

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

**Company Appeal (AT) No.136 of 2018**

**(Arising out of Judgement and Order dated 12.3.2018 passed by National Company Law Tribunal, Chandigarh in Company Petition No.05/2004-RT CP(CAA)No.182/Chd/HP/2017 with CA No.49/2008)**

**IN THE MATTER OF:**

**Morepen Laboratories Ltd  
Morepen Village,  
Nalagarh Road, Near Baddi,  
District Solan, HP**

**...Appellants**

**Vs**

**1. Regional Director (Northern Region),  
Ministry of Corporate Affairs,  
B-2 Wing, 2<sup>nd</sup> floor,  
Paryavaran Bhawan,  
CGO Complex,  
New Delhi-110003.**

**2. Registrar of Companies,  
ROC Cum Official Liquidator,  
Corporate Bhawan, 1<sup>st</sup> floor,  
Plot No.4-B,  
Madhya Marg,  
Sector 27 B,  
Chandigarh 160019**

**3. Kiran Verma  
D/o B.K. Trehan,  
D-10, 1<sup>st</sup> Floor,  
G.K. Enclave -I  
New Delhi-110048.**

**4. Ganesh  
S/o Salek Chand  
A-2/277, Sultanpuri,  
New Delhi-110086**

**...Respondents**

**Present: Mr. A.S. Chandhiok, Sr. Advocate, Mr Sumesh Dhawan, Ms Vatsala Kak, Mr. Pramod Singh, Ms Aditi Mohapata, Ms Sweta Kakkad, Ms Priya Agarwal, Mr Angad Baxi, Ms Tulika Bhatnagar, Advocates for appellants.  
Mr. Anil Panwar, Mr. Rahul Singh, Advocate for R1 and R2.**

**Mr. Mukul Bawa, Mr Prashant Samuel, Advocates for  
Intervenors/R3.**

**JUDGEMENT  
(23<sup>rd</sup> JULY, 2019)**

**MR.BALVINDER SINGH, MEMBER (TECHNICAL)**

The present appeal under Section 421 of the Companies Act,2013 has been preferred by the Appellant against the judgement dated 12.03.2018 passed by the National Company Law Tribunal, Chandigarh Bench vide which the scheme of arrangement with the FD holders is dismissed.

2. The brief facts of the case of that the appellant is a public limited company listed on National Stock Exchange as well as Bombay Stock Exchange. The appellant company has raised several loans from Banks as well as Financial Institutions including Short Term Loans to build new production capacities compliant to USFDA standard. The appellant could not maintain financial discipline and cases were filed against the company in DRT by the Banks and Financial Institutions. The company arrived at one time settlement with the Banks/Financial Institutions and settled the amount. To tide over the sudden financial crisis, the appellant raised Rs.72.5 crores from the international market through an issue of global depository receipts. The appellant faced difficulty in servicing its obligations vis a vis the public deposit holders but also in relation to the credit facilities extended by different banks and financial institutions. Many cases were filed against the company which were in the nature of civil cases, proceedings under Section 138 of Negotiable Instruments Act, winding up petitions by the creditors, the petitions filed

before DRT, Delhi, Chandigarh and Mumbai and the proceedings under the Consumer Protection Act and arbitration proceedings.

3. The company has invited deposits since 1993 from the public under Section 58A of the Companies Act, 1956. Having defaulted in repayment of the deposits on maturity and as such the erstwhile Company Law Board started receiving applications from aggrieved depositors in terms of Section 58A(9) of the Companies Act, 1956. While considering these applications it transpired that the Company had defaulting repayments of matured deposits right from October, 2002. The outstanding position of the fixed deposits as on 31.3.2003 was Rs.16183.76 lakhs and the number of depositors was 85,921. The company on its own stopped accepting deposits from public w.e.f. April, 2003 (Page 119). Since a large number of applications under Section 58A(9) of the Companies Act, 1956 were received, Company Law Board decided to invoke suo-moto powers under Section 58A(9) of the Act for all the deposits matured or to be matured in near future. The appellant submitted the reasons for default and also its plan of action to clear all the matured deposits and also its proposal to pay off deposits which would matured for repayment in future. Before the Company Law Board, the appellant company gave three options to make the payment of FD holders. After hearing the parties, Learned NCLT passed the following directions in respect of FD holders:

- i) The interest payable will be the contracted rate upto the date of maturity and 7% per annum after the date of maturity;
- ii) all deposits upto Rs.5000/- payment will be made within one year from the date of maturity;

iii) All deposits of Rs.5001/- to Rs.20000/- shall be paid within 4 years from the date of maturity at 20% in the first year, 20% in the second years, 20% in the third year and balance 40% in the fourth years. The interest for both pre and post maturity period will be paid along with the last instalment.

iv) All deposits of Rs.20001/- to Rs.50000/- shall be paid within four years from the date of maturity at 15% in the first year, 20% in the second year, 25% in the third year and balance 40% in the fourth year. The interest for both pre and post maturity will be paid alongwith the last instalment.

v) All deposits of Rs.50001/- to Rs.50000/- shall be paid within four years from the date of maturity at 10% in the first year, 15% in the second year, 35% in the third year and balance 40% in the fourth year. The interest for both pre and post maturity will be paid alongwith the last instalment.

vi) The company shall issue post dated cheques for first instalment to all the depositors who have submitted/surrendered the original fixed deposit receipt, on demand by the company.

vii) The above scheme will be applicable to all depositors whether over due or yet to mature and whether any application has been filed before the Company Law Board or not.

viii) The scheme shall be effect from the date of this order.

While passing the order dated 19.8.2003 the then Member, Company Law Board also gave certain directions to the company to comply with.

