45QA(1) of the RBI Act. To get over this difficulty, the learned counsel for the appellant has submitted that Chapter IIIB of the RBI Act is not a complete code. This apart, the RBI Act and the Companies Act must be read in their own sphere since both operate in different fields, altogether. We are unable to agree with the aforesaid submission of the learned senior counsel for the parties.

**45.** Chapter IIIB of the RBI has been incorporated through RBI (Amendment) Ordinance 1997, subsequently replaced by the RBI (Amendment) Act, 1997. The Statement of Objects and Reasons make it abundantly clear that before the amendment, the unincorporated bodies circumvented the statutory restrictions by floating different partnership firms as and when a firm reached the level of 250 depositors. It was also reiterated that several unincorporated bodies were advertising aggressively through various media, soliciting deposits from public by offering high rates of interest and other incentives. The Amendment Act provides several safeguards for NBFCs so as to ensure their viability. This includes compulsory registration of NBFCs with RBI, stipulation of minimum need in the funds requirements, creation of reserved funds and transfer of certain percentage of profits every year to the fund; and prescription of liquidity requirements. The RBI has also been vested with powers to issue guidelines intended to ensure sound and healthy operations and the quality of assets of these companies. The RBI was also empowered to issue directions to Auditors of NBFCs to order special Audits in NBFCs, prohibited acceptance of deposits by NBFCs and make

applications for winding up of NBFCs. It is specifically noticed that earlier the only recourse available to the depositors was to approach the Court of Law for redressal of grievances. However by the Amendment, powers have been vested with the Company Law Board for directing the defaulter NBFCs to make repayment for the deposit interest with a view to protect the interest of depositors. The NBFCs have been totally prohibited from accepting deposits for the purpose other than for personal use, if unincorporated. They have been permitted to continue to take deposit after incorporating themselves within the regulatory framework. The unincorporated bodies have also been specifically prohibited for issuing any advertisements in any form. The real intent is set out in Paragraph 6, which is as under:-



"6. There are reports of several finance companies and incorporated bodies having failed to repay the deposits collected from unsuspecting depositors who have been tempted by the attractive returns and incentives offered. Concern has been expressed in several quarters on the need to take urgent steps to regulate the activities of such companies and unincorporated bodies."

**46.** Keeping in view the aforesaid objects and reasons, it becomes evident that Chapter IIIB of the RBI Act is a self contained code. It is not possible for us to accept the submissions of the learned

counsel for the appellants that the RBI Act and the Companies Act operate in distinct and different fields. We are unable to accept the submission of the learned counsel for the appellants that the provision contained in the RBI Act being regulatory in nature will not apply to cases of schemes submitted for approval under the Companies Act. We may also notice here that the learned senior counsel for the appellant relied on **Haridas Exports (supra)** in this context. In the aforesaid case, this Court upon a comprehensive analysis of the Monopolies and Restrictive Trade Practices Act, 1969 and Customs Tariff Act, 1975 concluded that the said two Acts substantially operate in different fields and, therefore, the provisions of Section 9-A of Customs Tariff Act cannot be implied to repeal the provisions of Section 33(1)(*j)* of the MRTP Act, 1969. Since the main issue involved in the matter before us is different from the case of **Haridas Exports (supra),** the said case is of no assistance to the appellant company.

**47.** We are also not able to accept the submission of the learned senior counsel for the appellant and the intervenors in support of the appellant that the non-obstante clause in

Section 45QA will not have an overriding effect over the provisions contained in the Companies Act in the Sections 391-394. We are also not able to accept the additional submission of Mr. Chagla that if overriding effect is given to Section 45QA, the provisions contained in Section 391 would be rendered nugatory so far as NBFCs are concerned. We are not persuaded to accept the submissions of the learned senior counsel for the appellant that the non-obstante clause contained in Section 45A ought to be given a limited application. Even applying the ratio of the judgments cited by the learned senior counsel, there is no justification for lessening the scope of the applicability of the non-obstante clause in Section 45Q of the RBI Act. It states in categoric terms that provisions of Chapter IIIB *shall* have effect *notwithstanding* anything inconsistent therewith *contained in any other law*. *The overriding effect extends not only to any other law for the time being in force but also to any instrument having effect by virtue of having such law.* The reasons for giving such categoric overriding effect are evident from the objects and reasons given in the Amendment Act. *The magnitude of the exploitation of the poor sections of the society, leading to utter destruction of*

