

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REFERENCE NO.1 OF 2007

IN

WRIT PETITION NO.1293 OF 2007

IN

REFERENCE APPLICATION NO.8 OF 2005

1. The Chief Controlling Revenue Authority, Maharashtra State, Pune)
2. Superintendent of Stamp (Headquarters) Mumbai.)..Applicants

V/s.

- | | |
|------------------------------------|----------------|
| 1. M/s.Reliance Industries Limited |) |
| Mumbai |) |
| 2. M/s.Reliance Petroleum Limited |) |
| Gujarat |)..Respondents |

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Mr.A.A.Kumbhakoni, Sr.Advocate and Special Counsel with
Mr.A.B.Vagyan, Govt. Pleader with Mr.Shardul Singh.
Mr.V.N.Sagare AGP & Ms.Tintina Hazarika i/by Shri Sunil Y.Kale,
Law officer for the petitioner in Civil Reference No.1/2007 and for
respondents in WP No.5533 of 2008.

Dr.Milind Sathe, Senior Advocate with Ms.Melane D'souza i/by Junnarkar and Associates for respondents in Civil Reference No.1 of 2007 and for petitioners in WP No.5533 of 2008.

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**CORAM :S.C.DHARMADHIKARI,J
K.R.SHRIRAM,J
B.P.COLABAWALLA,J**

RESERVED ON : 5.2.2016

PRONOUNCED ON : 31.3.2016

JUDGMENT :- (Per : K.R.SHRIRAM,J)

1 The Reliance Industries Limited (respondent no.1) and Reliance Petroleum Limited, Jamnagar Gujarat (respondent no.2) entered into a scheme of amalgamation under Sections 391 & 394 of the Companies Act 1956. The provisions of section 391 r/w 394 of the Companies Act required obtaining of an order from the High Court in whose jurisdiction these companies are registered, sanctioning the Amalgamation Scheme filed by both, the transferor, as also the transferee company. The purpose and the object as to why both, the transferor and the transferee company had to obtain order from the court sanctioning the Scheme of Amalgamation is that, such a scheme of amalgamation must bind the dissenting members, as also, all the creditors of both the companies. As per the Scheme, from the appointed date, the assets/undertakings of the transferor company, viz., respondent no.2 was to, without any further Act, instrument or deed, stand transferred to and vested in or deemed to have been transferred to and vested in the transferee (respondent no.1) company, pursuant to the provisions of Sections 391 to 394 of the Companies Act so as to become the properties and assets of the transferee company.

Accordingly, on 10th April 2002, the respondent no.1-transferee company filed a Company Petition No.391 of 2002 and Company Application No.133 of 2002 in this court for sanctioning the

arrangement in the Scheme of Amalgamation. Similarly, respondent no.2, the transferor company on 16th April 2002, filed the Company Petition No.75 of 2002 and Company Application No.76 of 2002 in Gujarat High Court for sanctioning the arrangement in the Scheme of Amalgamation.

This court passed an order under Section 394 of the Companies Act 1956 on 7.6.2002 sanctioning the scheme and the Gujarat High Court passed an order on 13.9.2002 sanctioning the scheme.

2 On 16.10.2002, Respondent no.1 submitted the order dated 7.6.2002 passed by this court along with the order dated 13.9.2002 passed by the Gujarat High Court for adjudication of stamp duty in the office of Superintendent of Stamp, Mumbai (the applicant no.2) now known as Superintendent of Stamp (Head quarters) Mumbai. Respondent no.1 requested the applicant no.2 to adjudicate the stamp duty, if any, payable on the order dated 7.6.2002 passed by the Bombay High Court. The respondent no.1 had paid stamp duty of Rs.10 crores in the State of Gujarat on the order dated 13.9.2002 passed by the Gujarat High Court.

3 During the hearing of the adjudication proceedings, the respondent no.1 had urged that the maximum stamp duty payable

under Article 25 (da) of schedule-1 of Bombay Stamp Act 1958 for order sanctioning the Scheme of Amalgamation in the State of Maharashtra was Rs.25 crores and since respondent no.1 had already paid stamp duty of Rs.10 crores in the State of Gujarat on the order of sanction of scheme passed by the Gujarat High Court, the respondent no.1 was entitled to remission/deduction/set off in the payment of stamp duty thereon to the extent of Rs.10 crores and therefore, the respondent no.1 was liable to pay only Rs.15 crores as stamp duty. The applicant no.2 rejected the submissions of respondent no.1 and directed respondent no.1 to pay the entire amount of Rs.25 crores as stamp duty.

4 The respondent no.1 appealed against this order of adjudication under Section 53(1A) of the Bombay Stamp Act 1958 before the Chief Controlling Revenue Authority, Maharashtra State who while dismissing the appeal upheld the order of applicant no.2. Against this order the respondent no.1 filed an application to the applicant no.1 to refer the case to Bombay High Court for opinion under Section 54 of the Bombay Stamp Act 1958 as it involved a serious and a substantial question of law. This application was rejected. Against this order, the respondent no.1 filed a Writ petition being Writ Petition No.591 of 2006 before this Court. By an order dated 22.2.2006 this court remitted the matter back to the applicant

no.1 to decide the reference application afresh after hearing the parties. The applicant no.1 once again rejected the reference application against which the respondent no.1 filed a fresh writ petition bearing No.1293 of 2007.

5 By an order dated 1.3.2007, this court directed the respondent no.1 to deposit the balance amount of deficit stamp duty of Rs.10 crores in the office of the applicant no.2 within two weeks thereof and directed the applicant no.1 to make reference to this court under Section 54(2) of the Bombay Stamp Act 1958 within 4 weeks from the date of deposit of the balance amount of deficit stamp duty by respondent no.1.

