In Re: JVG Leasing (Securities and Finance) Ltd. and Others

Court: Delhi High Court

Date of Decision: Nov. 25, 2005

Acts Referred: Companies Act, 1956 â€" Section 391(1), 391(2), 393, 433, 439
Reserve Bank of India (Amendment) Act, 1997 â€" Section 45IA
Reserve Bank of India Act, 1934 â€" Section 17, 18, 45I, 45IA, 45IA(3)

Citation: (2008) 144 CompCas 780 : (2006) 2 CompLJ 242 : (2007) 79 SCL 541

Hon'ble Judges: A.K. Sikri, J

Bench: Single Bench

Advocate: Mukul Rohtagi and Jayant Bhushan, Shally Maheshwari, Rishi Maheshwari, Abhimanyu Mahajan and Prantik Hazarika, Dushyant Dave and Manisha Singh, Adv S.K. Luthra and Manisha Tyagi, for the Appellant;

Judgement

A.K. Sikri, J.
Reserve Bank of India (in short the ''RBI'') filed three winding up petitions against JVG Leasing Ltd. (CP No. 266/98), JVG

Securities Ltd. (CP No. 267/98) and JVG Finance Ltd. (CP No. 265/98) seeking winding up of these companies under the provisions of Section

45MC of the Reserve Bank of India Act, 1934 (in short the ''RBI Act'') read with Section 433 of the Companies Act. All the three companies

(hereafter referred to as the ''Companies'') were classified as Non-Banking Finance Companies (NBFC). As these companies were accepting

fixed deposits and other borrowings from banks, corporate institutions and the public, in the year 1997 the Reserve Bank of India Act was

amended, first by issuing Reserve Bank of India (Amendment Ordinance), 1997 which was replaced by Reserve Bank (Amendment) Act 1997

and Section 45-IA was introduced as per which, it became obligatory on the part of such NBFCs to obtain necessary license from the RBI in

order to carry out/continue their non-banking finance activities. Number of other provisions were inserted through this amendment like creation of

Reserve Fund and requirement of transfer of certain percentage of profit every year to the Fund (Section 45-IC), the prescription of liquidity

requirement (Section 45-IB) etc.... Vide Section 45JA, RBI has been vested with powers to issue guidelines on compassing aspects such as

income recognition, accounting standards, provision for bad and doubtful debts, capital adequacy etc. The provisions are intended to ensure sound

and healthy operation and the quality of assets of these companies. The bank has been empowered (i) to issue directions to the auditors of NBFCs

and order special audit of NBFCs (Section 45MA), (ii) to prohibit acceptance of deposits and alienation of assets by NBFCs (Section 45MB)

and (iii) to make an application for winding-up NBFCs (Section 45MC). Powers have also been vested in the Company Law Board u/s 45QA for

directing the defaulting NBFCs to make repayment of the deposits/interest with a view to protect the interest of the depositors.

2. Armed with the powers conferred upon the RBI under the aforesaid provisions, inspection of the Companies was carried out with reference to

their financial position. According to the RBI, various irregularities were found and in the circumstances, show cause notices were served upon the

Companies calling upon them as to why they should not be prohibited from accepting deposits. After considering the reply, prohibitory orders

were also passed. These companies also submitted applications to the RBI for issuing a certificate of registration under the provisions of Section

45-IA of the RBI Act. Inspections were again carried out wherein it was found that these companies were continuing to flout the provisions of the

RBI directions. Show cause notices were accordingly issued calling upon the Companies as to why their applications for grant of certificate of

registration be not rejected. These applications were ultimately rejected and thereafter the aforesaid company petitions were filed seeking winding

up of the companies. In these petitions ex parte orders dated 5th June 1998 were passed by this Court appointing the Official Liquidator attached

to this Court as the provisional liquidator with direction to forthwith take charge of the properties/assets and books of accounts as well as other

records of the companies. The companies were also restrained from disposing of, alienating or parting with possession of its assets. The companies

filed the reply opposing the winding up petition. After hearing, petitions were admitted vide order dated 3rd October 2001 and publication of

citations were directed. After the publication of citations and hearing the matter, final winding up orders were passed on 29th August 2003 and the

O.L. was directed to act as the Liquidator. Notices of winding up were also directed to be published which directions have also been complied

with.

