

\* THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

+ Writ Petition No. 5399 of 2008

% 06.07.2017

# M/s GVK Power and Infrastructure Limited,  
Rep. by its Director Mr. S. Bhupal and 2 others

...Petitioners

Vs.

\$ The District Registrar of Assurances,  
Red Hills, Hyderabad and 2 others

... Respondents

!Counsel for the Petitioners : Sri L. Venkateshwar Rao

^ Counsel for the Respondents : GP for Revenue

< Gist :

> Head Note :

? Cases referred:

1. (1963) II Comp.L.J 61



HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

Writ Petition No. 5399 of 2008

Order:

The second petitioner company filed a Company Petition No.64 of 2007 under Sections 391 and 394 of the Companies Act, 1956, seeking sanction and confirmation of the scheme of arrangement as consented by the shareholders of the first petitioner company. This Court, by order dated 20.07.2007, sanctioned the scheme of arrangement. It is also stated that the scheme of arrangement was sanctioned by the High Court of Delhi in Company Petition No.123 of 2007 dated 03.09.2007. While so, the first respondent issued a notice dated 02.11.2007 to the first petitioner company stating that he is liable to pay a stamp duty of Rs.1,47,28,890/- at 2% of the value of shares involved in the scheme of arrangement under Article 20(d) of Schedule I-A of the Indian Stamp Act. The first petitioner submitted a reply on 27.11.2007 stating that the scheme of arrangement does not involve any transfer of shares, but only an exchange of shares. The first respondent vide his letter dated 17.12.2007 informed the petitioners that the explanation submitted by them on 24.11.2007 is not acceptable and they were asked to pay requisite stamp duty on or before 31.12.2007. A remainder was issued on 08.01.2008. Again a reply was submitted by the petitioners. In spite of the same, when the first respondent issued a notice on 04.02.2008, the present Writ Petition was filed challenging the same.

Learned counsel for the petitioners submits that the scheme of arrangement does not come within the definition of amalgamation or merger as there was no fresh allotment of shares consequent to the merger of company, and the two companies remained as it is. He further

submitted that there are different situations contemplated under Sections 391 and 394 of the Companies Act, but the legislature wanted to collect stamp duty in respect of the market value involved in the transfer of shares covered by amalgamation and merger under Section 394 of the Companies Act.

Learned Government Pleader appearing on behalf of learned Advocate-General submitted that the value of the shares involved in exchange can be independently subjected to stamp duty without there being a case of amalgamation or merger.

The rationale and purpose of the scheme reads as follows:

“2.1 GVKIL is a subsidiary of GVKPIL. As on December 31, 2006 GVKPIL owns 53.96% of the paid up share capital of GVKIL. The balance paid up shareholding of GVKIL as on December 31, 2006 is held as follows:

| Name of the Shareholder                                         | %     |
|-----------------------------------------------------------------|-------|
| Vintage Investments Limited, Mauritius                          | 25.00 |
| Golden Palm Limited, Mauritius                                  | 4.75  |
| International Finance Corporation, Washington                   | 10.00 |
| Transmission Corporation of Andhra Pradesh Limited (AP Transco) | 3.22  |
| Public Shareholders                                             | 3.07  |
| Total:                                                          | 46.04 |

2.2 For rationalizing the administrative structure of GVKPIL's group businesses and as an investor friendly gesture GVKPIL is desirous of granting greater liquidity to the shareholders of GVKIL whilst protecting their interests. To give effect to the aforesaid objectives, this Scheme (as defined below) provides for the transfer to GVKPIL of all equity shares in GVKIL held by the shareholders of GVKIL other than GVKPIL, i.e., the other shareholders (as defined below). In consideration of the aforesaid transfer of equity shares in GVKIL to GVKPIL, the other shareholders shall be entitled to receive equity shares in GVKPIL.

2.3 A reorganisation of the ownership structure of the two group companies, pursuant to the aforesaid share transfers, by making GVKIL a wholly-owned subsidiary of GVKPIL, would deliver substantial benefits to GVKPIL, GVKIL and its shareholders by aligning the interests of all shareholders in al single listed entity, will eliminate areas of potential conflicts of interest and concerns about related party transactions.”

The consideration for transfer and vesting reads as follows.

“In consideration of the transfer and vesting in GVKPIL of the GVKIL shares in terms of Clause 6.1 hereinabove, on the share

issuance date to be fixed by the Board of Directors of GVKPIL or a committee thereof, GVKPIL shall without any further application, act or deed, issue and allot to the other Shareholders of GVKIL in accordance with the provisions of Clause 8 hereof, equity shares in GVKPIL in the ratio of 3 (three) equity shares in GVKPIL of Rs.10/- each credited as fully paid up for every 40 (forty) equity shares of Rs.10/- each credited as fully paid up held by such other shareholder in GVKIL as on the record date.”

Thereafter, the procedure for issue of shares to other shareholders is mentioned. This Court, while sanctioning the said scheme of arrangement, observed as follows.

“On the question whether a meeting of the creditors of the company, or any class of them, was required to be called for, Sri V.S. Raju, learned counsel for the petitioner, would submit that the present scheme of arrangement is between the transferor Company and its members, that unlike a scheme of amalgamation where the entire undertaking is transferred the present case does not involve transfer of the undertaking of the transferor Company, that the consequences, of the scheme of arrangement being sanctioned by this Court, would only be that the transferee company and its nominees would hold the entire issued, subscribed and paid up capital of the transferor company and the shareholders of the Transferor Company, to the extent of 46.04% of the paid up capital, would cease to be members of the transferor company and would, henceforth, be the members of the transferee company. Learned counsel would submit that, since the transferor company continues to exist, and as the rights of the creditors of the transferor company is not affected in any manner, it was wholly unnecessary for a meeting of the creditors of the transferor company to be called for. I find considerable force in this submission of the learned counsel. Firstly, the scheme of arrangement, in the present case, is under Section 391(1)(b) between the transferor company and its members. Leaving the question, whether even in case of such a compromise a meeting of the creditors is required to be called for when their rights may be affected, open to be examined in an appropriate case, the facts of the present case would justify not calling for a meeting of the creditors of the company since, admittedly, they continue to remain the creditors of the transferor company, the entire undertaking is retained by the transferor company, none of the assets of the transferor company are being transferred and all that will happen, on approval of the scheme by this Court, is that a section of the members of the transferor company will be allotted shares in the transferee company in exchange for the shares held by them in the transferor company.”