6 The following questions therefore, have been referred to this court under Section 54 of the Bombay Stamp Act 1958 :-

1. Whether a scheme sanctioned between the two companies under Section 391 and 394 of the Companies Act is one and same document chargeable to stamp duty regardless of the fact that order sanctioning the scheme may have been passed by two different High Courts by virtue of the fact that the Registered Offices of the two Companies are situated in two different states ?
2. Whether the instrument in respect of amalgamation or compromise or scheme between the two companies is such a scheme, compromise or arrangement and the orders sanctioning the same are incidental as the computation of stamp duty and valuation is solely based on the scheme and scheme alone ?

3. Whether in a scheme, compromise or arrangement sanctioned under Section 391 and 394 of the Companies Act where registered office of the two companies are situated in two different States, the Company in state of Maharashtra is entitled for rebate under Section 19 in respect of the stamp duty paid on the said scheme in another State ?

4. Whether for the purpose of Section 19 of the Act the scheme/compromise/arrangement between the two Companies must be construed as document executed outside the state on which the stamp duty is legally levied, demanded and paid in another State ?

7 This being the background of the matter, let us proceed to answer the four questions of law.

8 Under Entry 44 of List III of VII Schedule to the Constitution of India, the power to levy stamp duty other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty, on all documents is concurrent. Consequently, charging provisions as to levy of stamp duty can be enacted by both, the Parliament and the State Legislature, subject to Article 254 of the Constitution of India. But the power to prescribe the rate of such levy is excluded from this Entry 44. This power to prescribe the rate of such levy is divided between the Parliament and the State Legislature. The rates of stamp duty can be prescribed by the Parliament under Entry 91 of List I and by the State Legislature under Entry 63 of List II of the VII Schedule.

Entry 91 of List I covers rates of stamp duty in respect of Bills of Exchange, Cheques, Promissory Notes, Bills of Lading, Letters of Credit, Policies of Insurance, Transfer of Shares, Debentures, Proxies and Receipts. Whereas, Entry 63 of List II covers rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty. This aspect has been considered by the Hon'ble Supreme Court in the case of **Bar Council Vs. State of U.P.**¹ Paragraphs-11 & 12 read as under :-

"11. Now Entries 77 and 78 in List I in the Seventh Schedule to the Constitution are as follows Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; person entitled to practice before the Supreme Court.

78 Constitution and organisation (including vacations) of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practice before High Courts".

Entry 91 relates to rates of stamp duty in respect of certain instruments which do not cover an instrument or a document with which we are concerned, namely, certificate of enrollment is-sued under [s. 22](#) of the Act. Entry 96 in the same list relates to fees in respect of any of the matters in the List but not including the fee taken in any court. Entry 63 in List II relates to rates of stamp duty in respect of documents other than those specified in List I i.e. Entry 91. In the same List Entry 66 relates to fees in respect of any of the matters in that List but not including fee taken in any court. The following Entries in List III may be reproduced :

"26. Legal, medical and other professions". "44. Stamp duties other than duties or fees collected by means of judicial stamp, but not including rates of stamp duty".

There is no dispute that the Act was enacted under Entries 77 and 78 in List 1. It is equally clear that the words "persons entitled to practice" would include determining or prescribing the qualifications and conditions that a person should possess and satisfy before becoming entitled to practice as an advocate before, the Supreme Court or the High Courts. So far

¹ AIR 1973 SC 231

as persons entitled to practice before these courts are concerned "the power to legislate regard to them is carved out from the general power relating to the provision in Entry 26 in List III and is made the exclusive field for Parliament". In other words the power to legislate in regard to persons entitled to practice before the Supreme Court and the High Courts is altogether excluded from Entry 26 in List II. (See 6. N. Mohindroo v.- The Bar Council of Delhi & Others⁽¹⁾). From the entries the following scheme with regard to persons entitled to practice will appear to emerge; (1) The Parliament has the exclusive power under Entry 77 and Entry 78 in List I to prescribe, inter alia, the qualifications and conditions on the fulfillment of which persons would be entitled to practice before the Supreme Court or the High Courts. Any fee which may be payable by such persons before they can claim to be entitled to practice would fall under Entry 96 of that List; (2) Entry 44 of List III enables legislation with regard to its levy but the rates of the stamp duty can be prescribed by the Parliament only with regard to instruments falling within Entry 96 of List I and by the State Legislature under Entry 63 of List II.

12. The main question on which the controversy has centered is whether the levy of stamp duty on the certificate of enrollment of an advocate is a purely taxation measure or whether it is a part of the conditions prescribed by [s. 24](#) of the Act which an advocate must satisfy before he becomes entitled to practice. If the requirement of the payment of such a duty is a condition precedent to the conferment on a person of the privilege of audience and representing suitors before the Supreme Court and the High Courts any legislation relating to it would be within the competence of the Parliament. If, however,, it is purely a taxation measure then it would fall within Entry 44 of the Concurrent List in which event both the Parliament and the State Legislature would be competent to enact legislation for the levy of the duty although it is only under Entry 63 of List II that rates can be prescribed by the State Legislature. In other words, the charging provisions can be enacted by both the Parliament and the State Legislatures subject to the provisions of [Art. 254](#) of the Constitution. It is well settled that the scheme of the Entries in the various Lists is that taxation is not intended to be comprised in the main subject in which "it might on an extended construction be regarded as included but is treated as a distinct matter for the purpose of legislative competence". Even under the residually power a. legislation conferred by [Art. 248](#) the Parliament can only impose that tax which is not mentioned in either List III or List II.

Thus, it is the State Legislature, which has legislative power to impose stamp duty, as also, prescribe the rates of stamp duty

inasmuch as the instrument that deals with 'Amalgamation of Companies'.