3. On the appointment of the Liquidator he took charge of the assets of the companies and some of the assets are even liquidated. At this stage,

this petition is filed by all the JVG Companies under Sections 391(1) and 393 of the Companies Act proposing scheme of re-construction

arrangement and amalgamation. Copy of the said scheme is annexed with the petition and prayer is made that necessary direction be given to

convene the separate meetings of the equity shareholders and unsecured creditors of the three companies and for the purpose of these meetings

Chairman and Alternate Chairman be appointed.

4. It is stated in the petition that the scheme is necessary for the company to re-start their business and make payment to their secured and

unsecured creditors and to revive their prospects. The details of total creditors of each company are given in para-19 of the petition, which are as

under:-

Name of Company Total Public Inter Corporate Other

Creditors Deposits Deposits Creditors

(Rs. in lacs) (Rs. in lacs) (Rs. in lacs) (Rs. in lacs)

JVGFL 21350 5850 13400 2100

No. of creditors 80104 80000 7 97

JVGLL 4800 4000 NIL 800

No. of creditors 25085 25000 NIL 85

JVGSL 150.25 150 NIL 0.25

No. of creditors 15003 15000 NIL 3

Total (Rs. in lacs) 26300.25 10000 13400 2900.25

Total

(no. of Creditors) 1,20,192 1,20,000 7 185

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5. For the purpose of the Scheme, the depositors have been re-grouped into the following three categories:-

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S.No. Category of Depositor Number of Depositors Amount

(Rs. in lacs)

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1. Depositors who have

deposited up to Rs.5,000/- only 1,02,500 5125

2. Depositor who have

deposited above Rs.5,000/- but

less than Rs.25,000/- 15500 3875

3. Depositor who have deposited

Rs.25,000/- and above 2000 1000

Total 1,20,000 10000

The financials relating to the proposed arrangement of the Companies with their Creditors are set out in the table below:-

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S. No. Particulars Total Amt. Amt. payable under the Scheme

Payable as Year 1 Year 2 Year 3 Year 4 Year 5 Year 6

on 1.10.97 Cash Cash Cash Cash Cash Cash

A Secured creditors Nil Nil

B Income tax dues 500 500 Nil 200 200 100

C Public Deposits 10000 10000

up to Rs.5,000/- 5125 5125 1537.5 1537.5 1537.5 512.5

Rs.5000/- to 25000/- 3875 3875 775 775 775 1162.5 357.5

Above Rs.25,000/- 1000 1000 Nil Nil 200 400 400

D Other Creditors 2400 2400 Nil Nil Nil 1000 1400

E Inter corporate 13400 13400 Nil Nil Nil Nil 1600 11800

Deposits/loans

Grand Total 26300 26300 2312.5 2512.5 2712.5 3175 3357.5 11800

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6. In order to make the payment to these creditors in a phased manner indicated above, it is stated that the companies propose to set up a group

housing project at Village Bore Khurd and Sidwali near Gurgaon over 60 acres of land which is already in possession of the O.L. on behalf of the

companies. The companies propose to construct approximately 3000 flats of various sizes in a constructed area of about 30 lacs sq. fts. to

generate income for paying their creditors. Para 18. Cash Flow for making payments to the creditors is identified in the following manner:-

Cash Flow Statement Available for Repayment of Debts (Rs. in lacs)

S.No. Source of Funds Total Amt.

