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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: September 26, 2024

Decided on: November 06, 2024

+ **W.P.(C) 5638/2014 & CM APPL. 13964/2014**

AMBUJA CEMENT LTD.

..... Petitioner

**Through: Mr. Sudhanshu Batra,
Senior Advocate with
Mr. Vijay Kumar Singh,
Mr. Adhip Ray,
Mr. Shashwat Singh,
Ms. Simran Sakunia and
Ms. Simran Jeet, Advocates**

V

COLLECTOR OF STAMPS, DELHI

..... Respondent

**Through: Mr. Santosh Kumar
Tripathi, Standing Counsel
with Mr. Divyam Nandrajog,
Ms. Surbhi Soni and
Mr. Rishabh Srivastava,
Advocates**

CORAM

HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

J U D G M E N T

1. The present petition is filed on behalf of the petitioner under Articles 226 and 227 of the Constitution for quashing of the impugned order dated 07.08.2014 bearing reference no.



F.10/Misc(Merger)/COS(HQ)/CD/183 (hereinafter referred to as **“the impugned order”**) passed by the respondent along with consequential proceedings and for restraining the respondent from taking any coercive action against the petitioner. The petitioner has prayed as under:

- a) Issue a writ of certiorari or any other appropriate writ, order, or direction in the nature thereof, striking down and quashing the Impugned Order bearing reference No. F.10/Misc(Merger)/COS(HQ)/CD/183 and dated 07.08.2014 passed by the Respondent in the matter of Show Cause Notice bearing No. F.10/COS/HQ/CD/Merger/12556 dated 20.03.2014, and any proceedings initiated, or contemplated to be initiated, by the Respondent pursuant to, or in furtherance of, the Impugned Order, as against the Petitioner, its Directors, officials, representatives etc.;
- b) Issue a writ of mandamus or any other appropriate writ, order, or direction in the nature thereof restraining the Respondent from taking any further coercive action(s) or initiating any proceedings pursuant to, or in furtherance of, the Impugned Order against the Petitioner, its Directors, officials, representatives etc.;
- c) Issue any other appropriate writ, order or directions as the facts and circumstances of the present case may require; and
- d) Grant costs.

2. The factual background of the case is that Holcim (India) Private Limited (hereinafter referred to as **“the petitioner”**) is a



private limited company incorporated under the Companies Act, 1956 and is a wholly owned subsidiary of Holderind Investments Ltd., Mauritius (hereinafter referred to as “**Holderind**”). Ambuja Cements India Private Limited (hereinafter referred to as “**ACIPL**”) was incorporated under the Companies Act was an investment company and did not undertake any business. ACIPL was a 100% subsidiary of Holderind which held 55% shares of ACIPL directly and the remaining 45% shares were held by the petitioner. The Boards of Directors of the petitioner and ACIPL approved a scheme of amalgamation between these two companies on 03.04.2009 and 04.09.2009 and ACIPL was proposed to be merged into the petitioner. Thereafter an application under sections 391 to 394 of the Companies Act, 1956 was filed for sanction of the scheme of amalgamation. ACIPL did not have any immovable property at that time and the only movable property held by ACIPL was its shareholding in ACC Limited (hereinafter referred to as “**ACC**”) and Ambuja Cements Limited (hereinafter referred to as “**ACL**”) in dematerialized form. A Coordinate Bench of this Court approved the merger of ACIPL into the petitioner vide order dated 14.11.2011



(hereinafter referred to as **“the merger order”**). The merger order was filed with the Registrar of Companies, Delhi and Haryana on 07.02.2011 and the merger came into effect from 06.01.2012. The petitioner in a meeting held on 30.11.2012 issued 353,84,08,355 equity shares to the shareholders of ACIPL in accordance with the share exchange ratio and ACIPL was dissolved without winding up. The Board of Directors also authorized issuance of share certificate bearing no.12 to Holderind under the common seal of the petitioner which was issued under the common seal of the petitioner signed by two Directors and the Company Secretary of the petitioner in Haryana. The requisite stamp duty as per the Indian Stamp Act, 1899 (hereinafter referred to as **“the Act”**) as applicable to the State of Haryana was also affixed to the share certificate at Haryana.

2.1 The petitioner received a show-cause notice dated 20.03.2014 bearing no.F.10/COS/HQ/CD/Merger/12556 (hereinafter referred to as **“the show-cause notice”**) on 29.04.2014 issued by the respondent wherein it was stated that the respondent noticed that the petitioner has filed a Form 21 dated 07.12.2011 vide SRN no. B-26545426 for registration of the merger order for giving effect to the amalgamation.



It was alleged in the show-cause notice that the petitioner had not paid the stamp duty on the merger order and was directed to furnish proof of payment of stamp duty on the conveyance as per the Act, failing which, non-payment of stamp duty within prescribed time would be considered as an act of evasion of stamp duty and would attract heavy penalty and prosecution of Directors and officers in default. The show-cause notice also specified that it was being issued in view of the judgment passed by this Court in **Delhi Towers Ltd. V G.N.C.T. of Delhi**, 2009 SCC OnLine Del 3959 (hereinafter referred to as “**Delhi Towers Ltd.**”). The show-cause notice directed the Director or Authorized Representative of the petitioner to appear before the respondent on 27.03.2014 along with supporting documents. The petitioner submitted a preliminary reply dated 06.05.2014 and detailed reply dated 21.05.2014 wherein it was stated that no stamp duty was payable on the merger order under the head ‘conveyance’ and the transfer of shares of ACC and ACL from ACIPL to the petitioner in dematerialized form did not attract any stamp duty. The respondent issued another notice to the petitioner on 28.05.2014 stating that the petitioner has submitted an application for



