

*Securitisation Ordinance in India: A
legislated misconception*



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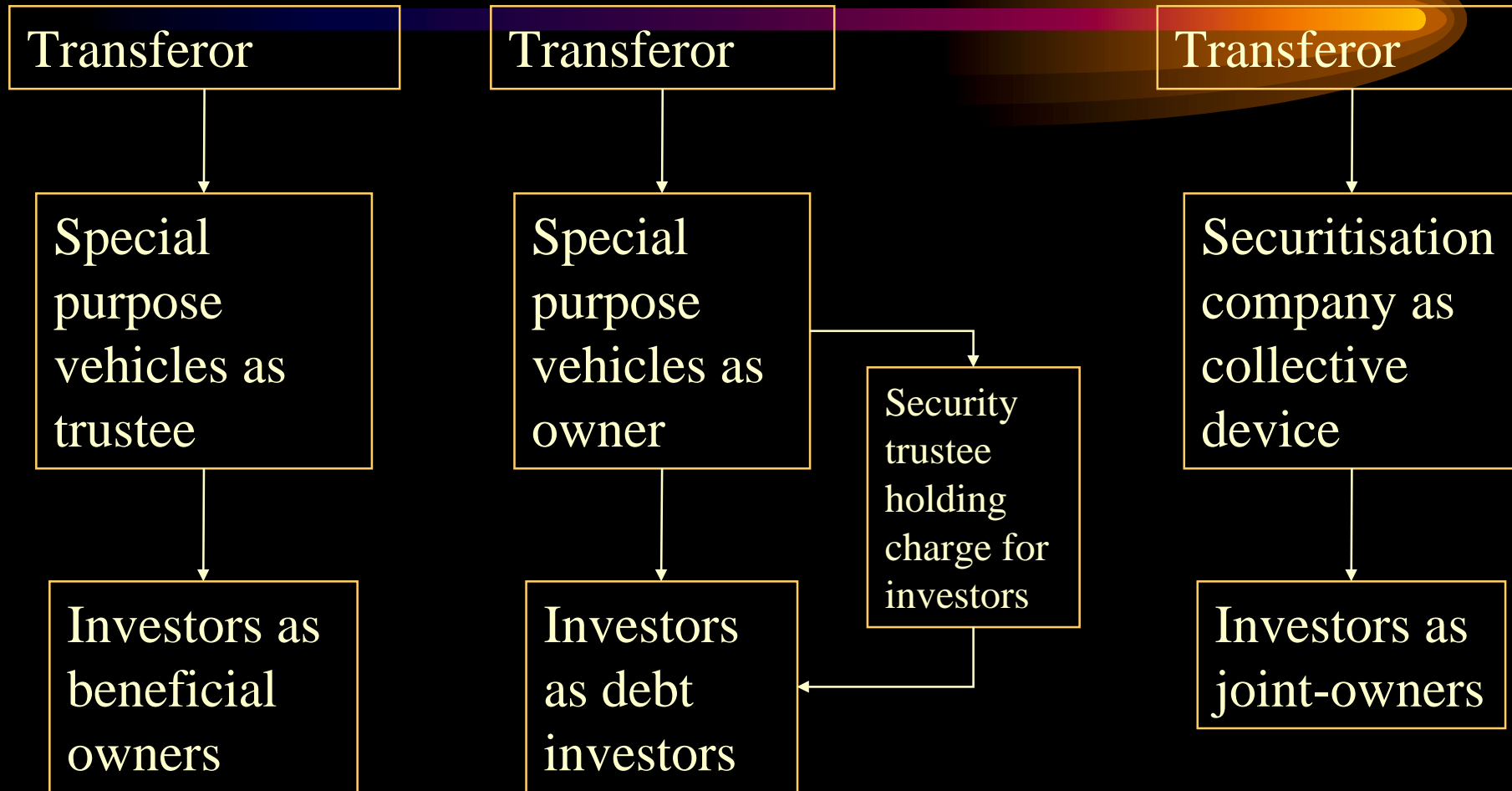
Securitisation website: <http://vinodkothari.com>

Securitisation Ordinance



- A combo law - mixes up unrelated issues:
 - securitisation
 - reconstruction companies
 - perfection of security interests
- Successes:
 - makes fractional transfers legally sacrosanct
 - permits future flows to be transferred
 - overrides bankruptcy law provisions on transfers prior to bankruptcy, transfers of future flows, etc.
 - cannot protect transactions which are “de facto” financing transactions. No safe harbour on ‘true sale’.

Wrong notion of the securitisation device



Pass-through form

Pay-through/
CDO/ CLO form

Our 'invented' form

Failures

- Failures:
 - No bar on securitisation through non-corporate SPVs outside the law
 - relates only to transfer of “financial assets” by banks and Fis.
 - mixes up “securitisation business” with some sort of financial activity
 - Imposes “owned fund” requirement which is completely alien to securitisation SPVs
 - by defining “security receipts”, rules out pay-through securitisation which is a global norm
 - does not resolve - rather, complicates the stamp duty issues further
 - takes “security receipt” as transfer of undivided interest, and not undivided *beneficial interest* - makes security receipt also a legal property
 - the mandatory requirement of registration applies to all securitisation companies; operative provisions of sec. 5-6 are only for securitisation by banks/FIs
 - Worsens the problem under sec. 88 of IT Act - the securitisation company is deemed to be the “lender”
 - problem of taxation in case of multiple classes of securities remains the same

Failures..contd.

- Withholding tax problem left untouched
- Investments permitted only to qualified institutional buyers - as per SEBI definition
- Mortgage-backed receivables are “immovable property” in law - therefore, registration requirements will continue to apply [sec. 8 does not exempt Registration for immovable properties.
- Sec 9 giving special powers to take over management of the borrower, sale/lease of undertaking etc. totally irrelevant to securitisation - wrongly made applicable.
- RBI prudential regulation of the securitisation company- unheard of in any other part of the world
- Imposes compulsory registration requirement for each securitisation transaction; all modification, satisfaction, etc. Open to inspection by any person.

Stamp duty under the Ordinance

- Mode of acquiring assets:
 - acquisition by issuing a “debenture”
 - duty on the instrument of transfer; and
 - on the issue of debentures
 - acquisition by an agreement: agreement is a conveyance, and will require stamping
 - “notwithstanding” clause in sec. 5 does not avoid stamp duty
- Therefore, state-level stamp duties remain the same
- Issue of “security receipts”
 - since a security receipt is a security under SCRA and Companies Act, issue of security receipts stampable as “receipt”
- Transfer of security receipts:
 - stampable as transfer of securities; unless in a demat format