Period of Realisation (in Years)

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1 2 3 4 5 6

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1 Receivables from old Assets 1700 2100 1300 1800 1000 3400

2 Promoter"s Contribution 600

3 Income from Group Housing Project 309.67 993.17 1640.37 915.57 2267.04 13117.27

Total Funds Available 2609.67 3093.17 2940.37 2712.57 3267.04 16517.27

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7. Mr. Mukul Rohtagi, learned senior counsel appearing for the JVG Companies/petitioners, submitted that in this petition filed u/s 391(1) of the

Companies Act, the only prayer made is for convening of the meetings of different categories of creditors as well as shareholders in order to

ascertain their views on the proposed scheme. His argument was that in the first instance a scheme is to be put to the creditors and shareholders,

as requirement of law is that creditors and shareholders of the value of 75% have to approve such a scheme. If the scheme is approved by the

shareholders and creditors, thereafter sub-section (2) of Section 391 of the Companies Act prescribes the procedure for sanctioning of the scheme

and at that stage public notice is to be issued inviting objections, if any, including from the Central Government and the O.L. and at that stage the

Court is to consider as to whether such a scheme is to be approved or not. His submission, Therefore, was that at this stage order for convening of

the meetings only is to be passed and it was not open to the RBI or the O.L. to file objections which opportunity they would get when second

motion petition u/s 391(2) of the Companies Act is filed if creditors and shareholders approve the scheme with requisite majority.

8. On merits, it was his submission that the winding up petitions are filed by the RBI u/s 45MC of the Act, as according to the RBI, the application

for license was rejected by the RBI and, Therefore, the companies could not, in law, do a non-banking finance business and accept deposits from

the public etc. However, that was not the intention in the scheme as the JVG companies had already diversified into real estate business way back

in 1994-95. The intention was to carry out activity only after amalgamating all the three companies and, Therefore, RBI could not raise any

objection to such a scheme whereby the companies had no intention to re-start business as NBFC. It was also submitted that the companies were

within their rights to file petition u/s 391(1) of the Companies Act proposing such a scheme, as even in a petition filed by the RBI u/s 45MC, such

a petition was governed by the provisions of the Companies Act. It was submitted that Section 45MC of the RBI Act enables the RBI to file a

winding up petition, and gives it a locus which is otherwise missing u/s 439 of the Companies Act. Therefore, this was only an enabling provision.

However, after winding up petition was filed it was to be governed by the provisions of the Companies Act as specifically provided under sub-

section (4) of Section 45MC. Therefore, once a company petition is filed, even u/s 45MC of the RBI Act, it was to be treated at par with any

other winding up petition filed under the provisions of the Companies Act and once the provisions of the Companies Act relating to winding up of

the company became applicable to such a petition, Section 391 of the Act was also attracted which enabled the propounder to come out with such

a scheme.

9. In this backdrop, two questions arise for determination, namely, (a) Non-Banking Finance Company which is denied license by the RBI u/s

45IA of the RBI Act or a company whose license is cancelled under the aforesaid provisions, has to be necessarily wound up u/s 45MC of the

RBI Act? Or to put it otherwise, whether a scheme for revival/arrangement in respect of such a company can be entertained allowing it to divert its

business activity and start some business other than non-banking finance business for which it was primarily incorporated?

(b) Whether the scheme proposed by the company is feasible enough to permit it to put it to the shareholders and the creditors?

10. QUESTION A: In order to answer the question posed at (a) above, one will have to scan through the legislative history and the raison d''eter

which persuaded, nay compelled the Legislature to make amendment in the RBI Act providing for the provisions of obtaining license by NBFCs

from the RBI and permitting the RBI to file winding-up petition in case of those NBFCs whose license are rejected or if given but subsequently

cancelled.

11. In the year 1949, Banking Regulation Act, 1949 was enacted for the purpose of consolidating and amending the law relating to banking. The

main objective of the said Act was to protect the interests of the depositors, especially in the light of failure of several banking institutions and many

banking institutions going into liquidation, rendering thousands of depositors penniless and consequently ruined. By the said enactment the

acceptance of deposits by banking institutions and the entire gamut of operations of banks were brought under the strict regulatory measures under

close surveillance of the Bank. In the year 1959, the Banking Regulation Act was amended to include Sections 17 and 18 thereby requiring

banking companies to create reserve funds and maintain cash reserves. By this process even in the organized sector, the institutions doing banking

business were required to maintain certain cash reserves and create reserve funds etc. to maintain liquidity, which was mainly intended to protect

the interests of the depositors. Subsequently, it was notice that the non-banking companies, which were not covered by the Banking Regulations

