

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**NEW DELHI**

**COMPANY APPEAL(AT) NO.340 OF 2018**

(ARISING OUT OF ORDER DATED 02.05.2018 PASSED BY NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI BENCH, NEW DELHI IN COMPANY PETITION NO.868/2015).

<b><u>IN THE MATTER OF:</u></b>	<b>Before NCLT</b>	<b>Before NCLAT</b>
1. Bank Street Securities Pvt Ltd M-122, Jagat Ram Park, Laxmi Nagar, Delhi-110092	1 <sup>st</sup> Petitioner	1 <sup>st</sup> Appellant
2. Bhutani Leasing & Finance Ltd 202, IInd floor, F-49, Laxmi Nagar, Delhi-110092.	2 <sup>nd</sup> Petitioner	2 <sup>nd</sup> Appellant
3. Cellular Fincap Pvt Ltd 41-D, MIG Flats, Mayur Vihar III Delhi-110096.	3 <sup>rd</sup> Petitioner	3 <sup>rd</sup> Appellant
4. DKT Marketing Pvt Ltd M-122, Jagat Ram Park, Laxmi Nagar, New Delhi-110092	4 <sup>th</sup> Petitioner	4 <sup>th</sup> Appellant
5. Jaideepak Textiles Pvt Ltd 202, IInd Floor, E-49 Laxmi Nagar, Delhi-110092.	5 <sup>th</sup> Petitioner	5 <sup>th</sup> Appellant
6. A.A. Gems Pvt Ltd, 202, IInd Floor, E-49 Laxmi Nagar, Delhi-110092.	6 <sup>th</sup> Petitioner	6 <sup>th</sup> Appellant
7. AR Agro Industries Pvt Ltd 202, IInd Floor, E-49 Laxmi Nagar, Delhi-110092.	7 <sup>th</sup> Petitioner	7 <sup>th</sup> Appellant
8. Win Capital Ltd, 202, IInd Floor,		

E-49 Laxmi Nagar,  
Delhi-110092.

8<sup>th</sup> Petitioner

8<sup>th</sup> Appellant

9. SRD Trading Pvt Ltd.  
202, IInd Floor,  
E-49 Laxmi Nagar,  
Delhi-110092.

9<sup>th</sup> Petitioner

9<sup>th</sup> Appellant

Vs

Regional Director,  
Northern Region  
B-2 Wing,  
2<sup>nd</sup> Floor,  
Pt Dindyal Upadhyaya Antyodaya Bhawan  
CGO Complex  
New Delhi 110033

1<sup>st</sup> Respondent

**For Appellant: Mr. Ashish Middha, Advocate.**

**For Respondent: None**

**JUDGEMENT**  
**(Dated 17<sup>th</sup> January, 2019)**

**A.I.S. CHEEMA, J. :**

This appeal has been filed by the appellants who had moved the National Company Law Tribunal, Delhi Bench, New Delhi (NCLT in short) for acceptance of their scheme of arrangement so that the appellants 1 to 8-transferor companies could amalgamate with the appellant No.9 company. The petition of the appellants came to be rejected and hence the present appeal.

2. It appears that the appellants had filed first motion before the Hon'ble High Court of Delhi by filing CA(M) No.153/2015. The Hon'ble High Court was pleased to dispense with the requirement of convening meetings of equity shareholders, secured and unsecured creditors of the Companies in view of their consent being obtained. The appellant then filed joint petition for sanction of scheme of amalgamation before the Hon'ble High Court vide second motion C.P. No.868/2015 under Section 391 to 394 of Companies Act, 1956 ("Old Act" in short). Notice was issued to the Registrar of Companies/Regional Director and Official Liquidator. Notice by newspaper publication was also directed. The

second motion petition No.868/2015, before it could be decided came to be transferred to the Learned NCLT in view of the powers getting vested with NCLT vide notification dated 7<sup>th</sup> December, 2016 of the Ministry of Corporate Affairs.