*innumerable families was the underlying impetus to bring the NBFCs under strict control.* Therefore, we have no hesitation in concluding that Chapter IIIB of the RBI Act is a complete code in itself. The Companies Act is a prior enactment as the same was enacted in the year 1956, whereas, Chapter IIIB was inserted in the RBI Act (55 of 1963) w.e.f. 1964. Section 45QA was inserted by the Act No. 23 of 1997 w.e.f. 9th January, 1997. Thus, provisions of the RBI Act would prevail over the Companies Act, it being a later enactment. It is a settled proposition of law that a later enactment will override the earlier enactment. We may usefully make a reference here to the relevant paragraphs of **Tata Motors Limited (supra)**,which are as under:-

**"21.** It was conceded by Mr Sundaram SICA being a special law vis-à-vis the 1956 Act, it shall prevail over the latter. The learned counsel, however, qualifies his submission by contending that SICA only excludes the provisions of the Companies Act when they are inconsistent with each other.

**22.** The provisions of a special Act will override the provisions of a general Act. The latter of it (*sic* Act) will override an earlier Act. The 1956 Act is a general Act. It consolidates and restates the law relating to companies and certain other associations. It is prior in point of time to SICA.

**23.** Wherever any inconstancy (*sic* inconsistency) is seen in the provisions of the two Acts, SICA would prevail. SICA furthermore is a complete code. It contains a non obstante clause in Section 32.

**24.** SICA is a special statute. It is a self-contained code. The jurisdiction of the Company Judge in a case where reference had been made to BIFR would be subject to the provisions of SICA."

**48.** In our opinion, Chapter IIIB has been given an overriding effect over all other laws including Companies Act by incorporating Section 45Q with a clear intention to ensure that in a case of NBFC, a scheme under Section 391 of the Companies Act cannot be entertained unless it is in conformity with the provisions of Section 45QA of the RBI Act.

**49.** We may briefly notice here the judgments relied by the learned counsel for the appellant in support of the submission that the non-obstante clause in Section 45Q of the RBI Act will not have an overriding effect over the Sections 391-394 of the Companies Act. Reliance was placed on **Aswini Kumar Ghose (supra); Madhav Rao Jivaji Rao Scindia (supra); A.G. Vardarajulu (supra); ICICI Bank Ltd. (supra); R.S. Raghunath** and **JIK Industries Limited (supra)**. The said cases undoubtedly reiterate the settled law on the manner in which a particular non-obstante clause ought to be interpreted. In **Aswini Kumar Ghose (supra)**, this court held that "a non-obstante clause must be construed strictly and the Court must try to find the extent to which the legislature had intended to give one provision overriding effect over another provision."

Similar observations were reiterated by this Court in the other cases relied by the appellant. Since it has been already noticed by us that the Parliament clearly intended to give an overriding effect to Chapter IIIB of the RBI Act over Sections 391-394 of the Companies Act, the aforesaid observations will not be of any help to the appellants in support of their submission that Section 45Q and/or Section 45QA of the RBI Act will not override Sections 391-394 of the Companies Act.

**50.** We, therefore, endorse the opinion expressed by the High Court that the scheme has been introduced only *with a view to avoid repayment to the small depositors as* it contemplates that instead of repaying of amount in accordance with the terms and conditions of the deposit, such amount shall be considered as convertible debentures with interest @ 6%, which would be converted into equity shares within a period of one year. Such a provision is clearly contrary to the mandatory requirements under Section 45QA(1) which requires that "every deposit accepted by a NBFC, unless renewed, shall be repaid in accordance with the terms and conditions of such deposit". This ingenious effort by the appellants in fact justifies the

insertion of the amendment, which has been obviously incorporated with a view to protect the depositors and *to avoid exploitation of these hapless and poor depositors from exploitation by Non Banking Financial Institutions,* such as the appellant. It is for this reason that Chapter IIIB clearly provides that the provisions contained therein shall override all other laws, which are inconsistent with the same. This will also be applicable to Sections 391-394 of the Companies Act.

**51.** The Companies Act as well as the RBI Act are Central Acts. Chapter IIIB, which was inserted by Act No. 55 of 1963 w.e.f. 1st December, 1964 being a later enactment clearly has to prevail. We are unable to agree with the submissions of the learned counsel for the appellant that if such an interpretation is given to Section 45QA, it would render Sections 391-394 nugatory.