A reading of the above scheme makes it clear that 46.04% shareholders of GVKIL are allotted shares of GVKPIL in exchange for the shares held by them in GVKIL. Thus, some shareholders of GVKIL

become shareholders of GVKPIL. There will be consequential adjustments in the capital of the respective companies.

In the light of the above, whether the case falls under Article 20(d) of Schedule I-A of the Indian Stamp Act should be seen.

Article 20(d) of Schedule I-A of the Indian Stamp Act reads as follows:

“20. Conveyance as defined by Section 2(10) not being a sale, charged under (No.47-A) or a transfer charged or exempted under (No.53).

...

(d) conveyance, so far as it relates to amalgamation or merger of companies under the order of High Court under Section 394 of the Companies Act, 1956. (Central Act 1 of 1956).

Two rupees for every one hundred rupees or part thereof of the market value of the property, which is the subject matter of such conveyance.

Explanation: For the purpose of the Clause (d) the market value of the property shall be deemed to be the amount of total value of the shares issued or allotted by the transferee company, either in exchange or otherwise, and the amount of consideration, if any, paid for such amalgamation or merger.

Provided that where an agreement to sell an immovable property is stamped with the *ad valorem* stamp required for a conveyance on sale under Article 47-A and a conveyance on sale in pursuance of such agreement is subsequently executed, the duty on such conveyance on sale shall be the duty payable under the article less the duty already paid under Article 47-A subject to a minimum of five rupees.”

It deals with the cases of amalgamation and merger only. The other cases of compromise or arrangement coming under Section 394 of the Companies Act does not fall within Article 20(d) attracting stamp duty and in order to clarify the situation it is necessary to extract Section 394(1) of the Companies Act, which reads as follows.

“394. Provisions for facilitating reconstruction and amalgamation of companies. (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 all or 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 Company Law Board, or 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 the 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."

Thus, it is clear that the cases of amalgamation and merger are different from the cases of arrangement. This issue came up for consideration before the Division Bench of this Court in *S.S. Somayajulu v. Hope Prudhomme and Company Limited, Madras*<sup>1</sup> and their Lordships were considering a similar provision occurring in Section 153-A of the Indian Companies Act and observed as follows.

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<sup>1</sup> (1963) II Comp.L.J 61

“We shall now consider the liability of the first defendant company. Section 153-A of the Indian Companies Act, 1913, added by Section 83 of the Act (XXII of 1936), makes provision for facilitating arrangements and compromise. According to that section, under a scheme for the amalgamation of any two or more companies, the whole or any part of the undertaking or the property or liabilities of any company concerned in the scheme referred to as the “transferor company” can be transferred to another company called the “transferee company” with the sanction of the Court. By this method, one company in effect absorbs the other. The word “amalgamation” has no definite legal meaning. It contemplates a state of things under which two companies are so joined as to form a third entity, or one company is absorbed into and blended with another company. Amalgamation does not involve the formation of a new company to carry on the business of the old company.

In *Corporation of the Royal Exchange Assurance v. Walker* (L.R.(1935) 1 Ch.D.567), a scheme of arrangement was promoted by the directors of six electric lighting companies under which their capital or at least 90 per cent., thereof was to be acquired by a holding company would issue shares at par value to the stockholders in exchange for their holdings. The objects of the holding company were to control the policy of the constituent companies to effect economies in administration, and to carry on other business which might advantageously be combined with that of the companies but was beyond their powers. No transfer of the undertakings of the constituent companies to the holding company was either effected or intended, but the pooling of profits was suggested as a future possibility. It was held by Justice Eve, which decision was confirmed by the Court of Appeal, that the scheme was not an “amalgamation of the company with another company” within the Trustee Act, 1925, section 10, sub-section (3)(c), in which the trustees of a settlement comprising a sum of stock of one of the observations of Buckley, J., in *In re South African Supply and Cold Storage Co.* (L.R.(1904) 2 Ch.D. 268, 287), to the following effect:

“Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam—a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should pass—substantially they must pass – nor need all the incorporators be parties, although substantially all must be parties. The difference between reconstruction and amalgamation is that, in the latter is involved the blending of two concerns one with the other but not merely the continuance of one concern.”

Exhibit B-19 recites that the assets and liabilities on that day continue to remain those of D-2 company and not of D-1 company. Having regard to the provisions of section 153-A

of the Indian Companies Act, and the principles aforesaid, and the contents of Exhibit B-19, we have no doubt that in the instant case there has been no amalgamation of the first and second defendant companies.”

In view of the clear language employed in Article 20(d) of Schedule I-A of the Indian Stamp Act and Section 394(1) of the Companies Act, this Court has no hesitation to hold that the impugned notice of demand dated 04.02.2008 is beyond the power of the first respondent and is accordingly set aside.

The Writ Petition is, accordingly, allowed. There shall be no order as to costs.

As a sequel thereto, the miscellaneous petitions pending in this Writ Petition, if any, shall stand closed.

Date: 06.07.2017  
Nsr

A. RAMALINGESWARA RAO, J