4. From the record placed before us it is seen that the company did not comply the orders fully and when the company did not comply the orders, ROC Jalandhar filed prosecution against the company and its officers on 26.3.2004 before the Court of Chief Judicial Magistrate, Solan under section 58-A (10) and 58-A read with Rule 3(2) for accepting of deposits in excess of prescribed limit. The prosecution under Section 58-A read with Rule 10 for non-filing of return of deposits as at 31.3.2003 and under Section 274(1)(g) read with Companies Disqualification of Directors Rule 2003 were also filed in the Court of Chief Judicial Magistrate, Jalandhar. The company has accepted excess fixed deposits of Rs.51.26 crores from public in contravention of Section 58A(6) read with Rules 3(2)(ii) of the Companies (Acceptance of Deposits) Rules, 1975 during the period 1.4.2002 to 30.9.2003 and it failed to repay outstanding fixed deposits of Rs.16.19 crores and upto date interest. ROC has stated that it has filed various cases before the Chief Judicial Magistrate, Solan the details of which given at Page 55.

5. The company filed CP No.5/2004 before the Hon'ble High Court of Himachal Pradesh praying therein to convene separate meetings for different classes of creditors and shareholders, as also to appoint the Chairman and Alternate Chairman for such separate meetings of different classes of creditors and shareholders and to fix the procedure to be following at the meetings. The Hon'ble High Court of Himachal Pradesh, Shimla vide order dated 28.6.2004 (Page 589) appointed different Chairman/Alternate Chairman for different meetings and directed that on the "*conclusion of the meetings, Chairman/Alternate Chairman shall submit their respective reports to the court alongwith result of the meetings within seven days of the conclusion*

*of the meetings.*” During the pendency of the Company Petition the appellant company filed Company Application No. 23/2008 (Page 627) for modification of Scheme of Arrangement and Compromise between the appellant company and its members and fixed deposit holders and prayed to convene a meeting for the purpose and also to appoint Chairman and Alternate Chairman for convening such meeting. Hon’ble High Court of Himachal Pradesh vide order dated 4.9.2008 (Page 688 & 692) subsequently modified on 10.9.2008 (Page 763) appointed the Chairman/alternate chairman for convening the meeting and directed that on the conclusion of the meetings, *“Chairman/alternate chairman shall submit their respective reports to the court alongwith result of the meetings within seven days of the conclusion of the meetings. The reports shall be duly supported by respective affidavits of the Chairman/Alternate Chairman.”*

6. The appellant company filed a Company Application No.49 of 2008 (connected with Company Application No.23/2008) (Page 695) in Company Petition No.5 of 2004 before the Hon’ble High Court of Himachal Pradesh, Shimla seeking sanction of Scheme of Arrangement and compromise between the appellant company and its Fixed Deposit Holders. Hon’ble High Court of Himachal Pradesh, Shimla vide order dated 4<sup>th</sup> August, 2009 (Page 913) sanctioned the compromise and arrangement and posted the matter for 8<sup>th</sup> September, 2009 (Page 917). The appellant company intimated about the sanction of scheme to National Stock Exchange and Bombay Stock Exchange vide letters dated 12.8.2009 (Page 918 and 919) and also intimated that the Board of Directors in its Meeting held on 12.8.2009 has made an allotment of 9,24,90,413 equity shares of Rs.2/- each to the Fixed Deposit Holders of the

company at a price of Rs.11.32 per share which has been arrived at in accordance with the terms of the approved scheme and the pricing formula specified in SEBI(DIP) Guidelines. Compliance affidavit dated 19.8.2009 (Page 921-923) of Shri Rajiv Jain, DGM (Finance) of the appellant company was filed.

7. Being aggrieved by the impugned order dated 4<sup>th</sup> August, 2009, the Central Government, Ministry of Corporate Affairs through ROC, Jalandhar filed Company Appeal No.2/2009 before the Hon'ble High Court of Himachal Pradesh, Shimla levelling various allegations against the appellant company.

8. The matter was listed before the Hon'ble High Court of Himachal Pradesh on 27.8.2009 (Page 963) and after hearing the parties the following orders was passed by the Division Bench:

***"Company Appeal No.2/2009***

***Heard. Admit.***

***Company Application No.20/2009***

***Heard at length. Respondent may proceed to implement the scheme, as approved by the Court, vide impugned order, but such implementation shall be subject to the final decision in the main appeal.***

***Liberty to make mention for early hearing.***

***Xxxx***

***August 27, 2009***

***Sd/- Surjit Singh, J***

***Sd/- Surinder Singh, J***

9. The matter was heard on 14<sup>th</sup> September, 2010 by the Division Bench of the Hon'ble High Court, who after hearing the parties passed the following relevant order dated 14.9.2010 (Page 970)

**“Consequently, we allow this appeal, set aside the impugned order and remand the case to the learned Single Judge, who will consider the representation, which was filed and was placed on the record of the Company Petition, after the passing of the impugned order and decide the petition afresh, after hearing all the parties and taking into consideration the aforesaid representation.”**

10. Aggrieved by the said order dated 14.9.2010 of the Division Bench of Hon'ble High Court of Himachal Pradesh, Shimla the appellant company filed a SLP No.548/2011 before the Hon'ble Supreme Court of India praying therein to grant special leave to appeal against the impugned order/judgement dated 14.9.2010 passed by the Learned Division Bench of the Hon'ble High Court of Himachal Pradesh in Co. Appeal No.2/2009 and also prayed as interim stay that the order dated 14.9.2010 passed by the Hon'ble Division Bench of Hon'ble High Court of Himachal Pradesh may be stayed. However, the Hon'ble Supreme Court after hearing the parties the Hon'ble Supreme Court vide order dated 14.1.2011 (Page 1017) ordered ***“We are not inclined to interfere with the impugned order/judgement. However, in the facts and circumstances of these cases, we request the learned single Judge to decide the matters as expeditiously as possible.”***

11. After passing of the order by the Hon'ble Supreme Court, the matter was listed before the Hon'ble High Court of Himachal Pradesh and as per para 36 of the impugned order dated 12.3.2018 (Page 73), the matter remained pending before the Hon'ble High Court of Himachal Pradesh thereafter. In the hearings held on 7.11.2016 and 12.12.2016 and on few earlier dates before the Hon'ble High Court of Himachal Pradesh, only the counsel for the



petitioner company and the Union of India through Assistant Solicitor General of India had been appearing. Thereafter the petition was transferred to the National Company Law Tribunal, Chandigarh in view of Rule 3 of the Companies (Transfer of Pending Proceedings) Rules, 2016.