**52.** Faced with this situation, Mr. Shyam Divan learned counsel for the appellant had submitted that in fact there is no inconsistency between Section 45QA of the RBI Act and Sections 391-394 of the Companies Act. It is submitted that

scheme of arrangements under Sections 391 to 394 is a form of novation of a contract. Under the Contract Act, each individual party is entitled to vary the terms and conditions of the Contract. Therefore, debenture holders accepting cash payment of lesser face value or exchanging debentures for shares would only be continuance of a practice which has been vogue since late 1800s. He makes this submission relying on *Charlesworth's Company Law 18th Ed. 771-72*, which are as follows:

"The word "arrangement" has a very wide meaning, and is wider than the word "compromise". An arrangement may involve debenture holders giving an extension of time for payment accepting a cash payment less than the face value of their debentures, giving up their security in whole or in part, exchanging their debentures for shares in the company, or in a new company, or having the rights attached to their debentures varied in some other respect. Creditors may take cash in part payment of their claims and the balance in shares or debentures in the company. Preference shareholders may give up their rights to arrears of dividends, agree to accept a reduced rate of dividend in the future, or have their class rights otherwise varied."

In our opinion, these observations would be of no avail to the appellants in view of our conclusions recorded earlier that the present arrangement is not *bona fide*.

**53.** We are further of the opinion that there can be no question of novation in the face of the categoric provisions contained in Section 45Q, which has an overriding effect over

all other laws, which would necessarily negate the principle of novation contained in the Contract Act also. Since we have already negated the submission of the learned counsel for the appellant that it was open to each individual depositor to vary the contract, i.e., novate the contract, it would not be possible to accept the subsequent submission of the learned counsel that since the scheme has been approved by the requisite majority and sanctioned by the Court, it is binding on the minority as well. In support of this submission, learned counsel has relied on the observations made by this Court in **J.K. (Bombay) Private Ltd. (supra)** and **Administrator of the Specified Undertaking of the Unit Trust of India (supra)**. On the basis of the aforesaid, it is submitted that if the parties could have novated the terms and conditions individually, there is no bar on such novation through a scheme. The observations relied upon are as follows:-

**"28.** ……The principle is that a scheme sanctioned by the court does not operate as a mere agreement between the parties: it becomes binding on the Company, the creditors and the shareholders and the statutory force, and therefore, the joint-debtor could not invoke the principle of accord and satisfaction. By virtue of the provisions of Section 391 of the Act, a scheme is statutorily binding even on creditors and shareholders who dismanted from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the shareholders and the creditors acquiesce in such alteration, (cf. *Premila Devi* v. *Peoples Bank*). The effect of the scheme is "to supply by recourse to the procedure thereby

prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity". (*Palmer's Company Law*, 20th Edn. 664) Sub-Section (2) of Section 391 of the Act allows the decision of the majority prescribed therein to bind the minority of creditors and shareholders and it is for that reason that a scheme is said to have statutory operation cannot be varied by the shareholders or the creditors unless such variation is sanctioned by the court."

**54.** We are unable to accept the aforesaid submission. The aforesaid observations reiterate the settled position of law that a scheme duly sanctioned after fulfilling all the legal formalities would be binding on all the shareholders. In the present case, the scheme is in the teeth of Section 45Q and it has rightly not been approved by the High Court. This apart, the scheme has been rightly held to be lacking *bona fide*, as well being contrary to *public policy*. It has been proposed with the oblique purpose of avoiding the mandate of Section 45QA(1) of RBI Act.



**55.** We are also not inclined to accept the submission of the appellant that Section 45QA of RBI Act is *pari materia* if not identical with Section 58A of the Companies Act. It was further argued that if a scheme of arrangement is not prohibited under the latter section; it cannot be prohibited under the former, i.e., Section 45QA of the RBI Act. The issue concerning Section 45QA being *para materia* with Section 58A of the

Companies Act does not arise since, in our considered opinion, the provisions of the RBI Act will override the provisions of the Companies Act. Thus, this submission is also rejected.