adjudication of stamp duty on merger and the petitioner was directed to produce certain documents. The petitioner filed a written response dated 03.06.2014 wherein it was stated that the petitioner had not submitted any application to the respondent and was under no obligation to submit any documents to the respondent. It was also stated that both the transferor and transferee companies were wholly owned subsidiaries of a common parent company. The merger had taken place between two subsidiary companies of each of which not less than 90 per cent of the share capital was in the beneficial ownership of a common parent company and the said transaction was not exigible to stamp duty by virtue of Notification no. 13 dated 25.12.1937 issued by the Central Government (hereinafter referred to as “**the 1937 Notification**”) which was also mentioned in the **Delhi Towers Ltd.** judgment. The respondent passed the impugned order on 07.08.2014 holding that as per Article 23 of Schedule IA of the Act, the petitioner was liable to pay stamp duty on the merger order @ 3% of the total amount of Rs.7295,93,97,242/- which comes to Rs.218,87,81,917.26 besides imposing penalty of Rs.69,00,00,000/- upon the petitioner. The respondent also held that the petitioner was



liable to pay stamp duty on the issue of 353,84,08,335 equity shares pursuant to the merger as per Article 19 of Schedule IA of the Act. The respondent had not considered the 1937 Notification despite relying upon **Delhi Towers Ltd.** and the petitioner submitted representation dated 22.08.2014 to the respondent to bring the said omission to its notice.

2.2 The petitioner, being aggrieved filed the present petition and challenged impugned order on the grounds that the respondent misinterpreted and misapplied **Delhi Towers Ltd.** while passing the impugned order. The respondent did not consider and appreciate that as per **Delhi Towers Ltd.**, an approved scheme of amalgamation would amount to transfer *inter vivos* between two companies only where right, title and interest in immovable property of the transferor company was transferred to transferee company and that the present scheme of amalgamation does not fall under the said category. The respondent failed to appreciate that for a merger order to be stampable, the transfer of immovable properties thereunder must be *in presenti* to be covered under the definition of ‘conveyance’ as per section 2(10) of the Act. The respondent erred in treating the merger



order as exigible to stamp duty as a conveyance. The respondent did not appreciate the settled position of law that in order to determine whether or not an instrument is exigible to stamp duty, it is mandatory to consider the terms of the said instrument and not merely the label of the said instrument. A merger order could be stamped as a conveyance only if it results in transfer of an asset/property which is not provided elsewhere in Schedule IA of the Act. The merger order to be chargeable as a conveyance, the merger order must be covered under Article 23 of Schedule IA of the Act which does not apply to transfer of shares exempted under Article 62 of Schedule IA of the Act. The transfer of shares of ACC and ACL held by ACIPL in dematerialized form was not liable to attract stamp duty as per section 8A of the Act. The impugned order is erroneous in concluding that the merger order is an instrument of conveyance chargeable under Article 23 of Schedule IA of the Act.

2.3 The respondent has exceeded his jurisdiction by requiring the petitioner to produce documents or information which is not provided for under either section 31 or 33 of the Act. The respondent did not have jurisdiction to issue notices dated 20.03.2014 and 28.05.2014



directing the petitioner to appear before him and produce the documents. The respondent erred in dismissing the jurisdictional objections raised by the petitioner by stating that the petitioner is estopped from raising such objections. The respondent failed to appreciate that lack of jurisdiction cannot be cured by consent or acts of the parties. The respondent has exceeded its jurisdiction in seeking to levy on the petitioner as section 40 of the Act provides for imposition of penalty only in cases where the respondent exercises powers under section 33 or section 38(2) of the Act. The impugned order is reflecting inconsistencies and contradictions. The respondent did not consider that the 1937 Notification is applicable to the present case as Holderind held more than 90% of the share capital of ACIPL and the petitioner which are both 100% subsidiaries of Holderind. The merger order was clearly covered under the 1937 Notification and was exempt from payment of stamp duty. The respondent has erroneously directed the petitioner to pay stamp duty on the issue of shares pursuant to the amalgamation in accordance with Article 19 of Schedule IA of the Act. The petitioner raised other grounds and prayed that the impugned order be quashed along with consequential



proceedings and the respondent be restrained from taking any coercive action against the petitioner.

3. The respondent filed counter affidavit wherein denied averments made by the petitioner in the petition. The petitioner has not availed equally efficacious remedy which is available under section 56 of the Act. The issue involved in the present petition is chargeability of scheme of de-merger/merger/amalgamation. A scheme or an order of a court approving a scheme *per se* is not exempted from chargeability of stamp duty. A scheme settled *inter vivos* between the shareholders of transferor and transferee company duly approved by the court under sections 391 and 392 of the Companies Act is an instrument as defined under section 2(14) of the Act. Every scheme is covered under the definition of instrument and also a document by which properties are transferred by the transferor company to the transferee company without the process of liquidation of the transferor company. This Court in **Delhi Towers Ltd.** has held that the order approving the scheme of amalgamation passed by the company court in exercise of jurisdiction under section 394(2) of the Companies Act which has the effect of transferring all assets and



liabilities including the property of the transferor company to the transferee company would be exigible to stamp duty under the Act. The scheme of amalgamation/merger involves transfer of a business including transfer of assets and liabilities and consideration of which is the allotment of shares of the transferee company to the shareholders of the transferor company. The transfer of property upon sanction of scheme has all the ingredients of sale and that the orders sanctioning the scheme would be instruments for the purpose of the Act and would attract stamp duty.

3.1 The petitioner has mixed the issue of chargeability of the order approving a scheme with the chargeability of shares issued in pursuance of such scheme. The stamp duty is chargeable on scheme and not on transfer of shares and the scheme is chargeable to stamp duty in terms of Article 23 of Schedule IA. The exemption granted under section 8A of the Act is for securities dealt in a depository and shares would not qualify as securities and as such the exemption granted under section 8A is not applicable to shares dealt in a depository. The scheme where all properties of transferor company are transferred to the transferee then duty is payable as conveyance



under Article 23 of Schedule IA of the Act and share certificates issued to the shareholders of the transferor company in pursuance of the scheme shall be exigible to additional stamp duty in terms of Article 19 of Schedule IA. The petitioner did not take the plea of exemption granted vide the 1937 Notification during the adjudicatory process and the conditions pre-requisite for applicability of 1937 Notification are not fulfilled in the present case. The 1937 Notification is no longer applicable as it stood repealed when the Central Government, vide GSR 1958, extended Schedule IA of the Stamp Act of Punjab to Delhi.