9 The questions referred to this court as mentioned above are required to be adjudicated in the context of the provisions of the Bombay Stamp Act 1958. The provisions of Bombay Stamp Act, 1958 which we need to consider for the purpose of adjudication of this matter are reproduced below :-

Section 2(d) : *"Chargeable" means, as applied to an instrument, executed or first executed after the commencement of this Act, chargeable under this Act, and as applied to any other instruments, chargeable under the law in force in the State when such instrument was executed or, where several persons executed the instrument at different times, first executed.*

"Section 2(g) : "Conveyance" includes -

- (i) a conveyance on sale,
 - (ii) every instrument,
 - (iii) every decree or final order of any Civil Court,
 - (iv) every order made by the High Court under Section 394 of the Companies Act, 1956 (in respect of amalgamation or reconstruction of companies, and every order made by the Reserve Bank of India under Section 44A of the Banking Regulation Act, 1949 in respect of amalgamation or reconstruction of Banking Companies);
- By which property, whether movable or immovable, or any estate or interest in any property is transferred to, or vested in, any other person, inter vivos, and which is not otherwise specifically provided for by Schedule I,"*

NOTE : sub section 2(g)(iv) was introduced by Maharashtra Act 17 of 1993 with effect from 1.4.1003

Section 2(i) : "executed" and "execution" used with reference to instruments mean "signed" and "signature",

[Explanation "- The terms "signed" and "signature" also include attribution of electronic record as per section 11 of the Information Technology Act, 2000]

Section 2(l) : "instrument" includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of

lading, letter of credit, policy of insurance, transfer of share, debenture proxy and receipt.

Section 2(t) : “settlement” means any non-testamentary disposition in writing of movable or immovable property made, -

- (i) in consideration of marriage ,
- (ii) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or
- (iii) for any religious or charitable purpose and

Includes an agreement in writing to make such a disposition and where any such disposition has not been made in writing any instrument recording whether by way of declaration of trust or otherwise, the terms of any such disposition.

Section 3 : Instrument chargeable with duty

“subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in Schedule I as the proper duty therefore respectively, that is to say –

- (a) every instrument mentioned in Schedule I, which not having been previously executed by any person, is executed in the State on or after the date of commencement of this Act ;
- (b) every instrument mentioned in Schedule I, which not having been previously executed by any person, is executed out of the State on or after the said date, relates to any property situate, or to any matter or thing done or to be done in this State and is received in this State :

[Provided that a copy or extract, whether certified to be a true copy or not and whether a facsimile image or otherwise of the original instrument on which stamp duty is chargeable under the provisions of this section, shall be chargeable with full stamp duty indicated in the Schedule I if the proper duty payable on such original instrument is not paid]

[Provided further that] no duty shall be chargeable in respect of

—
(1) any instrument executed by or on behalf of, or in favour of, the Government in cases, where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument [or where the Government has undertaken to bear the expenses towards the payment of the duty];

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Bombay Coasting Vessels Act, 1838, or [Merchant Shipping Act, 1958].

Section 4 : Several Instruments used in single transaction of (development agreement) sale, mortgage or settlement

(1) Where, in the case of any development agreement, sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule-I for the

conveyance, (development agreement) mortgage or settlement, and each of the other instruments shall be chargeable with a duty of (one hundred rupees) instead of the duty (if any) prescribed for it in that Schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purpose of sub-section (1) be deemed to be the principal instrument.

(3) If the parties fail to determine the principal instrument between themselves, then the officer before whom the instrument is produced may, for the purposes of this section, determine the principal instrument.

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

Section 17 : Instruments executed in the State -

All instruments chargeable with duty and executed by any person in this State shall be stamped before or at the time of execution [or immediately thereafter] [or on the next working day following the day of execution] :

[Provided that, the clearance list described in Articles 19, 20, 21, 22 or 23 of Schedule I may be stamped by an officer authorised by the State Government by rules made under this Act, if such clearance list is submitted for stamping by the clearing house of an Association in accordance with its rules and bye-laws with the requisite amount of stamp duty, within two months from the date of its execution.]

Section 19 : Payment of duty on certain instruments [or copies thereof] liable to increased duty in [Maharashtra State]

Where any instrument of the nature described in any article in Schedule-I and relating to any property situate or to any matter or thing done or to be done in this State is executed out of the State and subsequently [such instrument or a copy of the instrument is] received in the State –

- (a) the amount of duty chargeable on such instrument [or a copy of the instrument] shall be the amount of duty chargeable under Schedule-I on a document of the like description executed in this State less the amount of duty, if any, already paid under any law in force in India excluding the State of Jammu and Kashmir on such instrument when it was executed ;
- (b) and in addition to the stamps, if any, already affixed thereto such instrument [or a copy of the instrument] shall be stamped with the stamps necessary for the payment of the duty chargeable on it under clause (a) of this section, in the same manner and at the same time and by the same persons as though such instrument [or a copy of the instrument] were an instrument received in this State for the first time at the time when it became chargeable with the higher duty ; and
- (c) the provisions contained in clause (b) of the proviso to sub-section (3) of section 32 shall apply to such instrument [or a copy of such instrument] as if such were an instrument executed or first executed out of this State and first received in

this State when it became chargeable to the higher duty aforesaid, but the provisions contained in clause (a) of the said proviso shall not apply thereto.

Article 25 : CONVEYANCE (not being a transfer charged or exempted under Article 59)

On the [true market value] of the property which is the subject matter of the Conveyance-
[(da) if relating to the order of high court in respect of the amalgamation or reconstruction of companies under section 394 of the Companies Act, 1956 or under of the Reserve Bank of India under Section 44A of the Banking Regulation Act, 1949.

