

The Judgment Rendered in Gemini Vs. State of Maharashtra [(2004) 9 Scc

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Court : Kolkata

Decided On : Feb-08-2012

Appellant : The Judgment Rendered in Gemini

Respondent : State of Maharashtra [(2004) 9 Scc

Judgement :

IN THE HIGH COURT AT CALCUTTA

ORIGINAL JURISDICTION

CP No. 627 of 2011

IN THE MATTER OF

EMAMI BIOTECH LIMITED AND ANOTHER

AND

CP No. 398 of 2011

IN THE MATTER OF

ITP LIMITED AND ANOTHER

AND

CP No. 474 of 2011

IN THE MATTER OF

BRIJBHUMI AGENTS PRIVATE LIMITED AND OTHERS

For the Petitioners: Mr S.N. Mookerjee, Sr Adv., (in CP 627 of 2011) Mr Ratnanko Banerji, Adv. Mr K.K. Thakkar, Adv.,

Mr A.K. Mishra, Adv.

For the Petitioners: Mr S.N. Mookerjee, Sr, Adv., (in CP 474 of 2011) Mrs Manju Bhuteria, Adv., Mr Rajesh Upadhyay, Adv.

For the Petitioners: Mr P.C. Sen, Sr Adv., (in CP 398 of 2011) Mr R.R. Sen, Adv.,

Mr Dipayan Chowdhury, Adv.,

Mr Subhradal Chowdhury, Adv.

For the State: Mr Anindya Kr Mitra, Advocate General Mr Debangshu Basak, Adv.,

Mr Sakya Sen, Adv.

For the Central Ms Nilanjana Banerjee (Pal), Adv., Government: Mr Bhaskar Prasad Vaisya, Adv.

Hearing concluded on: February 02, 2012.

BEFORE

The Hon'ble Justice

SANJIB BANERJEE

Date: February 08, 2012.

SANJIB BANERJEE, J. : -

Considering the stage of the proceedings, the primary issue which has arisen at the behest of the court may be premature; yet the matter is of some importance

and it is necessary that an unsavoury practice is immediately arrested. The issue does not appear to be *res integra*, yet the petitioners insist that there is much to say in support of the continuing practice in this State for veritable sales and transfers of immovable properties to be concluded without offering any stamp duty to the State. Equally, this apparently cash-starved State is to blame for not being alive to its interest and insisting on the payment of stamp duty on the transfer of properties pursuant to the sanction of any scheme of amalgamation or demerger under the Companies Act, 1956. There can be no suspense as to how the question should be answered and the more conventional form needs to be eschewed to pronounce, at the outset, that stamp duty would be payable on transfers effected pursuant to any scheme of amalgamation or demerger under the Companies Act since that is the law of the land as recognised by the Supreme Court in the year 2003.

There is a history to the matter which requires narration. It was in 2002 that the company Judge of this court took a view that the transfer of property pursuant to any scheme of amalgamation or demerger would attract stamp duty as in any other ordinary case of transfer effected without the intervention of court. It was the court, and not the State, that took up the issue which culminated in the judgment reported at 114 Comp Cas 92 (*In re: Gemini Silk Ltd*) being rendered. The judgment held that an order sanctioning a scheme would amount to an instrument and conveyance that would be the subject to the charge under the Stamp Act as applicable in this State. That matter was heard upon notice to the State but the State's submission was recorded in two lines almost as a footnote to the judgment. The judgment reasoned that since an order of court or a decree could be regarded as an instrument within the meaning of that word appearing in the Stamp Act, that the transfer of properties was pursuant to an order of court and not by any document *inter partes* mattered little. The judgment referred to the Supreme Court pronouncements, *inter alia*, in AIR 1962 SC 1230 (*Haji Sk. Subhan v. Madhoroao*) and (1994) 1 SCC 531 (*Ruby Sales and Services (P) Ltd v. State of Maharashtra*). The argument in support of the petitioners' claim of exemption of stamp duty upon the sanction of a scheme of amalgamation or demerger that was made in *Gemini Silk Ltd* was that the transfer of any property upon the sanction of a scheme under the Companies Act was by operation of law and not a mere agreement between

the companies concerned. The court dealt with the argument by observing that schemes of amalgamation or demerger were nothing more than agreements between consenting parties that depended on the volition of the parties and persons connected with them and there was nothing involuntary about them. It was observed in the judgment that a transfer by operation of law would be where the parties to the transaction had no role to play and the transaction could have been completed without any of the parties seeking the court's imprimatur or doing any overt act like carrying a petition to court.