3.2 Section 47A (3) which was inserted vide the Indian Stamp (Delhi Second Amendment) Act, 2001 confers *suo-motu* powers upon the Collector to determine the chargeable duties and deficient amount. Section 47A (4) of the Act provides for an appeal before the District Court and similarly section 56 of the Act provides for revisional jurisdiction of the Chief Controlling Revenue Authority. The petitioner has not availed these alternative remedies, hence the present writ petition is not maintainable. The impugned order is not arbitrary, unreasonable, illegal, *mala fide* or erroneous and has not



been passed in excess of jurisdiction. The petitioner was granted sufficient, fair and reasonable opportunities before passing of the impugned order.

3.3 The petitioner is not a wholly owned subsidiary of Holderind. ACIPL was not merely an investment company and the petitioner never made this assertion during the adjudicatory process. The amalgamation of two companies by which a running business concern is transferred and merged with the transferee company is 'conveyance' and is chargeable to stamp duty under Article 23 of Schedule IA of the Act. It is not necessary that there should be transfer of immovable property for a merger order to be chargeable to stamp duty. There is no occasion to read Article 62 into Article 23 of Schedule IA as it applies to a separate and independent transaction of transfer of shares. The merger order which satisfies the definition of conveyance would be chargeable to stamp duty under Article 23 of Schedule IA of the Act. Section 8A of the Act applies to securities dealt in a depository which is not the case of the petitioner.

3.4 The respondent did not carry out any roving enquiry beyond the powers provided under the Act. There was no occasion for the



respondent to carry out any enquiry when the fact of merger by scheme of amalgamation is not disputed. The information, if any, sought by the respondent was only to ensure correct chargeability of stamp duty. The power of the respondent to recover stamp duty is not controlled by section 31 or 33 of the Act. Section 48 of the Act is an enabling provision independent of sections 31, 35, 38 or 40 of the Act and as such, it is not necessary that unless the original instrument is produced, duty cannot be recovered. The case of the petitioner is not covered by the 1937 Notification as neither the 1937 Notification is applicable in case of Schedule IA of the Act, nor the petitioner satisfies the condition of at least 90% holding of shares of the subsidiary company by the holding or the parent company. The petitioner is also liable to pay the stamp duty on the issue of share certificate. It is stated that the present petition is not maintainable and liable to be dismissed.

4. The petitioner filed a rejoinder to the counter affidavit filed on behalf of the respondent wherein the contents of the counter affidavit were denied and the contents of the writ petition were reiterated. It is stated that the present case is not filed for evasion and the petitioner



has paid the stamp duty exigible on the issuance of Share Certificate no.12. The respondent has constantly attempted to improve its case which is impermissible and has attempted to provide supplemental reasoning for making the merger order exigible to stamp duty on grounds which were not even considered while passing the impugned order. The only premise on which the show-cause notice and the impugned order were issued was the decision in **Delhi Towers Ltd.**

4.1 The respondent has assumed jurisdiction solely on the basis of its misplaced reliance on **Delhi Towers Ltd.** The respondent does not have power to compel production of documents and can impose stamp duty only upon original documents produced before it and not otherwise. The respondent has erroneously distinguished between ‘shares’ and ‘securities’ to exclude the applicability of section 8A of the Act. The respondent has not only exceeded its jurisdiction in seeking to levy penalty on the petitioner but also failed to assign reasons for levying such a heavy penalty. The respondent did not record reasons before imposing the penalty which shows that the respondent acted arbitrarily. The impugned order is illegal, arbitrary and capricious. The alternative remedy is not available to the



petitioner as the respondent has acted in excess of jurisdiction. This Court has jurisdiction under Article 226 of the Constitution to entertain a writ petition despite availability of alternative statutory remedies especially where the authority did not have jurisdiction. An appeal/revision under section 56 of the Act can be filed before the Chief Controlling Revenue Authority only against an order passed under Chapter IV or V of the Act and the impugned order in the present case has not been passed under the said Chapters, hence the remedy as per section 56 of the Act is not available to the petitioner.

4.2 Section 48 of the Act only empowers the respondent to recover amounts due under Chapter IV of the Act however, the impugned order has not been passed under Chapter IV of the Act. The respondent has erroneously averred that **Delhi Towers Ltd.** is applicable to the present case on the ground that every scheme of amalgamation sanctioned by the Court is an instrument exigible to stamp duty. This Court in **Delhi Towers Ltd.** while examining the issue of exigibility of amalgamation order to stamp duty, considered several aspects including transfer of movable/immovable properties and assets/liabilities of the company but in the present case, the



transferor company i.e. ACIPL did not hold any property, assets or employees. **Delhi Towers Ltd.** is not applicable to the present case as the transfer of shares does not come under the definition of conveyance. The respondent has wrongly created a distinction between shares and securities. The respondent never raised issue of stamp duty payable on the shares issued in pursuance of the scheme of amalgamation either in the show-cause notice or at the time of hearing. The petitioner prayed that the present petition be allowed in terms of the prayer clause of the petition.

5. Sh. Sudhanshu Batra, the learned Senior Counsel for the petitioner advanced oral arguments and written submissions are also filed on behalf of the petitioner. It is argued that the respondent has acted beyond the powers vested in him as the respondent does not have power to adjudicate stamp duty except under the provisions of section 31 (where an instrument is brought to the Collector to seek his opinion as to the duty chargeable) and section 33 (where an authorized officer impounds an instrument that comes into his possession) of the Act. The Act does not empower or authorise the respondent to adjudicate or levy stamp duty in any other manner. The



impugned order is *ex facie* illegal as it has not been passed under the abovementioned provisions. The respondent has clearly admitted in the impugned order as well as its counter affidavit that the power exercised in the present case was not under sections 31, 35, 38 or 40 of the Act but under section 48 of the Act which is an enabling provision, however, section 48 merely empowers recovery of all duties, penalties and other sums required to be paid under Chapter IV which is not the respondent's case. Section 31 of the Act does not empower the respondent to compel production of an instrument, rather the instrument has to be brought voluntarily before the respondent and even for exercising power under section 33 of the Act, a document must have been voluntarily produced. The respondent has exceeded his jurisdiction by requiring the petitioner to produce documents or information by way of a roving enquiry. The learned Senior Counsel placed reliance on **District Registrar and Collector V Canara Bank**, (2005) 1 SCC 496; **Ashok Kamal Capital Builders V State and Another**, 2009 SCC OnLine Del 2626; **Kotak Mahindra Bank Ltd. V Yogesh Baweja and**



Another, 2013 SCC OnLine Del 2738 and **Ajit Singh V Vinod Kumar and Others**, 2014 SCC OnLine Del 192.