3. It is stated that when the matter came up before NCLT, NCLT heard the same and considered report of the Regional Director and concluded that certain companies in the scheme were carrying on NBFC activities and approval of Reserve Bank of India had not been taken and the petition required to be rejected.

4. In the present appeal the appellants have claimed that the impugned order deserves to be set aside as circular of Reserve Bank of India relied on by the Regional Director required compliance of two conditions for being treated as NBFC namely that the company should satisfy that more than 50% of its assets should be invested in financial activities and more than 50% of its income should be from financial activities. The argument is that in the present matter both these conditions were required to be complied but when the report of Regional Director shows that in the matter of Companies No.1,2,4,5,6 the income was 'zero', it could not be said that both the conditions as mentioned in RBI Circular were satisfied. It has been argued by the learned counsel for the appellant that when the income was 'zero' it could not be said that financial assets are more than 50% of the total assets and income from financial assets is more than 50% of the gross income, which according to the counsel was requirement under the RBI Circular No.RBI/2006-07/158 DNBS (PD) C.C. No.81/03.05.002/2006-07 dated October 19, 2006, copy of which has been filed as Annexure-11.

5. The Regional Director did not appear to contest in this appeal inspite of service of Notice.

6. We have heard the learned counsel for the appellant and perused the record. A copy of the report of Regional Director has been filed at Annexure-21. The report shows that the Regional Director had issued query to the appellant company by letter dated 8<sup>th</sup> March, 2016 and the letters returned undelivered. Then one Advocate Mr. Ashish Middha by letter dated 15<sup>th</sup> March, 2016 filed reply with the Regional Director on behalf of the company. The impugned order shows that the ROC during the pendency of the matter before NCLT took action under Section 12(1) r/w Section 12(4) of the Companies Act, 2013 and imposed

penalty which came to be reduced by Regional Director in an appeal and which penalty was paid by the appellants. This relates to not giving notice of change of the registered office to the Registrar of Companies. This should reflect on working of these appellant companies with regard to how bona fide their actions are.

7. The report of the Regional Director para 7, 8 and reads as follows:

***“7. That the Deponent states that the Registrar of Companies, Delhi & Haryana vide his above referred report has stated that –“It has been observed from Balance Sheet as at 31.03.2015 that all the above mentioned companies are prima facie engaged in investment activities or extending loans and advances to certain parties/body corporate whereas there is no mention whether these companies are registered with RBI as NBFC to carry on such business. They fall within the definition of NBFC as per RBI Notification No.RBI-2006-07/158 DNBS (PD) C.C. No.81/03.05.002/2006-07 dated 19.10.2006 which states that “That company will be treated as a non-banking financial company (NBFC) if its financial assets are more than 50 per cent of its total assets (netted off by intangible assets) and income from financial assets is more than 50 per cent of the gross income”. Further, if the Companies are carrying out NBFC activity, they are to obtain prior written permission from RBI with regard to the proposed Scheme of Amalgamation as per RBI Notification No.DNBS.(PD)27 5/GM(AM)02014 dated May 26, 2014.***

***The transferor Companies No.1,2,4,5,6 have no activity being carried out as reflected in their respective Profit & Loss Statement for the year ended 31.03.2015 show ‘zero’ income from operations however, these companies show huge investments as their assets. The proposed share exchange ratio has been determined on the basis of Net Assets Value Method. As the intrinsic value of these investments (Assets) is not known, the reasonableness of the proposed exchange ratio is not ascertainable.***

**8. That the Deponent states that the letter dated 08.03.2016 issued to the Petitioner Companies for submission of various information have been returned undelivered and it appears that subject companies are not maintaining their registered offices which amounts to violation of provisions of Section 12 of the Companies Act, 2013.**

**9. That the Deponent states that as per reply no prosecution proceedings are pending against the Transferor and Transferee Companies and their Directors for violation of various laws such as the Companies Act, 1956. FEMA. IPC. SEBI Act, RBI Act etc.**

**In view of submissions made in Para 1 to 9 herein above after having examined the scheme, reply of Petitioner companies the Deponent is inclined to accept the report of Registrar of Companies and the Hon'ble Court may consider the proposed Scheme subject to compliance of RBI Act, 1934 by the Petitioner companies with regard to observations in Para 7 above and/or the Hon'ble Court may deem fit and proper in the facts and circumstances of the case."**

8. It is apparent from the above that the appellants who had made their submissions to the Regional Director through letter dated 15.03.2016 were unable to convince the Regional Director regarding the issue of NBFC. Report shows that Regional Director was satisfied that the appellant companies were prima facie engaged in investment activities or extending loans and advances to certain parties like corporate bodies and there was no mention that these companies are registered with RBI as NBFC to carry on such business.