The provisions of the Companies Act, 1956, necessary to consider for this matter are reproduced below :

COMPANIES ACT, 1956 :

Section 390. In sections 391 and 393-

- (a) the expression "company" means any company liable to be wound up under this Act ;
- (b) the expression "arrangement" includes a reorganization of the share capital of the company by the consolidated of shares of different classes, or by the division of shares into shares of different classes or, by both those methods ; and
- (c) unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

Section 391 (1) Where a compromise or arrangement is proposed -

- (a) between a company and its creditors or any class of them ;
or
- (b) between a company and its members or any class of them ;
the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the court directs.

(2) If a majority in number representing three-fourth in value of the creditors, or class of creditors, or members, or class of members, as the case may be present and voting either in person or where proxies are allowed [under the rules made under section 643], by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or in the case of a company which is being wound up, on the liquidator and contributories of the company ;

[Provided that no order sanctioning any compromise or arrangement shall be made by the court unless the court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the court, by affidavit or otherwise, all material facts relating to the company such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like]

(3) An order made by the court under sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [one hundred] rupees for each copy in respect of which default is made.

The court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the court thinks fit, until the application is finally disposed of

Section 394. (1) *Where an application is made to the court under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court-*

(a) *that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies, and*

(b) *that under the Scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company") ;*

The court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for allot any of the following matters :

(i) *the transfer to the transferee company of the whole or any part of the undertaking property or liabilities of any transferor company ;*

(ii) *the allotment or appropriation by the transferee company of*

any shares, debentures, policies, or other like interests in that company which, under the compromise or arrangement are to be allotted or appropriated by that company to or for any person ;

(iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company ;

(iv) the dissolution, without winding up, of any transferor company ;

(v) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement; and

(vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out :

[Provided that no compromise or arrangement proposed for the purposes of or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the court unless the court has received a report from the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.

Provided further that no order for dissolution of any transferor company under clause (iv) shall be made by the court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.]

(2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within [thirty] days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default shall be punishable with fine which may extend to [five hundred] rupees.

(4) In this section –

(a) “property” includes property, rights and powers of every description, and “liabilities” includes duties of every description ; and “transferee company” does not include any company other

than a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act or not."

10 It was submitted on behalf of the respondents as under :-

(i) Under section 2(l), only a document which creates right or obligations constitutes an "instrument".

(ii) Moreover an "instrument" could be chargeable to duty as a "Conveyance" under sec.2(g), only if it is a document by which property, whether movable or immovable, or any estate or interest in any property is transferred to, or vested in, any other person.

(iii) In respect of a Scheme of Amalgamation such as the present, the Scheme becomes effective/operative and the undertaking/assets/property are transferred to the transferee company, only when both the Application/Petition filed by the Transferor company AND the Transferee Company have resulted in the Scheme being sanctioned by the Courts.

(iv) In the case of Hindustan Lever Vs. State of Maharashtra (reported in (2004) BCR 767), the Hon'ble Supreme Court has held in the context of sec.2(g)(iv) that *"Thus the amalgamation scheme sanctioned by the court would be an instrument within the meaning of section 2(i). By the said "instrument" the properties are transferred from the transferor co. to the transferee company....."* The Court in that judgment also referred to the English judgment in Sun Alliance Insurance's case : (1971) 1 All ER 135 and observed *"It was*

further held that the order of the court was liable to stamp duty as it resulted in transferring the property and that the order of the court which results in transfer of the property would be an instrument as it includes every document.” In Litaka Pharma's case (Reported in (1996) 4 BCR 100) this Hon'ble Court had also earlier held that *“the amalgamation Scheme sanctioned by the Court would be an instrument within the meaning of sec 2(l)”*.

(v) Having regard to the legal requirement of both the transferor and the transferee company having to secure sanction separately, as also the provision of the Scheme itself, the Scheme as also the first order of this Hon'ble Court sanctioning the Scheme on the Transferee Company's Application, would not constitute an instrument or a conveyance, unless and until the Gujarat High Court had sanctioned the Scheme on the Transferor Company's Application. This is because the Scheme would become effective & operative and the property would stand transferred and vested from the transferor to the transferee, only on the Gujarat High Court making the second order sanctioning the Scheme. In fact if the second High Court had not sanctioned the Scheme, the same would not have become operative and there would be no transfer or vesting of property in the transferee company. Accordingly on such sanction being granted by the Gujarat High Court, the parties were liable to pay stamp duty on the sanctioned scheme (read with the

two orders) in Gujarat and then to pay stamp duty in Maharashtra subject to a rebate under sec.19 for duty already paid in Gujarat. Therefore, it is the scheme that is the instrument and not the orders.

(vi) Alternatively if pursuant to sanction by the Gujarat High Court, both court orders are treated as multiple instruments for giving effect to the same transfer/transaction, the last order/the order passed in the case of the transferor company would be the principal instrument in relation to which stamp duty had to be computed. In any event in such a circumstance sec.4(2) entitles the parties to determine for themselves which of the instruments shall be deemed to be the principal instrument. The parties were accordingly entitled in law to treat the Gujarat High Court order as the Principal instrument and offer to pay the highest duty thereon subject to rebate under sec.19 for duty already paid thereon in Gujarat.

(vii) In this context with question No.2 referred to above following issue also may be answered :

“Whether in the case of amalgamation of two companies where registered offices of transferor and transferee company are situated in two different states, the transaction of amalgamation is a single transaction contained in several instruments and transferee company is entitled to determine as to which of those instruments be deemed to be the principle instrument ?

(viii) In fact the Revenue had in previous Inter state amalgamation levied stamp duty only on the order of the transferor company.

(ix) Moreover in Intra State amalgamations the revenue had always levied stamp duty on only one of the orders as the principal instrument.