Act, 1949, started accepting deposits from the public in a big way. In the absence of any regulation regarding acceptance of deposits by such

companies, several unhealthy features and malpractices come to the surface in sixties. A sharp increase in the volume of deposits held by such

companies was also noticed. Later on non-banking financial companies started issuing catchy and misleading advertisements, soliciting deposits

from the public, offering tempting rates of interest but without giving any information regarding their financial position and management. Uninformed

and gullible small depositors fell prey to such mala fide modus operandi of augmentation of deposits. Such unfair growth of deposits, outside the

banking system and proliferation of institutions both financial and non-financial, depending mainly or wholly on deposits from public were viewed

with concern by the authorities. It was considered that, such institutions should not have unlimited and unrestricted access to the public funds. Such

unfettered augmentations of deposits from general public outside the banking system, not only created unhealthy situation for the depositors, but

also created lot of problems in the assessment/implementation of monetary and credit systems of the country by the concerned authorities. To meet

this situation and to prevent such unwanted growth of deposits outside the banking system, it was felt necessary to confer on the Bank, being

custodian to the monetary and credit system of the country, with necessary statutory powers enabling it to supervise, control and regulate deposits

acceptance by such institutions. For this purpose, the Reserve Bank of India Act, 1934 was amended in 1963. A new Chapter IIIB was inserted

in the Reserve Bank of India Act, 1934 by the Banking Laws (Miscellaneous Provisions) Act, 1963 under which powers were conferred on the

Bank to issue suitable direction for regulating and monitoring the deposit acceptance activities of those companies and corporate bodies.

12. With this legislative backing, the RBI issued Non-Banking Finance Companies Directions making them effective from 1st January 1967.

Subsequently, Non-Banking Non-finance Companies Directions 1967 and Miscellaneous Non-Banking Companies (Reserve Bank) Directions

1977 were also issued to curb the practices of certain companies whereby these companies started collecting funds from public by way of

subscription to various chit or benefit schemes, a device adopted to skip the rigors of 1967 Directions. Another practice adopted by certain

companies came to the notice of authorities, namely, deposits taken by such companies from public for the purpose of their own business. It was

found that the companies were not refunding these deposits on due dates and many companies even went into liquidation. It was, Therefore,

considered necessary to maintain necessary liquidity and for making it a statutory obligation to provide for this liquidity, Companies (Amendment)

Act, 1974 was enacted introducing Section 58A and 58B of the Companies Act, 1956. Under these provisions, the Companies (Acceptance of

Deposits) Rules, 1975 were framed requiring such company to follow the prescribed procedure in accepting the deposits. In 1977 consolidated

and revised directions were issued to NBFCs under these provisions. Subsequently it was noticed that certain companies and individuals were

luring the public under more price chits and money circulation schemes by attractive methods making quick money at the cost of general public. To

prevent such menace, the Price chit and Money Circulation Scheme (Banning) Act, 1978 was enacted. However, even these statutory measures

were found inadequate as observed by the Supreme Court when it had the occasion to examine the scope of the provisions and powers conferred

under Chapter IIIB of the RBI Act in the case of Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India, .

While upholding the provisions contained in Chapter IIIB and remarking that the RBI, if considered necessary, in the public interest so to do

specify the condition subject to which in prospectus or advertisement for eliciting deposits of money from public may be issued. In para 39 it

brought to the foray the dubious practices which such companies could adopt by serving as under:-

39. ... We cannot ignore the possibility of persons having no stake of their own starting such business and after collecting huge deposits from the

investors belonging to the poor and weaker sections of the society residing in rural areas, and to stop such business after a few years and thus

devouring the hard earned money of the small investors. It cannot be lost sight of that in such kind of business, the agents always take interest in

finding new depositors because they get a high rate of commission out of the first Installment, but they do not have same enthusiasm in respect of

deposit of subsequent Installments. In these circumstances, if the Reserve Bank has issued the directions of 1987 to safeguard the larger interest of

the public and small depositors it cannot be said that the directions are so unreasonable as to be declared constitutionally invalid.

13. Sequel to this judgment was the corrective action taken by the Parliament in making amendments to the RBI Act by the Amendment Act 23 of

1997. Existing provisions of Chapter IIIB were amended and some new provisions were introduced including Section 45IA to 45IC requiring

registration of NBFC and obligating NBFC to create a reserve fund, Section 45JA empowering RBI to determine policy and issue directions.