12. After service of notices to the parties concerned, the NCLT heard the counsel for the parties. After hearing the parties, NCLT, Chandigarh passed the impugned order dated 12.3.2018. The relevant portion of the order is as under:-

***“123.In view of the aforesaid discussion, CA No.49 of 2008 seeking approval of the scheme of arrangement with the FD holders is dismissed. With regard to the prayer made originally in CP No.05 of 2004, the matter having been settled with the other creditors admittedly the same stands disposed of having been rendered infructuous. However, this order will not affect the allotment of shares to the FD holders who have traded the shares to the third parties or transferred the allotted shares, for which it shall be the duty of the petitioner company to ascertain from the record of the stock exchanges and its own record. Even the de-mated shares which have still not been transferred by the original shareholders would stand cancelled as the ‘Scheme’ has been rejected. The petitioner company shall be bound to pay the outstanding amount as per scheme approved by the Company Law Board, to the original FD holders (except to those who have since traded/transferred) immediately, but positively within three months of the date of receipt of certified copy of this judgement***

***under intimation to the Registrar of Companies, concerned. For non-compliance, the Registrar shall take further appropriate steps as per the provisions of law.”***

13. Being aggrieved by the impugned order and judgement dated 12.3.2018 of NCLT, Chandigarh, the appellant has preferred the present appeal seeking therein for the following relief:-

- a) Set aside the impugned Judgement dated 12.3.2018 passed by the Hon'ble National Company Law Tribunal, Chandigarh Bench in CP No.5/2004, RT CP (CAA) No.182/Chd/HP2017 with CA No.49 of 2008;
- b) approve the scheme of arrangement with the fixed deposit holders proposed in CA No.49/2008; or
- c) in alternate remand the matter back to the Nation Company Law Tribunal, Chandigarh Bench for passing of appropriate ordrs in CP No.5/2004, RT CP(CAA) No.182/Chd/HP/2017 with CA No.49 of 2008.
- d) Pass any such other further order(s) as the Hon'ble Tribunal deems fit and proper in the facts and circumstances of the present case.

14. Appellant stated that the Scheme of Compromise and Arrangement involving secured lenders, creditors and FD holders was submitted to Hon'ble High Court of Himachal Pradesh, Shimla on 11.8.2004 and the modified scheme in respect of settlement with FD holders was filed in 2008. Appellant stated that the first motion was allowed on 4.9.2008 and the Scheme was approved by the Single Judge of Hon'ble High Court of Himachal Pradesh vide order dated 4.8.2009. Appellant further stated that the appellant intimated the National Stock Exchange and Bombay Stock Exchange about the order dated 4.8.2009 of the Hon'ble High Court of Himachal Pradesh and also held

a Meeting of its Board of Directors on 12.8.2009 and allotted 9,24,90,413 equity shares of Rs.2/- each to the FD holders @ 11.32 per shares as determined by SEBI formula. The appellant also vide its letter dated 12.8.2009 intimated to the National Stock Exchange and Bombay Stock Exchange about the allotment of these shares.

15. Appellant stated that the Ministry of Corporate Affairs filed Company Appeal No.2/2009 before the Hon'ble Division Bench of Hon'ble High Court of Himachal Pradesh which passed the following order on 27.8.2009:-

***“Company Appeal No.2/2009***

***Heard. Admit.***

***Company Application No.20/2009***

***Heard at length. Respondent may proceed to implement the scheme, as approved by the Court, vide impugned order, but such implementation shall be subject to the final decision in the main appeal.***

***Liberty to make mention for early hearing.***

***Xxxx***

***August 27, 2009***

***Sd/- Surjit Singh, J***

***Sd/- Surinder Singh, J***

Appellant stated that the said order dated 27.8.2009 was also communicated to the National Stock Exchange and Bombay Stock Exchange. Appellant stated that on 2.2.2010 (Page 1 para 1(e) of Bullet Points) the appellant wrote to the BSE for listing of the shares issued and on 17.2.2010 (Page 1 para 1(f) of Bullet Points) the NSE and BSE granted their listing and trading approval and in turn the appellant informed the FD holders who were issued shares that the shares have been listed on both NSE and BSE and can now be freely traded.

16. Appellant stated that the Company Appeal No.2/2009 filed by Ministry of Corporate Affairs was finally and heard by the Division Bench of Hon'ble High Court of Himachal Pradesh and the Hon'ble Division Bench allowed the appeal, set aside the order dated 4.8.2009 and remanded the matter to the Ld. Single Judge to hear the same afresh. Appellant stated that the appellant filed the Civil Appeal before the Hon'ble Supreme Court against the order of the Division Bench and the Hon'ble Supreme Court vide its order dated 14.1.2011 (Page 1017) ordered ***“We are not inclined to interfere with the impugned order/judgement. However, in the facts and circumstances of these cases, we request the learned single Judge to decide the matters as expeditiously as possible.”***

17. Appellant stated that after remanding the matter to Hon'ble High Court of Himachal Pradesh, the same matter was transferred to NCLT, Chandigarh the petition was transferred to the National Company Law Tribunal, Chandigarh in view of Rule 3 of the Companies (Transfer of Pending Proceedings) Rules, 2016. After hearing the matter, the NCLT passed the impugned order dated 12.3.2018.

18. Appellant stated that the once the Scheme has been approved by the Hon'ble High Court, the NCLT did not have the right to dismiss the scheme as the same has gone out of jurisdiction.

19. Appellant stated that the Scheme has been fully implemented and the said shares are being freely traded on NSE and BSE since 2010.

20. Appellant stated that the order of NCLT amounts to reviewing the order of High Court which in any event NCLT did not have jurisdiction to so.

21. Appellant stated that NCLT has created two classes. One class is where the order would not affect the allotment of shares who have already traded their shares or transfer their shares and the second class of FD holders who were allotted shares and has not been cancelled.

22. Appellant stated that the NCLT could not have passed the order without hearing SEBI specially when Regulator has taken a stand that the shares once issued to the fixed deposit holders could not be reversed.

23. At last the Appellant prayed that the impugned order dated 12.3.2018 may be set aside and the scheme may be approved.