5.1 Sh. Batra further argued that section 47A is inapplicable and reliance on section 47A by the respondent is clearly an after-thought, misplaced and untenable. He argued that the respondent has attempted to justify the impugned order as being permissible under section 47A (3) read with section 73 of the Act, however, section 47A (3) is not applicable to the present case as none of the conditions precedent exist and section 73 of the Act has no connection with the issues involved in the present petition. Section 47A (3) pertains only to documents that can be registered under the Registration Act, 1908 whereas the scheme of amalgamation cannot be registered under the Registration Act, 1908, hence section 47A is *ex facie* inapplicable. The fact of registration of an instrument but omission to refer it to the Collector for determination of duty is a condition precedent for the exercise of *suo motu* power under section 47A (3) of the Act, therefore, *suo motu* power can only be exercised in respect of registered instruments which is not the case in the present matter. Sh. Batra further argued that even if it is assumed that section 47A is



applicable to the present case, the petitioner filed Form 21 with the Registrar of Companies on 07.12.2011 and as per section 47A (3), the respondent could have exercised *suo motu* power within two years from the date of registration i.e. till 06.12.2013. However, the show-cause notice was issued on 20.03.2014 which is beyond the period of limitation provided under section 47A. Section 47A was enacted to remedy the mischief of undervaluation of immovable properties and is not applicable to the present case. The learned Senior Counsel cited **V.N. Devadoss V Chief Revenue Control Officer-cum-Inspector and Others**, (2009) 7 SCC 438.

5.2 Sh. Batra primarily and forcefully argued that the scheme of amalgamation is exempted from payment of any stamp duty in terms of the 1937 Notification which specifically exempts duty on instruments transferring property between two subsidiary companies of each of which not less than 90% of the share capital is in the beneficial ownership of a common parent company. In the present case, more than 90% share capital of the petitioner and ACIPL is held by a common parent company i.e. Holderind. Therefore, the 1937 Notification exempts the scheme of amalgamation from any stamp



duty. Sh. Batra in support of his argument cited **Delhi Towers Ltd.** wherein it was held that the 1937 Notification is applicable and binding.

5.3 The respondent in impugned order placed reliance on **Delhi Towers Ltd.** Sh. Batra argued reliance on **Delhi Towers Ltd.** is misplaced as it is not an authoritative law for imposition of stamp duty on all types of schemes of amalgamation. He argued that in the said case, immovable properties were sought to be transferred under a scheme of amalgamation and it was held that the stamp duty must be paid at the time of mutation of immovable properties even if such mutation is pursuant to a scheme of amalgamation. The **Delhi Towers Ltd.** case is distinguishable from the present case as there is no transfer of immovable properties by the scheme of amalgamation and present case only involves a transfer of shares in dematerialized form which is specifically provided for in Article 62 (a) of Schedule IA of the Act. Section 8A of the Act specially exempts the transfer of shares in dematerialized form from stamp duty. Sh. Batra argued that it would be against the legislative intent to read **Delhi Towers Ltd.**



to authorise levy of stamp duty on a transfer that is not conveyance and specifically exempted by the legislature.

5.4 Sh. Batra also advanced arguments on maintainability of the present petition and stated that the respondent has wrongly challenged the maintainability of the present petition on the ground that section 56 of the Act provides an alternative efficacious remedy. Section 56 does not provide any right of appeal or remedy to the petitioner. The procedure provided under section 56 is an internal mechanism empowering the Collector to refer certain cases to his superior i.e. the Chief Controlling Revenue Authority where there is an ambiguity regarding the amount of duty chargeable on an instrument. The Chief Controlling Revenue Authority under section 56 has limited power to intervene only in matters under Chapters IV and V, clause (a) of first proviso to section 26, sections 31, 40 or 41 of the Act and such limited powers cannot be construed to be powers of revision or appeal. He further argued that even if it is assumed that section 56 provides for an appeal or revision before the Chief Controlling Revenue Authority, the impugned order has not been passed under Chapter IV or V of the Act and therefore, the said



remedy is not available to the petitioner. Sh. Batra stated that it is a settled position of law that availability of alternative remedy does not *per se* bar an aggrieved party from invoking the writ jurisdiction of this Court. The learned Senior Counsel placed reliance in this regard on **Whirlpool Corporation V Registrar of Trademarks**, (1998) 8 SCC 1 and **State of Uttar Pradesh V Mohammad Nooh**, 1957 SCC OnLine SC 21.

5.5 Sh. Batra argued that present case is covered under section 8A of the Act as it stood prior to the amendment made in the year 2019. The ‘Depository’ is defined under section 2(1)(e) of the Depositories Act, 1996 which means a company which has been granted a certificate of registration under section 12(1A) of SEBI Act, 1992 and which holds securities like shares, debentures, bonds, government securities etc. The depository becomes the registered owner in respect of the security whereas the person who surrenders the physical shares is recorded as the beneficial owner. In the present case, there is only transfer of shares in dematerialized form and the legislative intent, as expressed in section 8A of the Act, is that such transfer of dematerialized shares should not be charged with stamp



duty. It would be against the legislative intent to authorize the levy of stamp duty on transfer of dematerialized shares which has been specifically exempted under section 8A of the Act. Section 8A also has an overriding effect over other provisions of the Act and over other enactments, therefore stamp duty cannot be levied on the merger order. Sh. Batra in light of above arguments prayed that the present petition be allowed.