Apart from these and other newly added provisions, two significant provisions introduced are Section 45MB and Section 45MC. u/s 45MB, RBI

has power to prohibit any NBFC, which violates the provisions of any Section or fails to comply with any direction or order given by the RBI,

from accepting any deposits and can also restrain such NBFC from alienating its assets. Section 45MC, under which winding-up petition has been

filed by the RBI against the petitioner company, reads as under:-

[45MC. Power of Bank to file winding up petition.--(1) The Bank, on being satisfied that a non-banking financial company-

(a) is unable to pay its debt; or

(b) has by virtue of the provisions of section 45IA become disqualified to carry on the business of a non-banking financial institution; or

(c) has been prohibited by the Bank from receiving deposit by an order and such order has been in force for a period of not less than three

months; or

(d) the continuance of the non-banking financial company is detrimental to the public interest or to the interest of depositors of the company, may

file an application for winding up of such non-banking financial company under the Companies Act, 1956 (1 of 1956).

(2) A non-banking financial company shall be deemed to be unable to pay its debt if it has refused or has failed to meet within five working days

any lawful demand made at any to its offices or branches and the Bank certifies in writing that such company is unable to pay its debt.

(3) A copy of every application made by the Bank under sub-section (1) shall be sent to the Registrar of Companies.

(4) All the provisions of the Companies Act, 1956 (1 of 1956) relating to winding up of a company shall apply to a winding up proceeding initiated

on the application made by the Bank under this provision.

14. These remedial measures by the Amendment Act 1997 were taken to suppress certain dubious practices being adopted by such NBFCs while

accepting deposits from the public, as can be gleaned from the Statement of Objects and Reasons appended to the Amendment Act, which reads

as under:-

Act 23 of 1997:- The activities of the non-banking institutions and unincorporated bodies receiving deposits are regulated in terms of the

provisions of Chapters III-B and III-C of the Reserve Bank of India Act, 1934, respectively. Until recently the emphasis was on regulating the

receipt of deposits by Non-Banking Finance companies (NBFCS) as an adjunct to credit and monetary policies and to provide indirect protection

to depositors. However, experience has shown that the provisions were neither sufficient to regulate the business activities of these companies nor

do they provide adequate protection to depositors.

2. The Joint Parliamentary Committee which enquired into the irregularities in securities and banking transactions had recommended that the

Government should examine whether the legislative framework for regulating NBFCs is sufficiently wide. The Working Group on Financial

Companies appointed by Reserve Bank of India (RBI) under the Chairmanship of Dr. A.C. Shah had suggested regulatory and control measures

to ensure the healthy growth and operations of these companies.

3. Despite the provisions before the promulgation of the Reserve Bank of India (Amendment) Ordinance, 1997 contained in Chapter III-C of the

Reserve Bank of India Act, the unincorporated bodies circumvented the statutory restrictions by floating different partnership firms as and when a

firm reached the level of 250 depositors. Further, it is reported that several unincorporated bodies were advertising aggressively through various

media soliciting deposits from public by offering high rates of interest and other incentives.

4. The Reserve Bank of India (Amendment) Ordinance, 1997, further to amend the Reserve Bank of India Act, provides several safeguards for

the NBFCs so as to ensure their viability. These include compulsory registration of the NBFCs with Reserve Bank of India (RBI), stipulation of

minimum net owned funds requirement, creation of reserve fund and transfer of certain percentage of profits every year to the fund and prescription

of liquidity requirement. RBI has also been vested with powers to issue guidelines encompassing aspects such as income recognition, accounting

standards, provision for bad and doubtful debts, capital adequacy, etc, which are intended to ensure sound and healthy operations and the quality

of assets of these companies. RBI is also being empowered to issue directions to the auditors of NBFCs, to order special audit of NBFCs,

prohibit acceptance of deposits by NBFCs, and to make application for winding up of NBFCs. Whereas earlier the only recourse available to the

depositors was to approach to Court of Law for redressal of grievances, powers have been vested with the Company Law Board for directing the

defaulting NBFCs to make repayment of the depositors/interest with a view to protect the interest of the depositors.