24. Reply on behalf ROC Chandigarh has been filed. Respondent has stated that the NCLT Chandigarh has rightly decided the company petition. The questions of law are very well decided by the Tribunal vide its order dated 12.3.2018 raised by the appellant have already been covered by the Tribunal. ROC stated that the only question of law which may arise for consideration is whether a company can have a compromise with Fixed Deposit holders under Section 391/394 of the Companies Act, 1956 under which shares can be allotted in lieu of Fixed Deposits particularly when part of the principal amount and entire interest is waived off. Respondent stated that this question of law is already settled by Hon'ble Bombay High Court in the matter of Ipco Papers Ltd, MANU/MH/0012/1982 (1984) 55 Comp Case 281 (Bombay), holding that the depositors, who are governed by the provisions of Section 58-A and the rules made there under stood outside a proposal for a scheme of compromise. Respondents further stated that the rights and remedies enacted in respect of deposits invited or received from the public by a company would be nullified if a company is allowed to launch a proposal for

compromise in respect of such public deposits. ROC further stated that the same view was taken by Madras High Court in the matter of Reserve Bank of India Vs Integrated Finance Company Ltd and the Hon'ble Supreme Court in the matter of M/s Integrated Finance Co Ltd Vs Reserve Bank of India has settled the law by rejecting such a scheme.

25. ROC further stated that a deposit accepted from the public will remain a deposit and it makes no difference if the same is accepted by a Non-Banking Finance Company or by some other company. ROC further stated that Section 45(Q) of RBI Act and Section 58 of the Companies Act, 1956 are having similar provisions regulating the acceptance and repayment of fixed deposits. ROC further stated that the only difference between the two is that Section 45(Q) of the RBI is administered by RBI while Section 58A of the Companies Act, 1956 is administered by the Ministry of Corporate Affairs.

26. ROC stated that legal right available to the Fixed Deposit holders for filing prosecution for non-repayment of Fixed Deposit cannot be withdrawn under Scheme of Arrangement and Compromises. ROC further stated that it is settled law that the scheme under Section 391/394 of the Companies Act, 1956 cannot be made applicable on fixed deposit holders as laid down by Hon'ble Supreme Court in the matter of *Integrated Finance Company Ltd Vs Reserve Bank of India and Others (2015) 13 Supreme Court Cases 772*.

27. ROC stated that the compromise which was under consideration of Hon'ble NCLT was under Section 391/394 of the Companies Act, 1956 and it was not a scheme under Section 230(5) of the Companies Act, 1956. Therefore, it was not necessary to hear the Securities and Exchange Board of India.

28. ROC stated that the case of FD holders was presented before the NCLT by the Central Government as thousands of complaints received by the ROC against the appellant company and it was also not practically possible for the small FD holders scattered throughout the country to present their case before the NCLT. ROC further stated that violation of the order of CLB by making default in repayment as per the order of CLB is sufficient to make out the violation of Section 58A of the Companies Act, 1956.

29. ROC stated that the NCLT, after hearing the parties decided the company petition pending before it under the provisions of Companies Act, 1956. There is no question of deciding a petition under the Companies Act, 2013 as no such petition was filed by the company. No such prayer was made by the appellant company to withdraw the petition filed under Companies Act, 1956 and to file fresh petition under Companies Act, 2013.

30. ROC stated the Learned NCLT has cancelled only those shares on which third party interest has not been created, as those shares have not been sold by the fixed deposit holders. The shares are cancelled and fixed deposit holders are to be repaid. ROC stated that this is a very simple action and there is no question of any difficulty in implementation of the order. ROC further stated that the SEBI has nothing to do with a scheme under 391/394 of the Companies Act, 1956.

31. ROC stated that there is no question of reduction of the share capital when the increase in capital by issue of shares to fixed deposit holders is not approved. Now the share capital of the company will be increased for the capital issued to the fixed deposit holders who have already sold their shares, hence question of any reduction in share capital does not arise.

32. ROC stated that illegal things cannot be legalized on the ground that it will be a loss to some shareholders and a profit to the others as such no one is entitled for illegitimate gain. ROC further stated that allotment of shares through illegal procedure is not permitted. The fixed deposit holders can get their money back as no authority is prohibiting them to purchase the shares of this company if they are interested. ROC further stated that illegal scheme cannot be legalised merely for the reason that the fixed deposit holders will get the benefit. ROC further stated that it goes against the appellant which is trying to deprive the public exchequer from getting due tax applicable on interest income. ROC further stated that the fixed deposit holders deserve compounded interest after the date of maturity at a rate originally agreed between the appellant company and the fixed deposit holders.

33. ROC stated that the reduced rate as per Company Law Board order dated 19.8.2003 is applicable only when the payment made as per the CLB order. The appellant has not made payment as per the order of the CLB and, therefore, the appellant has no right to pick up reduced rate of interest fixed by CLB. ROC further stated that delay in repayment results in to increased interest and not in reduced rate of interest. ROC stated as regard to Income Tax Benefit to fixed deposit holders, no one can be benefited at the cost of public exchequer and every citizen should pay the tax applicable to him.

34. ROC stated that debt has to be discharged as per the agreed terms and conditions of the debt and according to the provisions of the relevant law of the land. Discharge of debt by issue of shares is not permitted by the law to the extent it is applicable to the fixed deposit holders. ROC further stated that



the improved financial position of the appellant strengthen the legitimate expectation of the fixed deposit holders to get their money back.

35. ROC stated that any benefit to the banks and financial institutions cannot be given at the cost of the individual fixed deposit holders. The law has to be followed and the fixed deposit holders have to be repaid as per the terms of deposit.

36. ROC stated that the implementation of the scheme approved by the Hon'ble Company Court, vide order dated 27.8.2009 was subject to the outcome of the appeal of the Central Government before the Division Bench. The Division Bench of Hon'ble High Court vide order dated 14.9.2010 was pleased to set aside the order dated 4.8.2009 of the Ld. Single Judge of the Hon'ble High Court of Himachal Pradesh.

37. ROC stated that when order is subject to final decision of the main appeal, the final order has to impact everything which was subject to the final outcome. ROC stated that now the final outcome is rejection of the scheme and everything has gone which was subject to final outcome. ROC further stated that SEBI was not given any authority under Section 391/394 of the Companies Act, 1956.