The judgment rendered in Gemini Silk Ltd was carried in appeal and set aside in the judgment reported at 130 Comp Cas 510 (Madhu Intra Ltd v. Registrar of Companies). It transpires that prior to the judgment being delivered in Madhu Intra, the Supreme Court had spoken on the issue in Hindustan Lever v. State of Maharashtra [(2004) 9 SCC 438]. Though the primary issue before the Supreme Court in that matter was as to whether stamp duty would be payable upon an order sanctioning a scheme of amalgamation by the Bombay High Court being regarded as an instrument chargeable under the amended provision of the Stamp Act in that State, the Supreme Court opined in the clearest terms that the transfer of any property upon the sanction of a scheme of amalgamation or demerger had all the trappings of a sale. The matter should have ended there and the issue taken as concluded for even an obiter of the Supreme Court would be binding. In any event, and without taking lazy refuge in the principle that any obiter dictum of the Supreme Court would conclude a legal issue unless revisited and corrected by that court itself, it is evident that the relevant question arose in that matter and the Supreme Court held that even without the special provision in the applicable Stamp Act relating to stamp duty being payable on orders sanctioning schemes of amalgamation or demerger, such orders would, in any event, be instruments within the meaning of the Stamp Act that would attract stamp duty. The ratio decidendi in the Hindustan Lever judgment, which is what is binding on all courts in the country and is the law of the land under Article 141 of the Constitution of India, implied that even in the absence of any special provision requiring stamp duty to be paid on orders sanctioning schemes under the Companies Act, stamp duty would be payable thereon as in the case of any other comparable transfer.

With the State being oblivious to such law as declared by the Supreme Court, it did not make any demand for payment of stamp duty on orders sanctioning schemes of amalgamation or demerger. And orders there have been aplenty since 2004 with several crores worth of revenue lost to the State. The State remained content with its seemingly proactive role in having a Bill introduced in the legislature and passed in the year 2010, aping the similar provisions from the statute applicable in Maharashtra. The State informs the court that the Bill has been awaiting the Presidential assent for nearly 16 months, though it does not immediately appear to be an amendment pertaining to a list that should require the President's concurrence. Indeed, in *Madhu Intra* the State's submission appears to have been that it was necessary for the State to amend the applicable provisions to be entitled to stamp duty on orders sanctioning schemes under the Companies Act, but such submission does not appear to have been a concession since the State had said that such amendment would "make the position clear and unambiguous."

In all fairness, and notwithstanding the general drift of the petitioners' submission being against the grain of the Supreme Court dictum in *Hindustan Lever*, they have also referred to judgments of the Allahabad, Delhi and Madras High Courts rendered after *Hindustan Lever*, recognising the issue to have been concluded by *Hindustan Lever* and at least two of the High Courts holding that *Madhu Intra* runs contrary to the Supreme Court pronouncement. In *Delhi Towers Ltd v. GNCT of Delhi* (159 Comp Cas 129), the Delhi High Court observed that even if the relevant provision was not incorporated in the Bombay Stamp Act specifically covering schemes sanctioned under the Companies Act, orders sanctioning schemes would be exigible to stamp duty under Section 3 of the Indian Stamp Act, 1899. In other words, going by the Supreme Court's enunciation of the law in *Hindustan Lever*, the relevant amendment to the Bombay Stamp Act was merely clarificatory and orders sanctioning schemes under the Companies Act were exigible to stamp duty unless specifically exempted. The Allahabad High Court has also accepted such position at paragraph 27 of a judgment delivered in 2006 on a clutch of writ petitions (*Hero Motors Ltd v. The State of U.P.*; CMWP No. 41811 of 2006) that an order sanctioning a scheme of arrangement of merger or demerger is both an instrument and a conveyance within the meaning of the applicable Stamp Act. The

Madras High Court also read Hindustan Lever to have held that an order sanctioning a scheme under the Companies Act would be an instrument within the meaning of the definition relating thereto in the Stamp Act. The judgment, reported at (2010) 2 MLJ 553 [In re: Automac (Madras) Pvt. Ltd], found that it was premature at the time of sanctioning a scheme of arrangement to hold as to whether the order would be exigible to stamp duty, but observed that nothing in the order should be construed as exempting the concerned company from the liability to pay stamp duty, if applicable.

The petitioners canvass two principal points in support of their contention that an order sanctioning a scheme under the Companies Act would be exempted from stamp duty in this State. They contend that in view of the clear pronouncement of a Division Bench of this court in Madhu Intra, that stamp duty would not be payable on orders sanctioning schemes under the Companies Act, it is not open to the company Judge of this court to hold otherwise. They maintain that the Supreme Court judgment in Hindustan Lever should be read in the context of the issues that arose in that matter and against the backdrop of the added provisions of the Bombay Stamp Act that are absent in the Stamp Act applicable in this State. They suggest that in the appeal from Gemini Silk Ltd being allowed and the State accepting such position by not challenging it before the Supreme Court and the State subsequently passing a Bill to incorporate provisions for orders sanctioning schemes under the Companies Act being exigible to stamp duty, the issue remains concluded as far as this court is concerned.