5. The unincorporated bodies have been totally prohibited from accepting deposits for the purpose other than for personal use. They have been

permitted to continue to take deposits after incorporating themselves within the regulatory framework. The unincorporated bodies have also been

specifically prohibited from issuing any advertisements in any form.

6. There are reports of several finance companies and unincorporated 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.

15. Sub-section (4) of Section 45-IA of the RBI Act contains and enumerates all the factors which have to be kept in perspective to justify the

grant or rejection of an application by an NBFC for a certificate of registration enabling it to commence or continue such business. Sub-section (3)

of Section 45IA gave an outer limit of six years to the existing NBFC to obtain license from the RBI and comply with other provisions inserted by

this amendment. The importance of this provision is highlighted by this court (per Hon"ble Mr. Justice Vikramajit Sen) in Writ Petition (C) No.

16650/04 decided on 8th September 2005) in the following words:-

5. It is immediately relevant to mention the Proviso to sub-section (3) of Section 45-IA of the Act which places an embargo of six years in the

aggregate in respect of the period in which an NBFC/applicant company can be allowed to continue business in order to fulfill the requirement of

the "net-owned fund". This is indeed a salutary provision since it does not allow the efforts to comply with the requirements laid down in Section

45-IA to be open-ended. If this factor is lost sight of, the mischief which is intended to be eradicated could be allowed to fester unendingly.

Accordingly, at the time of filing of the application if some deficiencies are found to be in existence, the period in which these must be overcome

and eradicated within a reasonably short period. It is in this regard that the embargo of six years in the aggregate has been laid down.

16. In this backdrop one has to examine the special power given to the Reserve Bank of India u/s 45MC of the Act to file the petition seeking

winding up of the company. u/s 439 of the Companies Act the categories of persons who can file winding-up petition are specifically mentioned

and the RBI is not named therein. However, notwithstanding the same the Legislature wanted specific power to be conferred upon the RBI to seek

winding-up of erring NBFC. However, Section 45MC is more than mere enabling provision as it contains the specific grounds on which the RBI

can file winding up petition. It may be noted that Section 433 of the Companies Act stipulates the circumstances under which a company can be

wound up. However, as far as petition of RBI u/s 45MC of the RBI Act is concerned, it is not that the RBI shall file a petition on the grounds

mentioned in Section 433 of the Companies Act. On the contrary, sub-section (i) of Section 45MC of the RBI Act lists four circumstances under

which the RBI can file such a petition. Apart from the ground of inability to pay the debt, which is common with Section 433 of the Companies

Act, other grounds are peculiar to non-banking financial institutions. These grounds relate to the malfunctioning of such NBFCs, namely, (b) has by

virtue of the provisions of section 45IA become disqualified to carry on the business of a non-banking financial institution; (c) has been prohibited

by the Bank from receiving deposit by an order and such order has been in force for a period of not less than three months; and (d) the

continuance of the non-banking financial company is detrimental to the public interest or to the interest of depositors of the company.

17. Therefore, if any of these conditions exist in a particular case, Legislature considered it proper that (a) such a company should be wound up

and (b) rather than conferring power on another agency/authority like Registrar of Companies or the Company Law Board, it is specifically to the

regulator, namely, the RBI as the regulator is in a better position to enlighten the Court on these aspects. It may further be noticed that sub-section

(i) of Section 45MC empowers the RBI to file a petition on any of these grounds ""on being satisfied"", that one of such grounds in case of an

NBFC exists. Thus, even before filing such an application bank has also to satisfy itself about the existence of such a ground on which it proposes

to file the application for winding-up of such NBFC. As per the procedure adopted by the RBI, such satisfaction is arrived at only after the bank

conducts the inquiry/investigation into the affairs of such NBFC. When irregularities are found out, even show cause notice is given to such a

company and it is heard in the matter. Before passing an order u/s 45MC or passing an order prohibiting such NBFC from receiving deposits from

the public. There is a remedy of appeal provided to the affected company.