6. Sh. Santosh Kumar Tripathi, the Standing Counsel for the respondent advanced oral arguments and written submissions are also submitted on behalf of the respondent. It is argued that section 2(14) of the Act provides an inclusive definition for instrument which includes every document by which any right or liability is created, transferred, limited, extended, extinguished or recorded and also includes an electronic record. Sh. Tripathi stated that a share certificate either physical or dematerialized certainly creates, modifies, extinguishes or records a right or liability and therefore is an instrument chargeable under Article 19 of Schedule IA of the Act. He argued that a court order sanctioning the scheme of amalgamation between two companies authorises the transfer and vesting of rights,



assets and liabilities of transferor company with the transferee company and an order under section 394 of the Companies Act constitutes an instrument and comes under the definition of conveyance as per section 2(10) of the Act. Sh. Tripathi cited **Hindustan Lever V State of Maharashtra**, (2004) 9 SCC 438 and **Delhi Towers Ltd.** and also cited decisions given by different High Courts. He argued that stamp duty is payable under Article 23 of Schedule IA of the Act. The transaction comes under the purview of 'conveyance' under the Act, therefore the benefit of any notification pertaining to 'transfer of shares' cannot accrue, as such, the benefit of the 1937 Notification cannot be given to the petitioner.

6.1 Sh. Tripathi stated that remission in stamp duty was extended in respect of instrument evidencing transfer of property between principal and subsidiary company or between the two subsidiary companies etc. where holding is 90% or above. It was further stated that the 1937 Notification stood repealed when the Central Government vide GSR 1958 extended Schedule IA of the Stamp Act of Punjab to the Union Territory of Delhi. Section 3 of the Act provides that stamp duty shall be payable as per Schedule I subject to



the exemptions contained therein and since Schedule IA was extended to Delhi, the stamp duty in Delhi is payable only as per Schedule IA which does not contain any Article remitting the stamp duty in terms of the 1937 Notification. Schedule IA was comprehensively amended by the Delhi Assembly in 2001 therefore, the 1937 Notification is not applicable.

6.2 Sh. Tripathi also referred that the petitioner has contended that orders under section 394 of the Companies Act have not been specifically included within the definition of ‘conveyance’ by the Delhi Assembly. However this Court in **Delhi Towers Ltd.** has held that the amendments made to the Stamp legislations in other states were only clarificatory in nature and absence of similar state amendment for Delhi does not exempt orders under section 394 of the Companies Act from stamp duty. He argued that lack of comparable state amendment for Delhi does not preclude imposition of stamp duty on orders of the court sanctioning scheme of amalgamation under section 394 of the Companies Act, 1956.

6.3 Sh. Tripathi also argued that the scheme of amalgamation transferred a going business concern, therefore Article 23



(conveyance) is applicable and not Article 62 (transfer of shares). The scheme of amalgamation results in destruction of the corporate identity of ACIPL, thus the transaction far exceeds a mere transfer of shares. The Supreme Court in **Hindustan Lever (supra)** and **Hanuman Vitamin Foods (P) Ltd. V State of Maharashtra**, (2006) 6 SCC 345 observed that transfer of immovable property is not a *sine qua non* for a transaction to qualify as ‘conveyance’. Sh. Tripathi placed reliance on section 6 of the Act which provides that where an instrument comes within two or more descriptions of Schedule IA chargeable with different duties, it shall be charged with the highest duty. The petitioner is attempting to defeat the express provisions of the Act and the Supreme Court in **McDowell & Co. V CTO**, (1985) 3 SCC 230 held that it is incumbent upon the judiciary to combat tax evasion.

6.4 Sh. Tripathi also addressed argument on powers of Collector of Stamp to compel production and impose duty. He referred section 73 of the Act which provides that every document in custody of a public officer shall be open to inspection upon authorization by the Collector to inquire into potential omission of paying stamp duty.



The Supreme Court in **District Registrar and Collector V Canara Bank** (*supra*) has interpreted section 73 to empower the Collector to inspect public record of private documents available in his office. The merger order in the present case was publically accessible on the website of Ministry of Corporate Affairs, hence the respondent was authorized to inspect the merger order as per section 73. The respondent also has the power to call for and examine any instrument to satisfy himself as to the correctness of its value or consideration and determine the duty payable thereon. Sh. Tripathi further argued that the Collector of Stamp has sufficient power under section 47A(3) read with section 47A(2) to call for and examine any instrument to satisfy himself as to correctness of its value or consideration and determine the duty payable thereon including deficiency which the person shall be liable to pay. He further referred explanation to section 47A of the Act provides that the value of any property shall be estimated to be the price which such property may have fetched, if sold in the open market on the date of execution of the instrument relating to transfer of such property. The directions issued by the respondent to produce the document are necessary and incidental



steps in the exercise of his statutory powers and it is settled law that the power to do a thing also carries the power to regulate the manner in which it may be done as held by the Supreme Court in **State of Uttar Pradesh V Batuk Deo Tripathi**, (1978) 2 SCC 102. The petitioner has not availed the statutory remedy of appeal before the District Court provided under section 47A (4) of the Act and cannot be allowed to invoke the extraordinary writ jurisdiction of this Court.

6.5 Sh. Tripathi also addressed issue i.e. value at which stamp duty is to be imposed. He argued that the shares of the transferee company were issued to the shareholders of the transferor company as consideration for the amalgamation therefore, the price of the said shares shall be the basis for calculation of stamp duty. The individual assets and liabilities need not be separately accounted for in arriving at the said calculation as held by the Supreme Court in **Li Taka Pharmaceuticals Ltd. V State of Maharashtra**, 1996 SCC OnLine Bom 67 which was relied upon by this Court in **Delhi Towers Ltd.** Sh. Tripathi placed reliance on section 21 of the Act which provides that stock and marketable securities shall be valued according to the average price or value on the date of the instrument. He stated that



the consideration paid by the petitioner was valued at Rs.7295,93,97,242/- therefore, stamp duty @ 3% (as per Article 23 of Schedule IA) was levied amounting to Rs.218,87,81,917.26/- and a penalty of Rs.69,00,00,000/- was also imposed for non-payment of stamp duty for more than two years.