11 In the reference application, it is alleged on behalf of the applicants that all instruments as per the scheme of Bombay Stamp Act 1958, covered under schedule-1 thereof are chargeable with stamp duty. In the present case, instrument in question is the order dated 7.6.2002 passed by this court and accordingly as provided under Section 2g(iv), the order dated 7.6.2002 was liable to duty under Article 25(da) of schedule-1 of the Bombay Stamp Act 1958. The applicants also submitted that as per section 17 of the Bombay Stamp Act every document chargeable with duty under the Act is required to be charged with duty at the time of execution and therefore, the order dated 7.6.2002 is required to be stamped with duty as per the situation and circumstances on the day of its execution as per the Stamp Act. It was also submitted that the stamp duty payable was on the instrument and not on the underlying transaction.

12 On the stand of the respondent no.1 that they are entitled to a rebate on the stamp duty paid in Gujarat as mentioned in section 19, it is the case of the applicants that section 19 applies only when

an instrument chargeable under stamp duty in schedule-I and relating to any property situate or to any in matter or thing done or to be done in this State is executed out of the State and subsequently such instrument or a copy of the instrument is received in this State. As the instrument submitted for adjudication in this State is the order dated 7.6.2002 and which has been executed in the State prior to payment of stamp duty of Rs.10 crores in Gujarat, the question of taking benefit of section 19 does not arise. It was also submitted that section 19 provides for contingency in which instrument is executed outside the State and then brought into the State. In this case as the instrument is the order dated 7.6.2002 passed by this court within the State of Maharashtra, the question of being brought into the State did not arise. Hence, section 19 is not applicable at all.

13 The issue in short is whether the scheme of arrangement between the parties which has been sanctioned by the court is the instrument or the order of the court sanctioning the scheme is the instrument as parties are ad-idem that stamp duty is payable on an instrument. The respondents state the former is correct whereas the applicants state the latter is correct.

14 The Hon'ble Supreme Court, in ***Hindustan Lever Vs. State of Maharashtra***² in the context of Section 2(g)(iv) has held

² (2004) 9 SCC 438

that the transfer is effected by an order of the Court and the order of the Court sanctioning the scheme of amalgamation is an instrument which transfers the properties and would fall within the definition of Section 2(l) of the Bombay Stamp Act, which includes every document by which any right or liability is transferred. By the said instrument the properties are transferred from the transferor to the transferee company. Paragraph 38 of the Judgment reads as under :-

“As discussed above, the order passed under [Section 394](#) is founded on consent and this order is an instrument as defined under [Section 2 \(1\)](#) of the Bombay Stamp Act. The State Legislature would have the jurisdiction to levy stamp duty under Entry 44 List III of the Seventh Schedule of the Constitution and prescribes rate of stamp duty under Entry 63 List II. It does not in any way impinge upon any entry in List I. Entry 44 of List III empowers the State Legislature to provide for stamp duties other than duties or fees collected by means of judicial stamps. Along with this, Entry 63 of List II empowers the State Legislature to prescribe rates of stamp duty in respect of documents other than those specified in the provisions of List I, that is to say, rates of stamp duty in respect of Bill of Exchange, cheques, promissory notes, Bill of lading, letter of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. By sanctioning of amalgamation scheme, the property including the liabilities are transferred as provided in [Section 394](#) of the Companies Act and on that transfer instrument, stamp duty is levied. It, therefore, cannot be said that the State Legislature has no jurisdiction to levy such duty”.

(emphasis supplied)

15 In Hindustan Lever (supra) the apex court also referred to the English Court Judgment in ***Sun Alliance Insurance Ltd. Vs. Inland Revenue Commissioners***³ and observed “ It was further held that the order of the court was liable to stamp duty as it resulted

³ (1971) 1 ALLER 135

in transferring the property and that the order of the court which results in transfer of the property would be an instrument as it includes every document. Paragraphs-23, 24 & 25 of the Hindustan Lever (supra) reads as under :-

"23. Point as to whether the stamp duty was leviable on the Court order sanctioning the scheme of amalgamation was considered at length in Sun Alliance Insurance Ltd. Vs. Inland Revenue Commissioners 1971 (1) All England Law Reports 135. The point which arose for determination as to whether the stamp duty was payable on the order of the Judge sanctioning the scheme of arrangement under [Section 206](#) of the Companies Act, it was held:-

" It follows that it is the court order that effects the transfer; and this is nonetheless so because the scheme is not operative until an office copy has been delivered to the Registrar of Companies for registration, for the court order itself ordered that to be done and the Act so provides; nor because London has still to cause the name of Sun Alliance to be entered on to the register as the holder of the shares. The registration of the transferee occurs in every case where a transfer is executed, and merely perfects the title of the transferee. The same thing occurs in the case of registered land, where one finds a transfer and subsequent registration. I have therefore come to the conclusion that by the court order the shares were transferred to Sun Alliance, or, to use the words of [s. 54](#), by that order property was transferred to a purchaser."

24. Expression "conveyance on sale" as provided in [Section 54](#) of the Stamp Act, 1891 is similar to [Section 2](#) (g) of the Bombay Stamp Act. The expression "conveyance on sale" as defined in the said Section includes every instrument, and every decree or order of any Court or any Commissioner, whereby any property, or a estate or interest in any property, upon the sale thereof was transferred or vested in the purchaser, or any other persons on his behalf and on his direction.

25. The Court further considered as to whether the order of the judge is an 'instrument' executed in any part of the United Kingdom for the purposes of [Section 14\(4\)](#) of the Stamp Act, 1891; it was held that it was an instrument executed in the United Kingdom within the meaning of [Section 14\(4\)](#) of the Stamp Act 1891. It was further held that order of the Court was liable to stamp duty as it resulted in transferring the property and that the order passed by any Court which results in transfer of property would be an instrument as it includes every document."