37. ROC stated that the NCLT has not cancelled the shares which have been sold by the fixed deposit holders. ROC further stated that the illegal action which is contrary to law in a valid meeting has no meaning. The meeting may have been valid but the decision taken in the meeting was not as approval of a scheme of compromise with the fixed deposit holders was against the public policy and contrary to law.

38. At last the ROC prayed that the appeal filed by the appellant may be dismissed.

39. During the pendency of the appeal, an IA No.1325/2018 was filed by the applicants/Intervenors for impleadment. The same was allowed and the parties were directed to file their reply to implead application.

40. Rejoinder has been filed by the appellant thereby reiterating the submissions made in the appeal. Appellant has emphasised its submission that on transferring the petition to NCLT, the NCLT ought to have decided the matter in accordance with the corresponding section/provisions of the new Act i.e. Companies Act, 2013. Appellant have also annexed copies of annexures i.e. list of civil suits and proceedings under Section 138 of the Negotiable Instrument Act, winding up petition filed by creditors, cases filed by Banks before Debt Recovery Tribunal, proceedings under Consumer Protection Act which were filed before the Hon'ble High Court of Himachal Pradesh, Shimla.

41. We have heard the learned counsel for the parties and perused the record.

42. Learned counsel appearing on behalf of the appellant argued that the Scheme of Compromise and Arrangement with FD holders was filed in 2008 before the Hon'ble High Court of Himachal Pradesh and as per directions of the Hon'ble Court meeting with FD holders was convened and the Scheme was approved in the Meeting; and later on the same was placed before the Hon'ble High Court and the Scheme was approved by Learned Single Judge vide order dated 4.8.2009 and the appellant allotted 9,24,90,413 equity shares of Rs.2/- each to the FD holders @ Rs.11.32 per share as per SEBI

formula and the same was intimated to NSE and BSE on 12.8.2009 (Pages 918 and 919) and now the reversal of the Scheme after a span of 9 years vide impugned order dated 12.3.2018 unequitable, especially when no Fixed Deposit Holder or any other statutory authority objected to the Scheme.

43. Learned counsel appearing on behalf of the Respondent/ROC argued that a company petition was filed by the appellant before the Hon'ble High Court of Himachal Pradesh under Section to 391 to 394 of the Companies Act, 1956 for the sanction of the scheme with the approximately 82,488 FD holders. Learned counsel for the Respondent argued that in a separate meeting convened for the purpose, the Respondent could not put forth its stand on the said compromise/arrangement for the administrative reasons besides the reasons beyond the control of the Respondent/Ministry of Corporate Affairs, and also the affidavit containing the stand of the Respondent could not be filed before the Hon'ble High Court and the order dated 4.8.2009 was passed. Learned counsel for the Respondent further argued that that meeting may have been valid but the decision taken in the meeting was not valid as approval of a scheme of compromise with the fixed deposit holders was against the public policy and contrary to law. Learned counsel for Respondent/ROC further argued that the Respondents filed appeal before the Division Bench of Hon'ble Court who at the admission stage ordered that the appellant may proceed to "implement the scheme" but such "implementation shall be subject to the final decision in the main appeal". Learned counsel further argued that the appeal filed by them was finally heard and the Division Bench allowed the appeal, set aside the order dated 4.8.2009 and remanded the matter to the Ld. Single Judge to hear the same afresh.

Learned counsel further argued that the appellant filed Civil Appeal before the Hon'ble Supreme Court against the order of the Division Bench and the Hon'ble Supreme Court vide its order dated 14.1.2011 (Page 1017) ordered ***“We are not inclined to interfere with the impugned order/judgement. However, in the facts and circumstances of these cases, we request the learned single Judge to decide the matters as expeditiously as possible.”*** Learned counsel for the Respondent argued that the matter was transferred to NCLT, who heard the matter and passed the impugned order dated 12.3.2018. Learned counsel for the Respondent argued that Section 394-A of the Companies Act, 1956 provides that for application under Sections 391 and 394 of the said Act, notice to be given to Central Government by Tribunal before passing an order. Learned counsel for the Respondent further argued that this would enable the Government to study the proposal and raise such objections thereto as it thinks fit in the light of the facts and information available with it and also place the court in possession of certain facts which might not have been disclosed by those who appear before it, so that the interest of the public at large may be fully taken into account by the Court before passing the order. Learned counsel further argued that the Respondent placed all the facts before the Hon'ble Court in its appeal and after hearing the parties the Hon'ble Court has passed the impugned order dated 12.3.2018.

44. We have heard the learned counsel for the parties. After going the record and hearing the arguments of parties we observe that it is fact that the Scheme was approved by Learned Single Judge vide order dated 4.8.2009 and the same was challenged before the Division Bench of High Court who at the

admission stage ordered that the appellant may proceed to “implement the scheme” but such “implementation shall be subject to the final decision in the main appeal” and finally Division Bench allowed the appeal, set aside the order dated 4.8.2009 and remanded the matter to the Ld. Single Judge to hear the same afresh. Result was that the approval of the Scheme was set aside which meant that there was no approval and acts done pending appeal, which acts were subject to outcome of the appeal were rendered unprotected by any legal order. Appellant went up to the Supreme Court and the Hon’ble Supreme Court upheld the order of the Division Bench of Hon’ble High Court of Himachal Pradesh. As the order dated 4.8.2009 was set aside, Learned NCLT which had now stepped into the shoes of earlier Single Judge, heard the matter afresh and passed the order dated 12.3.2018. Therefore, on going through the events that happened in this matter, it cannot be said that the Scheme was approved and it was reversed after a span of 9 years.

45. Learned counsel appearing on behalf of the appellant argued that the Shimla High Court has approved the scheme and as such NCLT did not have the right to dismiss the scheme as the same have gone out of its jurisdiction. Learned counsel for the appellant further argued that the dismissal of second motion by NCLT not legally tenable as High Court had already allowed first motion and as such NCLT could not have gone on the issue of jurisdiction. Learned counsel for the appellant further argued that the order of NCLT amounts to reviewing the order of High Court which in any event NCLT did not have jurisdiction to do so. We find no force in this argument. In Second Motion it is open for NCLT to take a comprehensive view of the procedure followed and legality or otherwise of a scheme proposed.