7. Sh. Tripathi has challenged the maintainability of the present petition by arguing that the petitioner has invoked the extraordinary jurisdiction of this Court without availing the equally efficacious alternative remedy available under sections 56 or 47A (4) of the Act. The learned Senior Counsel for the petitioner countered the said argument by stating that sections 56 and 47A (4) of the Act do not provide any efficacious alternative remedy to the petitioner and availability of alternative remedy does not bar the aggrieved party from invoking the writ jurisdiction of this Court.

7.1 The Supreme Court in **Whirlpool Corporation V Registrar of Trade Marks**, (1998) 8 SCC 1, as also referred by the Sh. Batra, the learned Senior Counsel for the petitioner, observed as under:

14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in



the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

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17. A specific and clear rule was laid down in *State of U.P. v. Mohd. Nooh* [AIR 1958 SC 86 : 1958 SCR 595] as under:

“But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.”

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20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in



spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

7.2 It is a well-accepted proposition of law that the power of High Court to entertain a writ petition under Article 226 of the Constitution is not barred by the availability of an alternative efficacious remedy. The argument as advanced by Sh. Tripathi, Standing Counsel for the respondent does not have legal force and is therefore, rejected.

8. The learned Senior Counsel for the petitioner argued that the respondent is not having jurisdiction to adjudicate stamp duty except under sections 31 and 33 and the impugned order is illegal as it has not been passed under the said provisions. Sections 31 and 33 of the Act do not empower the respondent to compel production of a document rather the instrument has to be brought voluntarily before the respondent. The respondent has clearly admitted that the respondent has passed the impugned order in exercise of power conferred upon the respondent by section 48 of the Act, however section 48 merely empowers the respondent to recover all duties, penalties and other sums required to be paid under Chapter IV of the



Act which is not the case in the present matter. The learned Senior Counsel for the petitioner in support of his arguments cited **District Registrar and Collector V Canara Bank**, (2005) 1 SCC 496 wherein it was held as under:

12. The provisions of Section 29 providing for the persons by whom duties are payable have been left untouched. So is with Section 31 dealing with “adjudication as to proper stamp” which confers power on the Collector to adjudicate upon the duty with which a document shall be chargeable, though such document may or may not have been executed. The scheme of Section 31 involves an element of voluntariness. The person seeking adjudication must have brought the document to the Collector and also applied for such adjudication. The document cannot be compelled to be brought before him by the Collector. Section 33 confers power of impounding a document not duly stamped subject to the document being produced before an authority competent to receive evidence or a person in charge of a public office. It is necessary that the document must have been produced or come before such authority or person in charge in performance of its functions. The document should have been voluntarily produced. At the same time, Section 36 imposes an embargo on the power to impound vesting in the authority competent to receive evidence, by providing that it cannot question the admission of document in evidence once it has been admitted. None of these provisions have been amended by the State of Andhra Pradesh.

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58. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence and it cannot be acted upon by that person or by any public officer. This is the penalty which is imposed by law on the person who may seek to claim any



benefit under an instrument if it is not duly stamped. Once detected, the authority competent to impound the document can recover not only duty but also penalty, which provision protects the interest of revenue. In the event of there being criminal intention or fraud, the persons responsible may be liable to be prosecuted. The availability of these provisions, in our opinion, adequately protects the interest of revenue. Unbridled power available to be exercised by any person whom the Collector may think proper to authorise, without laying down any guidelines as to the persons who may be authorised and without recording the availability of grounds which would give rise to the belief, on the existence whereof only, the power may be exercised, deprives the provision of the quality of reasonableness. Possessing a document not duly stamped is not by itself any offence. Under the garb of the power conferred by Section 73 the person authorised may go on a rampage searching house after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73, the provision impugned herein, the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate to the purpose sought to be achieved and, therefore, a reasonable nexus between stringency of the provision and the purpose sought to be achieved ceases to exist.

8.1 This Court in **Ashok Kamal Capital Builders V Canara Bank**, (2005) 1 SCC 496, as also referred by the learned Senior Counsel for the petitioner, held as under:

23. However, in the National Capital Territory of Delhi no such power vests with the authorities to compel production



of an original document from a party to impound the same or levy penalty or for direction to pay proper stamp duty/penalty on failure to produce the original. In several amendments, limitation period has been prescribed when an order for production of the original document or for imposition of penalty on basis of the copy can be passed.

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28. In the light of the aforesaid judgments it is clear that the Sub-Divisional Magistrate who was also the Collector of Stamps could not have directed production of the original agreement dated 23rd December, 1987 or impounded the photocopy and passed an order directing the petitioners to pay the deficient stamp duty and penalty. Photocopy of the agreement dated 23rd December, 1987 is not an instrument, as defined in Section 2(14) of the Act. The impugned Order dated 29th November, 2004 therefore cannot be sustained to the extent that it impounds the photocopy of the agreement dated 23rd December, 1987 and directs payment of deficient stamp duty and imposes penalty under Sections 33 and 35 of the Act. It may be appropriate to refer to the decision of three Judges' Bench of the Delhi High Court in Dayal Singh v. Collector of Stamps, AIR 1972 Del. 131, wherein it was observed:

“10. Section 2(6) of the Stamp Act defines ‘chargeable’ to mean ‘chargeable under this Act’. Section 2(11) of the Stamp Act defines ‘duly stamped’ to mean ‘that such stamp has been affixed or used in accordance with the law for the time being in force in India’. Under Section 33 it is only when an instrument is ‘chargeable with duty’ and it ‘not duly stamped’ that it can be impounded. Can the sale deed in question be impounded under Section 33 because the transfer duty is either not paid or is insufficiently paid? The answer must be ‘No’. For, the meaning of the expression ‘any instrument chargeable’ or the expression ‘instrument not duly stamped’ used in Section 33 of the Stamp Act is to be understood in the light of the definitions in Sections 2(6) and 2(11). ‘Chargeable’ means chargeable



under the Stamp Act only and not under any other Act. The Stamp Act authorizes the levy of stamp duty only and not of the duty on transfer of property. The latter is authorized by the Corporation Act alone. The sale deed in question is not, therefore, ‘chargeable’ to transfer duty under the Stamp Act at all. It is not, therefore, an instrument chargeable to duty within the meaning of Section 33 of the Stamp Act.”