(emphasis supplied)

16 In ***Li Taka Pharmaceuticals Ltd. & Anr. Vs. State of Maharashtra***⁴ a division bench of this court had held that an order under Section 394 is found or based upon compromise or arrangement between the two companies of transferring assets and liabilities of one company to another company. The order is an “instrument” as defined under Section 2(l) of the Bombay Stamp Act which includes every document by which any right or liability is transferred.

17 Therefore, as the scheme of arrangement or amalgamation has no effect or force unless or until it was sanctioned by the court, it is the order sanctioning the scheme that would be an instrument under Section 2(l). Hence, the order dated 7th June 2012 passed by this court will be the instrument as defined.

18 Section 3(a) of the Bombay Stamp Act, 1958 provides for chargeability of the instruments covered under Schedule-I appended to the said Act, when first executed in the State. As per section 2(i) the words “executed” and “execution” means signed and signature. In this context the Order of the Hon'ble High Court, Bombay was executed on 07/06/2002. As per section 2(d) an instrument becomes chargeable on execution or first execution after the commencement of the Bombay Stamp Act, 1958. Section 17 of the Bombay Stamp

4 1996 (2) Mah. L.J. 156

Act, 1958 provides for stamping of the instruments executed in the State. This section makes it clear that any instrument chargeable with duty executed in the State is required to be stamped before or at the time of execution or immediately thereafter or on the next working day following the day of execution. Considering all the provisions above, the transferee- respondent no.1 in any event was bound to pay the necessary duty as it stood on the date of execution, i.e., 07/06/2002, the date of passing of Order by this Court. Here it is pertinent to note that the words “executed” and “execution” represent signed and signature under the stamp Law. These words, however, do not represent completion of an act, task, things or compliance of any nature, to be done as per contents of the document. Therefore it was obligatory on the part of the Respondent no.1-transferee to approach stamp Authority and pay the stamp duty on execution of Order by this Court. The Respondent no.1-transferee instead of fulfilling the legal obligation cast on it, paid part of the stamp duty in the State of Gujarat on the Order passed by Hon'ble High Court of Gujarat which was passed couple of months after the order passed by this Court. Had the Respondent no.1-transferee fulfilled its obligations in Law, the settling of any question of Law would have never arisen.

19 Section 3 of the said Act is a charging section and provides for charging stamp duties. As quoted above, section 2 of the said Act defines the terms "Conveyance" [2(g)], "Executed and Execution" [2(i)], "Instrument" [2(l)] and "Settlement" [2(t)].

It is the settled position in law that in terms of the scheme of the said Act, stamp duty is charged on 'the instrument' and not on 'the transaction' effected by 'the instrument'.

20 The Order dated 7.6.2002 as stated earlier would be the instrument and that was executed in Mumbai, i.e., in Maharashtra. As per section 3 every instrument executed in State of Maharashtra is chargeable to duty. The Order dated 7.6.2002 whereby assets of Respondent no.2 transferor company are transferred to the Respondent no.1-Transferee company, is the instrument upon conjoint reading of section 2(g), (l) and 3 of the Bombay Stamp Act. As per the Scheme of the said Act, instrument is chargeable to duty and not the transaction and therefore even if the Scheme may be the same, i.e., transaction being the same, if the scheme is given effect by a document signed in State of Maharashtra it is chargeable to duty as per rates provided in Schedule I. As per the Scheme of the Act, the taxable event is the execution of the instrument and not the transactions. If a transaction is not supported by execution of an instrument, there can not be a liability to pay duty. Therefore,

essentially the duty is leviable on the instrument and not the transactions. Although the Scheme may be same, the Order dated 7.6.2002 being conveyance and it being an instrument signed in State of Maharashtra, the same is chargeable to duty so far as State of Maharashtra is concerned.

21 Although the two orders of two different high courts are pertaining to same scheme they are independently different instruments and can not be said to be same document especially when the two orders of different high courts are upon two different petitions by two different companies. When the scheme of the said Act is based on chargeability on instrument and not on transactions, it is immaterial whether it is pertaining to one and the same transaction. The duty is attracted on the instrument and not on transaction.

22 As regards the amalgamation of Companies is concerned, section 391 r/w. Section 394 of The Companies Act, 1956, contemplates following steps :-

- (i) Formation of a Scheme mutually agreed by the Transferor and the Transferee company ;
- (ii) Holding of meeting for approval of the Scheme ;
- (iii) The Order of the Court sanctioning the Scheme ;
- (iv) Filing of a Certified copy of the Order sanctioning the Scheme

with the Registrar of Companies for registration ;

The transfer of any property or any interest in any property on account of such amalgamation, takes place pursuant to the Order passed by the Court sanctioning the Scheme of amalgamation. This aspect is clear in view of sub-section 2 of section 394 of the Companies Act, which specifically states that, by virtue of an Order issued under Section 394(1), the property of the Transferor Company gets transferred to and vests in the Transferee company. Thus, the instrument, which effects transfer, is the Order of the Court issued under Section 394(1) that sanctions the Scheme and not the Scheme of amalgamation itself. The incident of transfer is the second stage referred to in the aforesaid paragraph and not the first stage, as such.

23 Therefore, the contentions of the respondents that the Scheme of Amalgamation would be an instrument within the meaning of Section 2(l) of the said Act, is not legally sustainable. The Scheme of Amalgamation by itself cannot and does not result in transferring the property. It is the Order of the Court that sanctions such a Scheme of Amalgamation results in transferring the property and it is therefore, this Order alone would be an 'instrument', as defined by the said Act, on which stamp duty is chargeable. Therefore, the contentions of the respondents that the parties were

liable to pay stamp duty on the sanctioned Scheme (read with the two Orders) is not correct and cannot be accepted.