9. Para 2 of RBI Circular dated 19<sup>th</sup> October, 2006 (which has been referred by the Regional Director) may be reproduced. The same reads as under:

**" In this regard, it is further clarified that the business of non-banking financial institution (NFI) means a company engaged in the business of financial institution as contained in Section 45 I(a) of the RBI Act, 1934. For this purpose, the definition of 'Principal Business' given, vide Press Release 1998-99/1269 dated April 8, 1999 (copy enclosed) and mentioned in brief below may be followed:**

***The company will be treated as a non-banking financial company (NBFC) if its financial assets are more than 50 per cent of its total assets (netted off by intangible assets) and income from financial assets is more than 50 per cent of the gross income. Both these tests are required to be satisfied as the determinant factor for principal business of a company.”***

10. The learned counsel for appellants argued that if the appellant company No.1,2,4,5,6 had ‘zero’ income and transferee company also had ‘zero’ income and so it cannot be said that both the conditions i.e. more than 50% of assets should be invested in financial activities and more than 50% of income should be from financial activities were satisfied.

11. Having gone through the matter if the transferor companies show ‘zero’ income from operations and still show huge investments to be their assets, the Regional Director rightly observed that the intrinsic value of these investment (assets) is not known and the reasonableness of the proposed exchange ratio could not be ascertained. Such accounts showing ‘zero’ income and showing huge investments as assets must be said to be not inspiring confidence. If there are huge investments as assets and it shows that financial assets are more than non-financial assets and income from operation is zero without its break up between financial income and non-financial income, the required criteria to determine the principal business of the company being finance company gets met. The NCLT not being satisfied from the case put up by the appellant declined to accept the scheme and we find it difficult to interfere with the impugned order.

12. Section 45-I of the Reserve Bank of India Act, 1934 in sub-clause(a) has defined business of Non-Banking Financial Company as under:

***“Definition: In this Chapter, unless the context otherwise requires,-***

**(a) “business of a non-banking financial institution” means carrying on the business of a financial institution referred to in clause (c) and includes business of a non-banking financial company referred to in clause (f)”**

13. Clause f in definition of “financial institution” referred in Clause “C” reads as under:

**“Clause (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 institutions, as the Bank may, with the previous approval of the Central Government and by notification in the Official Gazette, specify”**

14. Looking to these definitions as mentioned above, when the report of the Regional Director shows that the appellant companies were engaged in investment activities or extending loans and advances, these above provisions would be attracted. Even with or without the circular of Reserve Bank of India dated 19<sup>th</sup> October, 2006, keeping in view the above legal provisions, the appellants have not been able to satisfy the Regional Director or the NCLT that they are not involved in NBFC activities. The counsel for the appellants has not been able to satisfy us also. The appeal does not even plead that the appellants are not indulging in NBFC activities. The appeal memo while referring to the appellant companies merely stated that the objects of the companies were as amended from time to time and which have been set out in Memorandum of Association of the different companies. No such Articles of Association or Memorandum of Association have been produced before us to show what are aims and objects of these companies. No documents are shown as to what are the activities of these companies. Thus no material has been brought to satisfy that the impugned order is erroneous and deserves to be interfered with.

15. For such reasons, we do not find any substance in this appeal. The appeal is dismissed. No order as to costs.

(Mr. Balvinder Singh)  
Member (Technical)

(Justice A.I.S. Cheema)  
Member (Judicial)

New Delhi  
Dated:17-1-2019

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