8.2 Sh. Tripathi, the Standing Counsel for the respondent to counter the said argument argued that section 47A (3) of the Act confers *suo motu* power upon the respondent to determine the duty chargeable and the deficient amount of duty. Section 73 of the Act empowers the respondent to inspect public record of private documents available in his office and the merger order in the present case was publically accessible on the website of Ministry of Corporate Affairs, hence the respondent was authorized to inspect the merger order as per section 73. Sh. Batra in response to this argument, argued that section 47A of the Act pertains only to instruments which are capable of being registered under the Registration Act, 1908 and therefore the said provision is not applicable to the present case and even if section 47A of the Act is assumed to be applicable, the exercise of *suo motu* power under section 47A(3) by the respondent by issuing the show-cause notice



dated 20.03.2014 is barred by limitation. Section 73 of the Act does not pertain to the issues involved in the present petition and this ground has been taken by the respondent for the first time in the written submissions which clearly shows that it is an afterthought.

8.3 Section 47A (3) of the Act, as applicable to Delhi, reads as under:

(3) The Collector may, suo moto, within two years from the date of the registration of any instrument not already referred to him under sub-section (1), call for and examine the instrument for the purpose of satisfying himself as to the correctness of its value or consideration, as the case may be, and the duty payable thereon, and if after such examination, he has reason to believe that the value or consideration has not been truly set forth in the instrument, he may determine the value or consideration and the duty aforesaid in accordance with the procedure provided under sub- section (2), and the deficient amount of duty, if any, shall be payable by the person liable to pay the duty and, on the payment of such duty, the Collector shall endorse a certificate of such payment on the instrument under his seal and signature.

8.4 The meaningful reading of section 47A reflects that it pertains to instruments which can be registered under the Registration Act, 1908. Section 47A (3) confers *suo-motu* power on the respondent to call for and examine any instrument to satisfy himself as to the correctness of its value or consideration and the duty payable thereon.



However, such *suo-motu* power can only be exercised within two years from the date of registration of the instrument. In the present case, the petitioner filed Form 21 with the Registrar of Companies for registration of the merger order on 07.12.2011 and the respondent issued the show-cause notice on 20.03.2014 which is beyond the period of limitation of two years as provided under section 47A (3). There is legal force in the argument advanced by the learned Senior Counsel for the petitioner that the exercise of power conferred upon the respondent by section 47A (3) is appearing to be barred by limitation.

9. Sh. Tripathi, the Standing Counsel for the respondent argued that as per section 3 of the Act, an ‘instrument’ is the subject matter of the charging provision and as per section 2(14), an inclusive definition has been provided for ‘instrument’ which includes every document by which any right or liability is, or purported to be, created, transferred, limited, extended, extinguished or recorded. He further argued that a share certificate whether in physical or dematerialized form, certainly creates, modifies, extinguish or records a right or liability. He further argued that any share certificate



irrespective of its physical or dematerialized form is an ‘instrument’ and therefore chargeable with duty under the relevant entries of the Act. Sh. Tripathi also referred definition of ‘conveyance’ as per section 2(10) of the Act and argued that this is an inclusive definition that ‘includes’ a conveyance on sale and every instrument by which property, whether moveable or immovable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I. Sh. Tripathi in background of these definitions argued that an order under section 394 of the Companies Act comes within the definition of ‘conveyance’ under section 2(10) of the Act. Sh. Tripathi after referring **Hindustan Lever V State of Maharashtra**, (2004) 9 SCC 438, argued that a scheme of amalgamation is an agreement between the parties, wherein the whole or any part of the undertaking, properties or liability of any company concerned in the scheme is to be transferred to the other company and the transferor has all the trappings of a sale. Sh. Tripathi further argued that an order under section 394 constitutes a document which is captive to the definition of an ‘instrument’ and in turn, ‘conveyance’ under the Act. Sh. Tripathi further referred **Delhi Towers Ltd.** He laid



emphasis that stamp duty is payable under Entry 23 of Schedule 1A of the Act. Sh. Tripathi emphatically argued that benefit of any notification for 'transfer of shares' cannot accrue to the petitioner.

9.1 To appreciate arguments as advanced by Sh. Tripathi, it is necessary to examine decision delivered by this court in **Delhi Towers Ltd.** The factual background of the case, as appearing from the judgment, is that fifteen companies incorporated under the provisions of the Companies Act, engaged in the business of real estate, were proposed to be merged with the Delhi Towers Ltd. which was also incorporated under the Companies Act. The transferor companies were stated to be 100% subsidiaries of Delhi Towers Ltd., the transferee company. The proposed scheme of amalgamation was approved by the court after recording statutory compliance. Thereafter, an application was made to the Tehsildar having jurisdiction over the properties of the company for effecting mutation in favour of the transferee company which was not effected as the stamping authorities have not accepted the scheme of amalgamation without payment of stamp duty. The issue for consideration was that whether an order passed by the company court under section 394 of



the Companies Act approving a scheme of amalgamation is covered under definition of 'conveyance' as per section 2(10) of the Act and therefore exigible to stamp duty. It was argued before the court that by virtue of the order sanctioning the scheme for amalgamation, nothing further is required to be done for the property to stand transferred to and vest in the transferee company.