24 The provisions of Section 391 r/w. Section 394 of the Companies Act require obtaining of an Order sanctioning the Amalgamation Scheme by both the Transferor, as also, the Transferee Company. The purpose and the object as to why both, the Transferor and the Transferee company, have to obtain the Order from the Court sanctioning the Scheme of Amalgamation, is that, such a Scheme of Amalgamation must bind the dissenting members, as also, all the creditors of both the Companies and not just for the purpose of effecting transfer of property, assets etc. Apart from the aforesaid legal aspect of the matter, as a matter of fact, in as much as the present case is concerned, the chronology of events separately submitted by the applicants when considered demonstrates that the first Order sanctioning the Scheme, was issued by this Court on 7th June 2002 and the order states as under :-

"AND THIS COURT DOTH ORDER that with effect from the Appointed Date, the Assets/Undertakings of the Transferor Company (as defined in the Scheme of Amalgamation being Exhibit "E" to the petition and in the Schedule hereto) shall without any further act, instrument or deed stand transferred to and vested in or deemed to have been transferred to and vested in the petitioner company pursuant to the provisions of Section 391 to 394 of the Companies Act, 1956 so as to become the properties and assets of the petitioner company."

(emphasis supplied)

Therefore, the order of this court sanctioning the Scheme was not a conditional order, which was to operate after the scheme was also sanctioned by the Hon'ble Gujarat High Court. By this Order dated 7.6.2002 of this Court itself, it could be considered that the transfer was effected and therefore the said Order of this Court is the 'order made by the High Court under Section 394 of the Companies Act 1956....." as contemplated by Section 2(g) (iv) of the said Act. For the same reason the order dated 7.6.2002 of this Court is the 'instrument', as contemplated by the provisions of the said Act.

However, it may also be mentioned that this court in its order dated 7th June, 2002 has further ordered as under :-

“AND THIS COURT DOTH FURTHER ORDER that the petitioner company do within 30 days of the sealing of this order, cause a certified copy of this order to be delivered to the Registrar of Companies, Maharashtra, Mumbai for registration And upon such certified copy of order being so delivered to the Registrar of Companies, Maharashtra, Mumbai And upon receipt of the order sanctioning the Scheme of Amalgamation by the High Court of Gujarat at Ahmedabad and upon receipt of the files and documents in respect of Transferor Company from the Registrar of Companies, Gujarat, the Registrar of Companies, Maharashtra, Mumbai shall place and register with him on the files and documents kept by him in relation to the petitioner company and shall consolidate the files of the Transferor Company and the petitioner company accordingly.”

That part of the order of this court clearly directs the Transferee Company to deliver to the Registrar of Companies, Maharashtra, Mumbai for registration, the certified copy of the order of this court within 30 days of the sealing of the order, without waiting for the Hon'ble Gujarat High Court to pass appropriate order in

regard to sanctioning the Scheme. Thus, the implementation of the order of this court was not made dependent upon passing of an appropriate order sanctioning the Scheme by the Hon'ble Gujarat High Court. This is the step contemplated by the provisions of sub-section 3 of section 394 of the Companies Act.

25 The aforesaid part of the order of this court will have to be considered from the point of view of 'effective date' read with clauses 23,24 and 27, as contemplated by the Scheme of Amalgamation. Thus, the transfer in issue though has taken place in terms of the provisions of the Companies Act only and only on account of the order of this court, such a transfer will take effect from the date the Hon'ble Gujarat High Court passes an order sanctioning the Scheme. In other words, after the Hon'ble Gujarat High Court passes an order sanctioning the Scheme on account of the order of this Hon'ble Court, the transfer in issue will take place.

26 It is further pertinent to note that the respondent no.2 – Transferor Company, vide its application dated 18th September, 2002, produced before the appropriate Authority contemplated by the Bombay Stamp Act, 1958 (as applicable in the State of Gujarat), only the order dated 13th September, 2002 of the Hon'ble Gujarat High Court, as is clear from Exhibit '4' to the affidavit filed on behalf of the

1st respondent. The Collector and Additional Superintendent of Stamps, Gujarat State, Gandhinagar, only on the order passed by the Hon'ble Gujarat High Court has imposed a stamp duty of Rs.10 crores. Admittedly, the respondents have not paid any stamp duty on the order of this Hon'ble court, which is the subject matter of this reference. The order of this court dated 7th June, 2002 was presented for payment of stamp duty for the first time only on 16th October, 2002 by the respondent no.1 – Transferee Company along with application produced at Exhibit '6' to the affidavit filed on behalf of the Transferee-1st respondent and not by the 2nd respondent-Transferor company.

27 The respondent no.2 – Transferor Company has not paid any stamp duty on the order passed by this court either in the State of Gujarat or in the State of Maharashtra at the time when the aforesaid application dated 16th October, 2002 was submitted with the Superintendent of Stamps, Mumbai. Therefore, the respondent no.1 – Transferee Company was liable to pay full stamp duty on the order dated 7th June, 2002 passed by this Court in the State of Maharashtra inasmuch as on this order, no stamp duty was ever paid by anybody either in the State of Gujarat or in the State of Maharashtra.

28 The contention of the respondents that the provisions of Section 4 of the said Act enables the respondents to treat the order of the Hon'ble Gujarat High Court as "principal instrument" and act accordingly is wholly unsustainable in law and in view of the facts of the case.

29 Section 4 of the said Act has no application whatsoever in as much as the present controversy is concerned. Section 4 of the said Act applies only to the transactions set out therein viz. Development Agreement, Sale, Mortgage or Settlement. It is obvious that the instrument in issue does not fall in the first three categories viz. Development Agreement, Sale or Mortgage. This also answers that issue raised by the respondents as mentioned in paragraph-10(vii) above.