46. Learned counsel for the Respondents argued that the scheme approved by Learned Single Judge was set aside/dismissed by the Division Bench of the High Court and the order of the Division Bench of the High Court was duly upheld by the Hon'ble Supreme Court and that the Learned NCLT after hearing the representatives of the Central Government, as directed by Division Bench of High Court and Supreme Court, passed a speaking and a well reasoned order dated 12.3.2018, therefore, it cannot be said that the NCLT order amounts to reviewing the order of High Court.

47. We have heard the parties at length. While passing the order dated 4.8.2009 by the Learned Single Judge, the Central Government could not file its affidavit objecting to the scheme and that the arguments of the Central Government were not heard, therefore, the matter was directed to be heard afresh as per order of Division Bench of Hon'ble High Court and upheld by Hon'ble Supreme Court. Learned NCLT after hearing the parties, including the Central Government, passed the order 12.3.2018. Therefore, it cannot be said the NCLT has reviewed the order of High Court whereas the High Court order dated 4.8.2009 was set aside.

48. Learned counsel for the appellant argued that as per order dated 4.8.2009 the scheme was fully implemented. Learned counsel for the appellant further argued that the appellant wrote to NSE on 3.12.2009 (page 1, para 1(e) of Bullet Points) for listing of shares and also wrote to BSE vide letter dated 2.2.2010 for listing of shares. Learned counsel for the appellant further argued that both the Stock Exchanges on 17.2.2010 granted their listed and trading approval and the shares are being freely traded in both NSE and BSE since 2010. Learned counsel for the appellant further argued that

the ROC wrote three letters dated 7.10.2010, 11.10.2010 and 18.10.2010 (Vol IV, Page 1010-1013) to SEBI for delisting of shares but the SEBI vide its letter dated 29.10.2010 and 11.11.2010 expressed its inability to the request for delisting of shares on the ground that as the shares were freely tradeable, it was not possible to reverse the decision which would cause hardship to investors particularly, where 3<sup>rd</sup> party rights might have been created (Vol. IV, Page 1014-1016). Learned counsel for the appellant further argued that the SEBI is an expert body endowed with statutory powers of regulating listed shares, its decision in the matter should, therefore, have been given due weightage by NCL, which has not been done. Learned Counsel for the appellant further argued that the Companies Act, 2013 envisages considering the representation of the Securities and Exchange Board of India before passing an order of reduction of share capital.

49. Learned counsel for the Respondent argued that SEBI has nothing to do with a Scheme under 391/394 of the Companies Act, 1956. Learned counsel further argued that the Ministry of Corporate Affairs through Regional Director having jurisdiction in the matter was having the right to make representation under Section 394A of the Act, 1956. Learned Counsel for Respondent further argued that the SEBI has never said that the shares issued to fixed deposit holders cannot be cancelled. Learned counsel for the Respondent also argued that there is no question of reduction of share capital when the increase in share capital by issue of shares to fixed deposit holders is not approved.

50. We have heard the parties on this issue. We have also gone through the record also. We noted that after passing of the order dated 4.8.2009, the

appellant allotted 9,24,90,413 equity shares of Rs.2/- each to the FD holders @ Rs.11.32 per share as per SEBI formula. The appellant company vide its letter dated 12.8.2009 (Page 918 and 919) intimated to the National Stock Exchange and Bombay Stock Exchange to this effect. Here in the letter dated 12.8.2009 of the appellant to Stock Exchanges, the last line is important which is as under:

***“Kindly take the same on your record”***

It clearly shows that the appellant had only intimated the said two Stock Exchanges about the allotment of shares and requested them to take the same on their record. In the meantime, Respondent filed appeal before the Division Bench of the Hon’ble High Court of Himachal Pradesh who at the time of admission on 27.8.2009 passed the following order:

***“Company Appeal No.2/2009***

***Heard. Admit.***

***Company Application No.20/2009***

***Heard at length. Respondent may proceed to implement the scheme, as approved by the Court, vide impugned order, but such implementation shall be subject to the final decision in the main appeal.***

***Liberty to make mention for early hearing.***

***Xxxx***

***August 27, 2009***

***Sd/- Surjit Singh, J***

***Sd/- Surinder Singh, J***

On careful reading of the above order, we find that two directions were issued to Respondent/appellant herein. First was ***“Respondent may proceed to implement the scheme”*** and the second was ***“but such implementation***



***shall be subject to the final decision in the main appeal.***” We further noted that till the passing of this order dated 27.8.2009, the appellant had not approached the Stock Exchanges for listing of these shares. We observe that the appellant while replying to an email dated 23.11.2009 of National Stock Exchange in which NSE had sought clarification, the appellant giving reply to the said clarifications vide letter dated 3.12.2009 (Page 1 of Additional Documents) requested National Stock Exchange to grant listing permission. However, the appellant has not annexed the email dated 23.11.2009 of National Stock Exchange. It is also argued by the appellant that they had written letter dated 2.2.2010 (Page 8 of Additional Documents) for list of shares allotted to FD holders. We have gone through the letter dated 2.2.2010 addressed to Bombay Stock Exchange carefully. We find that the said letter dated 2.2.2010 is reply to certain query raised by the Bombay Stock Exchange. We further observe that in the said letter only heading of the letter is “*Listing permission pursuant to Scheme of Compromise and Arrangement*” but in the letter it is not mentioned that listing permission may be given. However, in the said letter dated 2.2.2010 it is clearly mentioned that ***“Nevertheless the company is duty bound to implement the scheme under the directions of the Hon’ble Court and would abide by such further orders as may be passed for final disposal of the case.”*** Now the appeal has been allowed and the order dated 4.8.2009 has been set aside. In our view the appellant, seeing the rider imposed in the order dated 27.8.2009 have got listed the shares knowing fully well that scheme if not approved it may have to take remedial measures to abide by the order as stated by them in letter dated 2.2.2010 addressed to Bombay Stock Exchange.