9.2 A Coordinate Bench of this Court in **Delhi Towers Ltd.** observed that the Supreme Court in **Hindustan Lever V State of Maharashtra**, (2004) 9 SCC 438 held that orders passed by courts have been subjected to levy of stamp duty in several situations. It was also observed that the thing which is liable to stamp duty is the instrument and it is not a transaction of purchase and sale which is struck at. The Court also observed that merely because the legislature has not amended the existing statutory provision as applicable to Delhi to specifically include transfer of property under an order approving a scheme of amalgamation in the definition of conveyance, it is of no consequence at all. The same does not amount to exclusion from applicability of the Indian Stamp Act and chargeability to stamp duty thereon. It was also observed that the



statutory definition of ‘conveyance’ under section 2(10) of the Act is an inclusive definition of wide import which cannot be confined to specific instruments mentioned in the statute. It was also observed that it would be immaterial for purposes of imposition of stamp duty as to whether the conveyance was by operation of law, statutory operation or by virtue of a private contract between the parties. Exemption has to be by specific statutory provisions. It was finally held as under:-

120. Accordingly, it is held that an approved scheme of amalgamation amounts to a transfer inter vivos between two companies who are juristic persons in existence at the time of passing of the order and sanctioning of the scheme whereby the right, title and interest in the immoveable property of the transferor company are transferred to the transferee company. The transfer takes place in the present and is not postponed to any later date and is covered under the definition of conveyance under sub-section 10 of section 2 of the Stamp Act.

9.3 Sh. Batra, the learned Senior Counsel for the petitioner tried to differentiate between **Delhi Towers Ltd.** and present case by arguing that in present case, only moveable property i.e. shares were transferred. However, there is no convincing decision of any court that there is a difference between immoveable and moveable properties for purpose of imposition of stamp duty in case of



amalgamation. The argument so advanced by Sh. Batra is without any legal basis.

9.4 The Court in **Delhi Towers Ltd.** referred **Li Taka Pharmaceuticals Ltd. V State of Maharashtra**, 1996 SCC OnLine Bom 67 wherein it was held that document of transfer of shares was a conveyance of property chargeable with stamp duty on basis of market value of the property. It is clear that the stamp duty is chargeable on market value of the property. It is apparent that an order of amalgamation passed under section 394 of the Companies Act, 1956 is an instrument within the mandate of section 2(10) of the Act and is chargeable to stamp duty. There is substance in arguments as detailed hereinabove advanced by Sh. Santosh Tripathi, the learned Standing Counsel for the respondent.

10. Sh. Batra, the learned Senior Counsel for the petitioner laid much emphasis and referred the 1937 Notification and argued that merger order is covered under the said notification and exempted from stamp duty. It is reflecting that both ACIPL (transferor company) and the petitioner (transferee company) are wholly owned subsidiary companies of a common parent company i.e. Holderind



and the merger/amalgamation had taken place between two subsidiary companies of each of which not less than 90% of the share capital was in the beneficial ownership of a common parent company i.e. Holderind.

10.1 It is necessary to refer to the relevant portion of the Notification no. 13 dated 25.12.1937 issued by the Central Government, which is reproduced as under:

In exercise of the powers conferred by clause (a) of section 9 of the Indian Stamp Act, 1899 (II of 1899), and in supersession of all previous notifications issued from time to time under the said clause of the said section in so far as they relate to the Province of Delhi (hereinafter referred to as the said Province) except the notification of the Government of India in the Finance Department (Central Revenue) No.6 - Stamps, dated the 14th August, 1937, the Central Government is pleased to reduce, to the extent set forth in each case, the duties chargeable in the said Province under the said Act in respect of the instruments hereinafter described under Nos. 4, 15, 30, 39,40 [43,49, 56 and 57] and to remit the duties so chargeable in respect of instruments of the other classes hereinafter described:-

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K. OTHER DOCUMENTS

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55. Instrument evidencing transfer of property between companies limited by shares as defined in the Indian Companies Act, 1913, in a case where:



- (i) at least 90 per cent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or
- (ii) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 per cent of the issued share capital of the other, or
- (iii) where the transfer takes place between two subsidiary companies of each of which not less than 90 per cent of the share capital is in the beneficial ownership of a common parent company:

Provided that a certificate is obtained by the parties to the instrument from the officer appointed in this behalf by the Chief Commissioner of Delhi that the conditions above prescribed are fulfilled.

10.2 The Standing Counsel for the respondent countered this argument by stating that the 1937 Notification dated 25.12.1937 is not applicable as it stood repealed when the Central Government, vide GSR 1958, extended Schedule IA of the Stamp Act of Punjab to the Union Territory of Delhi. Section 3 of the Act provides that stamp duty shall be payable as per Schedule I subject to the exemptions contained therein and since Schedule IA was made applicable to Delhi, the stamp duty has to be paid only as per Schedule IA which does not contain any Article remitting the stamp duty in terms of the 1937 Notification. Sh. Tripathi argued that the merger order is not exempted from stamp duty. In response, the learned Senior Counsel



for the petitioner argued that this Court in **Delhi Towers Ltd.** has held that the 1937 Notification dated 25.12.1937 is applicable and binding.

10.3 A Coordinate Bench of this Court in **Delhi Towers Ltd.** considered applicability and enforceability of the Notification no. 13 dated 25.12.1937 issued by the Central Government. The Court referred **Sandy Estates Ltd. V Landbase India Ltd.**, (1997) 6 AD 981 (Delhi) wherein the question was whether stamp duty is leviable on a transfer of assets by a scheme of amalgamation proposed between a hundred percent owned subsidiary company with its parent company. Reliance was placed on Notification dated 16th January 1937. It was held in said case that no stamp duty would be leviable in any case to the transfer of assets between the transferor and transferee companies when the transferor company is a 100 per cent subsidiary of the transferee company which is the parent company. This Court in **Delhi Towers Ltd.** observed that the Notification no. 13 dated 25.12.1937 issued by the Central Government is applicable and binding.



10.4 Accordingly, the argument advanced by the Standing Counsel for the respondent that the Notification no. 13 dated 25.12.1937 has been repealed and is not applicable, does not have any legal force and is accordingly rejected. The petitioner and ACIPL were wholly owned subsidiaries of a common parent company – Holderind and therefore, the scheme of amalgamation and the merger order are squarely covered under the Notification no. 13 dated 25.12.1937 which exempts the said instruments from payment of stamp duty.

11. The present petition is allowed in view of above discussion. Accordingly the show-cause notice dated 20.03.2014 and the impugned order dated 07.08.2014 issued by the respondent are quashed and set aside along with all consequential proceedings.

12. The present petition stands disposed of along with pending application.

**DR. SUDHIR KUMAR JAIN
(JUDGE)**

NOVEMBER 06, 2024
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