The petitioners assert that there is a distinction between the definition of "instrument" in Section 2(14) of the Stamp Act applicable in this state and the definition of "instrument of partition" in Section 2(15) of the Act and there is a clear indication in one definition including, inter alia, orders of court and the other not, that an order of court would not amount to an instrument unless specifically provided for, and, consequently, no order of court can amount to a conveyance. The legal issue on such aspect need not be re-answered in view of the more authoritative pronouncement in Hindustan Lever, but it is tempting to give additional reasons as to why such line of argument is fallacious. However, the relevant provisions of the Bombay Stamp Act and the Stamp Act applicable in this

State must first be seen to appreciate that the dictum in Hindustan Lever applies equally to the statute relevant in this State: Bombay Act:

"2(14) "Instrument".- "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished, or recorded."

"2(15) "Instrument of Partition".- "Instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue authority or any Civil Court and an award by an arbitrator directing a partition."

West Bengal Act:

"2(14) "Instrument".-"Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished, or recorded."

"2(15) "Instrument of partition".- "Instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes-

(i) a final order for effecting a partition passed by any revenue authority or any Civil Court;

(ii) an award by an arbitrator directing a partition; and

(iii) when any partition is effected without executing any such instrument, any instrument signed by the co-owners and recording, whether by way of declaration of such partition or otherwise, the terms of such partition amongst the co-owners."

Since Section 2(14) of the Stamp Act applicable in the State of Maharashtra is the same as the definition of an instrument as relevant under the applicable law in this State, it is next necessary to discover as to what is liable to be charged with stamp duty under the statute. Section 3 of the Stamp Act, as amended in various States, is the charging provision in the statute. The operative words in such provision are

"the following instruments shall be chargeable with duty ..." The word "instrument" in the Stamp Act is the genus of which, inter alia, conveyance, lease, mortgage-deed and the like as defined in Section 2 of the Act are species. The charging section operates on the instrument and instruments, as defined in the Act, can be of various kinds by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. The moot question that arises is whether the transfer of any property upon the sanction of a scheme of amalgamation or demerger under the Companies Act is different from the transfer of a property by a company to any other party other than under such a scheme. In view of the charging section, every instrument described therein is chargeable with duty of the amount indicated in the relevant schedule, subject to the provisions of the Act and the exemptions contained in the relevant schedule. Neither the Act nor the relevant schedule carves out any exception for orders sanctioning any scheme of merger or demerger under the Companies Act.

In *Haji Sk. Subhan* the Supreme Court considered whether the definition of a "document" under the relevant statute included a decree of the court. The Supreme Court observed, at paragraph 15 of the report, that since the applicable statute vested all proprietary rights in respect of a class of land in the State, there was no "reason why a decree of the court, when it affects the proprietary rights and is in relation to them, should not be included" within the meaning of the expression "document" in the relevant statute. The opinion in *Haji Sk. Subhan* cannot be read to have said that a decree of a court would be a document in all cases; the principle enunciated was that if the wording of a statute so demanded, a decree of a court could be regarded as a document for the purposes of such statute. It is such principle that was relied upon in *Gemini Silk Ltd.* The judgment in *Hindustan Lever* also accepted such proposition and traced the principle to *Haji Sk. Subhan*. In *Ruby Sales and Services (P) Ltd* the Supreme Court considered the Bombay Stamp Act prior to the 1985 amendment thereto and concluded that a consent decree was exigible to stamp duty even before the amendment. The view taken was that a consent or a compromise decree did not stand on a higher footing than the agreement which preceded it and was, as such, exigible to stamp duty. The Supreme Court held that the subsequent amendment by which a consent decree was included in the definition of "conveyance" in the relevant

statute was merely clarificatory and did not imply that consent decrees passed prior to the amendment coming into effect were not liable to be assessed for stamp duty. Again, Gemini Silk Ltd took sustenance from the opinion in Ruby Sales and Services (P) Ltd to hold that orders sanctioning schemes of merger and demerger in this State would be exigible to stamp duty notwithstanding the clarificatory provision in the Bombay Stamp Act being absent in the statute applicable in this State. In Hindustan Lever, the judgment in Ruby Sales and Services (P) Ltd has been referred to in support of the conclusion that an order sanctioning a scheme "is based upon the compromise between two or more companies ... (and) is an instrument which transfers the properties ..." Nothing in the Stamp Act applicable in this State is at variance with the corresponding provisions of the Bombay Stamp Act for the principle as recognised in Hindustan Lever to not be applicable in this State. In Madhu Intra the primary question which fell for consideration is stated at paragraph 49 of the report:

"In our view, the moot question which falls for consideration in these appeals, is not whether an order under section 394 is a "conveyance" or an "instrument", but as to whether in view of the provisions of sub-section (2) of section 394 an order under sub-section (1) sanctioning a scheme of amalgamation or arrangement is liable to be stamped under the Stamp Act."