In fact, in our view if such shares were being pushed into listing, in the face of Order of Division Bench dated 27.08.2009, there was duty to ensure such shares carried information/caution that they were being listed and are subject to final order of Hon'ble High Court. On a reference made by Ministry of Corporate Affairs to the SEBI for delisting of shares, the SEBI informed that *"it may be noted that since the shares are already listed and traded on the Stock Exchange, third party rights might have been created. Therefore, delisting the said shares may create hardships to investors who have bought the shares in secondary market. We are therefore, unable to accede to your request to direct Stock Exchanges to delist the shares under reference."* Further SEBI has never said that the shares can be issued to fixed deposit holders in a scheme of arrangement etc. This is a matter for High Court/(or NCLT now) to consider under the Act. The issue raised by the appellant that if the shares are cancelled then it will amount to reduction in share capital. We observe that there is no question of reduction of share capital when the increase in share capital by issue of shares to fixed deposit holders has not been approved by the competent forum in its final order. Even if reduction of share capital is the consequence such an exercise would only be in execution of the order of the Tribunal and would be fully legal, justified and valid.

51. Further when we asked the appellant to inform which scheme is approved by the Court then he replied that the Scheme was approved by the Learned Single Judge of the Hon'ble High Court of Himachal Pradesh, Shimla. Then we reminded him that the said scheme was rejected by the Hon'ble Division Bench of the same High Court and inform which scheme is approved. Then the appellant has no answer.

52. Learned counsel for the appellant argued that under Section 391 of Companies Act, 1956, gives powers to compromise or make arrangements with the creditors. Learned counsel further argued that there are number of categories of creditors and in the petition these categories have been shown. He has argued that compromise or arrangement can be done with all kind of creditors and there cannot be any exception for Fixed Deposit Holders only because FD holders are as much creditors of the company as any other category. Requirement of Section 391 of Companies Act, 1956 is that meetings of each category must be held separately and requisite approvals taken thereto. He further argued that since separate meeting of FD holders was convened and it was approved by the requisite majority so there is no flaw in the Scheme.

53. Learned counsel for Respondent argued that Fixed Deposit Holders are a separate category and is governed by the provisions of Section 58-A of the Companies Act, 1956 and the rules made thereunder, stood outside a proposal for a scheme of compromise. Learned counsel for the Respondent further argued that the rights and remedies enacted in respect of deposits invited or received from the public by a company would be nullified if a company is allowed to launch a proposal for compromise in respect of such public deposits. Learned counsel for the Respondent further argued that the deposit accepted from the public will remain a deposit and it makes no difference if the same is accepted by a Non-Banking Finance Company or by some other company. Learned counsel for the Respondent further argued that the compromise with FD holders is outside the purview of Section 391/394 of the Companies Act, 1956, as per law laid down by the Hon'ble

Supreme Court in the case of M/s Integrated Finance Co Ltd Vs Reserve Bank of India etc. Learned counsel for the Respondent further argued and stressed that the legal right available to the FD holders for filing prosecution for non-repayment of Fixed Deposit cannot be withdrawn under any Scheme.

54. We have heard the parties on the issue. We have noted that the Company intended to restructure the creditors providing different options for different classes of creditors as under:-

**(i) Class-I**

- a. Term Lender (including secured, unsecured and foreign currency)
- b. NCD holders.
- c. Working Capital Lenders.
- d. ICDs.

**(ii) Class-II**

- a. Fixed Deposit Holders.

**(iii) Class-III**

- a. Vendors.

**(iv) Class-IV**

- a. Preference and Equity Share Holders.

Looking at the list of creditors which has been provided by the appellant the nature of which has been are in the scheme it is to be noted that the fixed deposit holders are a separate category. It is also noted that Section 58A of the Companies Act, 1956 makes a provision to protect the interest of the Fixed Deposit Holders in case of default. There are no provision giving a legislative guidance to deal with the other kinds of the creditors and the matter has been left open to the commercial consideration or negotiation among the parties.

Since we are dealing with the FD holders only if the contention of the appellant is accepted it tantamount to making Section 58A as redundant the implication of which cannot be accepted that legislature enacted the section to protect the FD holders to be made redundant by action of the parties. This fact is also to be noted that out of 82231 depositors (Page 113) only 325 depositors participated and out of 325 depositors, 315 depositors favoured the Scheme. It is to be appreciated that out of 82231 depositors who are spread over all over India, only 325 depositors participated in the Meeting. We may keep this fact in mind that the small people who have given small deposits to the Company may be residing throughout the country and may not be in a position to attend the meeting at the place where the meeting took place. It will not be very easy for him to reach the place where the meeting is to take place. The cost of attending the meeting may be much more than the amount deposited with the company for which the remedies are to be pursued. It is precisely for this purpose that the compromise of FD Holders will run contrary to the protection provided under Section 58A of the Companies Act, 1956. Thus we are of the considered opinion that in the light of the Supreme Court Judgement as well as to protect the interest of the FD holders –creditors for protection of which special provisions are made, the Scheme of Compromise with the FD Holders is outside the general purview of Section 391/394 of the Companies Act, 1956

55. Learned counsel for the appellant argued that the matter was transferred from High Court of Himachal Pradesh at Shimla to NCLT Chandigarh. In the meantime, the Companies Act, 1956 was repealed and the Companies Act, 2013 came into force, NCLT ought to have decided the

Company Petition under the Companies Act, 2013, it has been stated. Learned counsel for the Appellant further argued that the new corresponding provision to Section 58A of the Companies Act, 1956 has undergone major changes and therefore the NCLT ought to have considered Section 74 of the Companies Act, 2013 before passing the impugned Order. Counsel for the Appellant further argued that the NCLT could not have passed the order without hearing SEBI especially when the same is mandate of Section 230(5) of the Companies Act, 2013. The NCLT passed the impugned order in spite of the fact that the Regulator had taken a stand that the shares once issued to the fixed deposit holders could not be reversed.

56. Learned counsel for the Respondent argued that the appellant had violated the order of Hon'ble Company Law Board by making default in repayment as per the order of CLB is sufficient to make out the violation of Section 58A of the Companies Act, 1956. There is no question of deciding a petition under the Companies Act, 2013. Learned counsel for the Respondent argued that the NCLT cannot pass an order under Section 230 of the Companies Act, 2013 while deciding an application before it under Section 391 of the Companies Act, 1956.