30 As regards the fourth category viz. 'settlement' is concerned, the instrument in issue does not even fall in this category. The term 'settlement' is defined by Section 2(t) of the said Act as under :-

Section 2(t) : "settlement" means any non-testamentary disposition in writing of movable or immovable property made, -

- (i) in consideration of marriage ,
- (ii) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or
- (iii) for any religious or charitable purpose and

Includes an agreement in writing to make such a disposition and where any such disposition has not been made in writing any instrument recording whether by way of declaration of trust or otherwise, the terms of any such disposition.

This definition demonstrates that 'settlement' contemplated by the provisions of the said Act is not and cannot cover "the Scheme of Amalgamation" whereby two Companies are amalgamated in terms of Section 391 r/w. Section 394 of the Companies Act. Section 4 of the said Act has no application at all to the facts of this case.

31 Apart from the aforesaid aspect, as set out in detail in the aforesaid paragraphs, we have to go only by the instrument on which stamp duty is payable and that instrument is the order passed by this Court dated 7th June, 2002. Thus, in absence of 'several instruments' used in 'single transaction', as such, the provisions of Section 4 of the said Act is not applicable.

32 Further Section 19 is not applicable in the present case.

Section 19 is applicable in respect of -

- (i) instrument executed out side State;
- (ii) of property in the State or thing done or to be done in State; and
- (iii) subsequently received in the State of Maharashtra.

The instrument in question is the order dated 7.6.2002 executed by High Court of Bombay. The order is already in Mumbai and executed in Mumbai. It is not executed out side Maharashtra.

The order dated 7.6.2002 is not received in Maharashtra since it originated in Maharashtra.

Therefore, the ingredients of Section 19 are not complied. Respondent no.2-transferee while paying duty on the order dated 7.6.2002 of the Bombay High Court can not claim rebate for duty paid on order dated 13.9.2002 in State of Gujarat by invoking Section 19 of the Act.

33 The provisions of Section 17 of the said Act also need to be considered in its proper perspective. This Section specifically contemplates that all instruments chargeable with duty, are required to be stamped either before or at the time of execution or atleast immediately thereafter on the next working day following the day of execution. In the present case, this Court passed the order, which is the instrument in issue on 7th June, 2002. The respondents were required to pay the stamp duty in that regard atleast immediately on the next working day following 7th June, 2002. The Hon'ble Gujarat High Court passed the order only on 13th September, 2002. The respondents were therefore, required to pay the requisite stamp duty much before passing of the Order by the Hon'ble Gujarat High Court

on 13th September, 2002. Had the respondents acted strictly in accordance with the said Act, the respondents would have paid the entire stamp duty of Rs.25 crores much before passing of the order by the Hon'ble Gujarat High Court. The respondents therefore, are liable to suffer other consequences in this regard in addition to the payment of full stamp duty on the order dated 7th June 2002 of this Court.

34 The contention of the respondents that under Section 2(l) of the said Act, only a document, which 'creates right or obligation' alone constitutes an 'instrument', is not correct, as is apparent from the definition clause itself. It is pertinent to note that, in first place, the definition of the term 'instrument' is an inclusive definition and is not an exhaustive definition, as such. Moreover, the term 'instrument', as defined, will also include, in addition to a document which 'creates right or obligation', a document, which 'purports to create, transfer, limit, extend, extinguish or record' any right or liability. It is emphasized that the term 'instrument' so defined, will also include a document, which merely records any right or liability.

35 In view of the above, we answer the questions raised by the present reference as under :-

- (i) Whether a scheme sanctioned between the two companies under Section 391 and 394 of the Companies Act

is one and the same document chargeable to stamp duty regardless of the fact that order sanctioning the scheme may have been passed by two different High Courts by virtue of the fact that the Registered Office of the two companies are situated in different States?

Ans. A scheme settled by two companies is not a document chargeable to stamp duty. An order passed by the Court sanctioning such a Scheme under Section 394 of the said Act, which effects transfer is a document chargeable to stamp duty. In case if the Registered Offices of the two Companies are situated in two different States, requiring such Orders, sanctioning the Scheme to be passed under Section 394 of the Companies Act by two different High Courts, then in that event, the order of this High Court which sanctions the Scheme passed under Section 394 of the Companies Act will be the instrument chargeable to stamp duty.

(ii) Whether the instrument in respect of amalgamation or compromise or scheme between the two Companies is such a scheme, compromise or arrangement and the orders sanctioning the same are incidental as the computation of stamp duty and valuation is solely based on the scheme and scheme alone?

Ans. The orders of the court, sanctioning a Scheme of amalgamation are not just incidental orders even in accordance with the Scheme of the Companies Act laid down by Section 391 r/w, Section 394. Only after the orders are passed by the Court, sanctioning the Scheme of Amalgamation, such a scheme becomes operational and effective. Computation of stamp duty and valuation does not make Scheme of Amalgamation alone chargeable to stamp duty. The order is the instrument.

(iii) Whether in a scheme, compromise or arrangement sanctioned under Sections 391 and 394 of the Companies Act where Registered Offices of the two Companies are situated in two different States, the Company in State of Maharashtra is entitled for rebate under Section 19 in respect of the stamp duty paid on the said scheme in another State?

Ans. The answer to this question will be in the negative for the reasons set out in detail herein above.

(iv) Whether for the purposes of Section 19 of the Act, the scheme/compromise/arrangement between the two Companies must be construed as document executed outside the state on which the stamp duty is legally levied, demanded and paid in another State?

Ans. Basically, a scheme/compromise/arrangement between the two companies is never a document chargeable to stamp duty, whether such a document is executed in the State or outside the State of Maharashtra. Moreover, in view of our conclusions above, Section 19 of the Act in any event, has no application whatsoever.

36 Civil Reference disposed accordingly.

37 No order as to costs.

(SC.DHARMADHIKARI,J)

(K.R.SHRIRAM,J)

(B.P.COLABAWALLA,J)