**56.** In view of the aforesaid, we reject the submission of the learned counsel for the appellant that the scheme of arrangement could be approved even though there is a non-compliance with the provisions of Chapter IIIB of the RBI Act in particular Section 45QA(1). We may notice here that the appellants had an opportunity to approach the Company Court under Section 45QA(1) to seek further time for making payment. It appears that no such application was made and, therefore, there is a complete infringement of Section 45QA(1). This would lead to an inevitable conclusion that the scheme of arrangements could not be approved.



**The Effect of Non-disclosure of the Notice dated 18th January, 2005**

**57.** The aforesaid notice has been sent to the Company under Section 45MB(1). Such notice is only sent if any NBFC violates the provisions of any section or fails to comply with any direction or order given by the RBI under any of the provisions

of Chapter IIIB. Under these provisions, the RBI has the power to prohibit the NBFC from accepting any deposit. Under Section 45MB(2), in order to protect the interest of the depositors, RBI is also empowered to direct the Non-Banking Financial Company not to sell, transfer, create charge or mortgage or deal in any manner with its property and assets without prior permission of the bank. It is an accepted fact that the orders directing the company not to accept deposits have been duly published in the Indian Express on 20th January, 2005. Learned counsel for the appellant has submitted that it is an accepted fact that on inspection of the books of accounts of the appellant company under Section 45N of the RBI Act, 1934, numerous violations were disclosed. The details of the violations have been extracted in the earlier part of this judgment. Whilst the investigation was being conducted into all the irregularities that have been committed by the company, the scheme of arrangement was presented to the Company Court on or about 19th May, 2005. It is an accepted fact that the notice dated 18th January, 2005 was not disclosed to the shareholders, who were present in the meetings which had been convened on the directions of the Company Court.

According to the learned counsel for the appellants, such a non-disclosure was not required under the provisions of the proviso to Section 391(2) of the Companies Act. In any event, according to the learned counsel, the notice dated 18th January, 2005 had been widely advertised by the RBI in various newspapers. Therefore, the whole information was in public domain. Consequently, the requirements of proviso to Section 391(2) would be deemed to be complied with. Furthermore, according to Mr. Datar, proviso to Section 391(2) only requires disclosure to the Court sanctioning to the scheme and not to the creditors or the shareholders with whom the scheme is made. The disclosure requirement to the shareholders or the creditors is specified under Section 393(1) and is much narrower. Learned senior counsel has placed reliance on the judgement of this Court in **Hindustan Lever Employees' Union** Vs. **Hindustan Lever Ltd. & Ors. (supra)** in support of this submission. This case is, however, distinguishable from the present case and circumstances. It was held therein that:

"In the facts of this case, considering the overwhelming manner in which the shareholders, the creditors, the debenture holders, the financial institutions, who had 41% shares in TOMCO, have supported the Scheme and have not complained about any lack of notice or lack of understanding of what the Scheme was about, we are of the view, it will not be right to

hold that the explanatory statement was not proper or was lacking in material particulars."

The preceding excerpt makes it clear that the scheme therein was not objected to by any of the interested persons. Thus, the reliance on the said case is misconceived.

**58.** In our opinion, the High Court has correctly concluded that even if no investigation was pending under Section 235-251 of the Companies Act, it was incumbent on the company to disclose the violations pointed out by the RBI on inspection of its books under Section 47N, which led to the issuance of the notice dated 18th January, 2005. This, in our opinion, would clearly reflect on the lack of *bonafide* of the company in proposing scheme of arrangement. In our considered opinion, non-disclosure of the action taken and initiated by the RBI as apparent from the letter dated 18th January, 2005, amounted to non-disclosure of material facts which are required to be disclosed under Section 391(1) read with Section 393(1) of the Companies Act. The Company Court whilst examining the fairness and the bonafide of a scheme of arrangement does not act as a rubber stamp. It cannot shut its eyes to blatant non-disclosure of material information, which could have a major influence/impact on the decision as to whether the scheme has

to be approved or not. In our opinion, the High Court has not committed any error of jurisdiction in rejecting the submission of the appellant that the non-disclosure of the letter dated 18th January, 2005 was not material.

**59.** For the aforesaid reasons, we find no justification to interfere with the judgment and order passed by the High Court. The appeals are accordingly dismissed.





…..……J.
**[Surinder Singh Nijjar]**

…..……J.
**[Pinaki Chandra Ghose]**

**New Delhi;**
**July 16, 2013.**