57. We have heard the parties on this issues. We observe that the appellant has defaulted in making the payment as per CLB order and is liable for action under Section 58A of the Companies Act, 1956. We also observe that there is no question of deciding a petition under Companies Act, 2013 and the petition was filed under Companies Act, 1956. The other issues raised by the appellant regarding SEBI, we observe that SEBI has nothing to do with a Scheme under 391/394 of the Companies Act, 1956 and the Ministry of

Corporate Affairs through Regional Director having jurisdiction in the matter and have right to make representation under Section 394A of the Act, 1956. Further SEBI has never said that the shares issued to fixed deposit holders cannot be cancelled. Further if the scheme approved is wrong and legally not valid in the eyes of law, there is no option except to reject the scheme.

58. Learned counsel for the appellant has argued that the NCLT in its order relied upon the Judgement of the Hon'ble Supreme in the matter of ***Integrated Finance Company Ltd vs Reserve Bank of the India (2015) 13 Supreme Court Cases 772***. Learned counsel argued that Section 45 Q of the RBI Act, 1934 provides that the provisions of Chapter III B shall have effect notwithstanding anything inconsistent therewith contained in any other law. Learned counsel further argued that since Section 45QA of the RBI Act, 1934 deals only with the fixed deposit accepted by NBFC's and as such the same has no applicability to this case and argued that Morepen is not an NBFC. Learned counsel for the appellant has also drawn our attention to judgement namely Integrated Finance Company Ltd (supra) particularly para 45 and 46 of the judgement to stress his argument. Learned counsel for the appellant has also relied upon the Judgement in the matter of IPCO Paper Mills Ltd, 1982 SCC Online Bom 398, Queens Park Property Co Pvt Ltd decided on 31.7.1978 by Calcutta High Court; DCM Ltd 2003 SCC Online Del 996.

59. Learned counsel for the Respondent argued that the law has been decided by the Hon'ble Bombay High Court in the matter of IPCO Papers Ltd, MANU/MH/0012/1982 holding that the depositors who are governed by the provisions of Section 58A and the rules made there under stood outside a

proposal for a scheme of compromise. The rights and remedies enacted in respect of deposits invited or received from the public by a company would be nullified if a company is allowed to launch a proposal for compromise in respect of such public deposits. Learned counsel for the Respondent further argued that the Hon'ble Supreme Court of India in the matter of ***Integrated Finance Co Ltd Vs Reserve Bank of India etc has settled the law by rejecting such a scheme.***

60. We have heard the learned counsel for the parties. Deposits under Companies Act, 1956 are regulated in terms of Section 58A. It is to be particularly noted in this Section 58A, Central Government is entitled to prescribe the limits upto which, the manner in which and the conditions subject to which deposits may be invited or accepted by a company either from public or from its members in consultation with Reserve Bank of India. Further it is noted that the deposits accepted by the NBFC is regulated under Section 45QA of Reserve Bank of India Act. As RBI is regulating the deposits under Section 45QA and/or is consulted by Government of India before framing the rules under Section 58A of the Companies Act, 1956 and both the rules being almost the same it cannot be said that the similar treatment given to the deposits under Section 45QA of RBI Act and Section 58A of Companies Act, 1956 will be different merely because they are occurring in different Acts. Whereas in both the Acts the RBI as authority to regulate financial matter has useful role to play. Therefore, they are in pari materia to the subject of deposits accepted by the companies. In *Integrated Finance Company Ltd Vs Reserve Bank of India and Others (2015) 13 Supreme Court Cases 772*, Hon'ble Supreme Court has settled the law by rejecting the



Scheme of Arrangement and Compromises with deposits holder. Therefore, we hold that the Scheme of Arrangement and Compromise under Section 391/394 of the Companies Act, 1956 with the FD holders regulated by Section 58A of Companies Act, 1956 cannot be held to be legal.

61. Learned counsel appearing on behalf of the Intervenor argued that the applicants herein have also been allotted equity shares of the appellant company in pursuance to the scheme of arrangement implemented by the appellant company. Learned counsel for the intervenors further argued that they were not aware of the objections raised by the Respondents and were under the bonafide impression that the allotment of shares has attained finality and there was no issue pending regarding the same. Learned counsel for the intervenors further argued that the applicants herein are keen to retain the shares which they have received and do not want to part with the same and in case the order of NCLT is upheld the rights of the applicant will be materially affected. Learned counsel for the intervenors further argued that the applicants will incur adverse tax liability if the applicant's shares are forcibly taken and instead make him again wait for the repayment of the fixed deposit on account of being liable to pay higher tax rate applicable of "Income from other sources" as compared with "Income from Capital Gains".

62. Learned counsel for the Respondent argued that this application has been filed with a sole purpose to defeat the process of law. He further argued that the scheme is illegal and cannot be approved and the NCLT has rightly held it.

63. We have heard the parties on this issue. We have already observed that the Scheme of Compromise with FD holders is outside the purview of Section

391/394 of the Companies Act, 1956, as per law laid down by the Hon'ble Supreme Court in the case of M/s Integrated Finance Co Ltd Vs Reserve Bank of India etc. We also observe that the legal right available to the FD holders for filing prosecution for non-repayment of Fixed Deposit cannot be withdrawn under any Scheme. The impugned order has rightly protected the interest of the FD holders. Shares already trade are not disturbed to avoid legal complications. If pending litigation shares are received subject to outcome, those shares still in the hands of FD holders on the date of impugned order lose protection and such FD holders cannot insist on holding on to them as Scheme has been rejected. Intervenors whether they fall in one category or the other category as per impugned order dated 12.3.2018 would be regulated accordingly.

64. In view of the foregoing discussions and observations the following order is passed:

- a) Impugned order dated 12.3.2018 passed by the Learned NCLT is upheld.
- b) Interim order passed, if any, by this Appellate Tribunal is vacated.
- c) Rs.50 lakhs is imposed as costs on the appellant to deposit the same with Ministry of Corporate Affairs within a period of one month from the date of this order for using it for welfare of Depositors.

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

(Mr. Balvinder Singh)  
Member (Technical)

New Delhi  
Bm