18. The intention of the Legislature in making these provisions is, thus, obvious. Those companies which are formed and incorporated as non-

banking financial companies and carry out their business in violation of the regulatory mechanism provided under the RBI Act have no right to exist

and should be wound up. Thus, Legislature in no uncertain terms mandated that such companies have no right to exist, otherwise there was no

necessity for providing the provision of winding up. The situation could be remedied by prohibiting such a company from doing the business as

non-banking financial institution thereby permitting them to do some other business. Parliament, in its wisdom, considered that it would not be a

sufficient safeguard and, Therefore, provided for extreme measure of winding-up of these companies as the solution for checking the menace of

dubious practices which could be adopted by these companies. I may immediately add here that when a petition is filed by the RBI u/s 45MC of

the RBI Act, it is for the Court to examine as to whether in a given case whether the orders of winding up of such a company are to be passed or

not. However, once it is found that any of the grounds mentioned in sub-section (i) of Section 45MC exists and the company should be ordered to

be wound up.

19. It would not be permissible for such a company to take a detour by coming out with a plea that it is ready to do some business other than non-

banking financial business and should be permitted to do so and under such a cloak file a scheme of arrangement. A company which is essentially a

non-banking financial company and has suffered winding up order because it violated the financial discipline provided under the RBI Act, as it has

no right to exist as NBFC and is to be wound up. When any of the conditions for winding up, as laid down in sub-section (i) of Section 45MC is

satisfied, it is obvious that irregularities committed by it are serious enough justifying its winding up. In the process it is normally established that the

depositors are either duped or the actions of such a company were detrimental to the public interest. Would it be wise to allow such a company to

continue to function by diverting its business activity? More so, when its incorporation and existence was, hitherto as a non-banking financial

institution? Regulatory regime provided by the Legislature by way of amendments in the RBI Act is applicable to non-banking financial companies

and Section 45-I(f) provides definition of NBFC in the following terms:-

(f) ""non-banking financial company"" means-

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement

or in any other manner, or lending in any manner;

(iii)such other non-banking institution or class of such institution, as the Bank may, with the previous approval of the Central Government and by

notification in the Official Gazette, specify.]

20. If such a company is allowed to do some other business, confidence of the public can be shaken. Legislature, it is obvious, did not intend this

course for such a company. If the promoters/ shareholders want that some other business activity should be done, they can always incorporate

another company with some other name and do such a business.

21. When the matter is looked into in the aforesaid perspective, I am not convinced with the interpretation given by him to sub-section (4) of

Section 45MC of the Act and to suggest that since all the provisions of the Companies Act apply to such winding up petitions, provisions of

Sections 391 to 394 shall automatically apply, more so when any of the grounds stated in clauses (b) to (d) of sub-section (i) of Section 45MC is

satisfied. Position may be different if the petition is filed only on the ground of inability of the NBFC to pay the debt. In that case, if the Court is of

the opinion that such a company is in a position, the Court may in that case consider such a scheme which course of action would be in the interest

of the depositors as they would be in a position to get back their money under the scheme if such scheme is found to be viable. This is the only

exception which can be made to the general proposition laid down above with the rider that even in such cases the Court would consider the

scheme with much circumference. Otherwise, as rightly contended by Mr. Dushyant Dave, learned senior counsel appearing for the RBI, it would

amount to permitting the petitioner to do something indirectly which it cannot do directly. The petitioner has got money from depositors. Assets are

acquired from the funds created in the form of such deposits and now, the company wants to do some other business with those assets thereby

retaining the funds of those depositors and wants to pay them in phased manner as envisaged in the proposed scheme.

22. QUESTION B: Even if it is presumed that remedy u/s 391 of the Act was available to the petitioner in the given case, I do not find the scheme

proposed by the petitioner to be viable and worthy of consideration. The salient features of the scheme have already been noted above. As per the

scheme the companies propose to set up housing project at Village Bore Khurd and Sidwali near Gurgaon over 60 acres of land, which according

to the petitioner, is already in possession of the Official Liquidator on behalf of the companies. The companies propose to construct approximately

3000 flats of various sizes in a constructed area of about 30 lacs sq. fts. to generate income for paying their creditors. The workability of such a

project is itself in doubt because of several reasons. Few of them are:

(a) The details of group housing project of such a magnitude are not even broached in the scheme;

(b) a project of this magnitude would require very huge amount of investment (no precise figure is given). The promoters, however, intend to put in

only Rs. 6 crores. Even it is not shown as to from which source this money would be arranged. To generate other funds, the strategy is ""continued

aggressive recovery plans for recovering arrears of debtors of the companies and other miscellaneous assets."" A vague and distant hope;

(c) a serious doubt is raised as to whether land itself is available as respondents have tried to demonstrate that land has already been sold. Original

title deeds of the land are not available;

(d) statement of affairs have been filed recently i.e. more than 7-8 years after the passing of the provisional winding up orders. Even this statement

of affairs, preliminary scrutiny by the Official Liquidator has revealed, is incomplete and lacks many details which would have bearing on the proper

implementation of the scheme. For example no particulars of any bank accounts or bank balance are given, cash shown now is nil whereas in a

statement made in the year 2002 it was stated by the petitioner that cash of over Rs. 1 crore was available; there are no proper complete details of

the creditors/depositors; there are no details as to who are debtors of the companies and what are the aggressive plans for recovery. At the time of

presentation of the winding up petition the RBI had submitted that these companies owe more than Rs. 1 crore to the public at large and have

committed gross violations in the matter of repayment of their deposits;

(e) all the three companies are defunct for the past several years. Even the proposed transferor company is under orders of winding up;

(f) the scheme proposes postponement of repayment for another five years and mentions that depositors under Rs. 5,000/- category would get

their refund in four consecutive years.

23. This would show that there is no substance or weight in the proposed scheme. Earlier also scheme of rehabilitation was proposed by filing

applications in all the petitions but the Court had rejected the said scheme. When such a scheme is proposed, normally at the stage of first motion it

is to be put to the shareholders and various categories of creditors etc. in order to ascertain as to whether 3/4 of the value of shareholders and

creditors approve such scheme or not. If shareholders and creditors do not approve the scheme, that would be the end of the matter and Court is

not to go into further scrutiny. However, if such a scheme is approved by the shareholders and creditors, at the time of second motion the Court is

to examine whether such a scheme is to be approved and in the process consider the viability/practicability of the scheme. However, this does not

mean that at the stage of first motion the Court has to necessarily and routinely pass an order of convening of the meetings of the shareholders and

creditors for ascertaining their views. The Court can look into the validity of the scheme.

24. I am conscious of the the principle of law which have come to be established over a period of time through series of judgments that whenever

choice is available to the court between revival of the company and its winding up, the court must as far as possible lean in favor of revival of the

company. However, that does not mean that whenever a scheme for revival is filed, the court has to automatically and routinely sanction the same.

It is also the duty of the court to satisfy itself that the scheme is genuine and bona fide . The court has also to satisfy about the feasibility,

completeness and workability of the scheme. The court does not function as a mere rubber stamp or post office and it is incumbent upon the court

to be satisfied prima facie about the genuineness of the scheme. If the scheme is intended to be a cloak to achieve some other purpose rather than

projected purpose of the revival of the scheme, it would be unfair to the creditors and other persons if such scheme is sanctioned and propounders

are allowed to achieve their oblique purpose. In Re.: Saroj G.Poddar, (1996) 22 C.L.A.200, the court refused to sanction the proposed scheme

after it was found that .the entire exercise undertaken by the sponsor with the support of the workers union was intended to acquire the land of the

company for its exploitation. The court also found that the scheme was not genuine but patently fraudulent as it had been evolved as a cloak to

cover the misdeeds of the directors to avoid misfeasance proceedings against them.

25. Therefore, I am forced to conclude that neither the scheme propounded is bona fide nor viable and further lacks completeness as well. It

cannot be treated as a valid scheme in the eyes of law as it does not deal with all the aspects required for revival of the company.

26. Therefore, for all these reasons I am of the view that the petition filed by the petitioner is misconceived and meritless. The same is accordingly

dismissed with costs quantified at Rs. 50,000/-.