The answer to the question is provided at the end of paragraph 53 of the report which runs as follows:

"... In our view, the transfer of assets and liabilities of the transferor company to the transferee company takes place on an order being made under sub-section (1) of section 394 by operation of sub-section (2) thereof."

In Hindustan Lever, paragraphs 32 and 38 of the report indicate in unambiguous terms that an order passed under Section 394 of the Companies Act is founded on consent that would make such order an instrument as defined under the Bombay Stamp Act. The following sentences at paragraph 38 of the report are of significance:

"38. ... 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."

It must be respectfully observed in the context that in the light of the judgment in Hindustan Lever, the view expressed in Madhu Intra does not hold good. The judgement in Madhu Intra did not notice the Supreme Court pronouncement in Hindustan Lever. If the Division Bench of this court had noticed Hindustan Lever and had still rendered the opinion in Madhu Intra, it would have been binding on the company Judge of this court. But in Madhu Intra not noticing Hindustan Lever and it being apparent that the question has been answered otherwise by the Supreme Court, it is the Supreme Court view that has to be followed.

It is submitted on behalf of the petitioners that despite the Allahabad High Court holding in Hero Motors Ltd that an order sanctioning a scheme of arrangement of merger or demerger being both an instrument and a conveyance within the meaning of the applicable Stamp Act, there was a difference of opinion as to whether the property transferred by an order sanctioning such a scheme would be regarded as movable or immovable property. The difference was referred to a third Judge and it was ultimately held that the properties covered by an order sanctioning such a scheme should be regarded as movables. The State is justified in its assertion, in such context, that the Stamp Act applicable in Uttar Pradesh makes a distinction between movables and immovables and nothing in Article 23 under Schedule IA to the Stamp Act applicable in this State makes such distinction. The State is also correct in its submission that the court is not concerned today with the manner of assessment since that is a post-sanction exercise. The Allahabad High Court was called upon to look into the manner of assessment since the orders of assessment were challenged before the Division Bench.

It is true that when a bundle of properties passes from one company to another under an order sanctioning a scheme of amalgamation or demerger, the assets (or the positive value) pass along with certain liabilities (the negative value). But that

is no different from, say, an immovable property being conveyed in favour of the vendee along with the liabilities (outstanding municipal rates and taxes, for example). By virtue of Article 31 of Schedule IA to the Stamp Act applicable in this State, the stamp duty on the exchange of property would be the same as a conveyance in Article 23 thereof and the quantum of stamp duty payable would be on the basis of the market value of the property of the greatest value. Again, in the context of the stage at which the matter is being considered, it is unnecessary to get into any protracted deliberation on the mode or manner of assessment of stamp duty as long as it is recognised that an order sanctioning a scheme of arrangement or demerger under Section 394 of the Companies Act would amount to both an instrument and a conveyance within the meaning of the Stamp Act applicable in this State.

The other aspect of the matter relates to a notification of the year 1937 issued by the Governor General-in-Council providing, inter alia, that stamp duty chargeable under Article 23 of Schedule I to the Indian Stamp Act, 1899 would stand remitted in the manner indicated in the notification. The petitioners say that under Article 372 of the Constitution of India "all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority." The petitioners suggest that since the expression, "all law in force," would include any notification that governed any specific field at the time before the commencement of the Constitution, the extent of remission of stamp duty under the 1937 notification continues to hold the field since it has not been altered or repealed or amended by any competent authority. The petitioners refer to the reluctant concession in such regard granted in the judgment of Gemini Silk Ltd. It is not necessary to delve deep into the issue and the interesting peripheral questions that arise. It may be possible to accept by virtue of Article 372 of the Constitution that any law, or any notification governing the operation of any statute, in force at the time of the commencement of the Constitution would continue to remain in force notwithstanding the source from which the law or the notification emanated being no longer in existence, until the corresponding post-Constitution authority of like competence altered, repealed or amended the same. It may also be possible to accept that the expression "altered or repealed or

amended" would involve an overt act.

The State says that Article 23, which applies to a conveyance, does not figure in Schedule I to the Stamp Act applicable in this State. Indeed, Article 23 which is relevant for the present purpose, falls under Schedule IA to the Stamp Act as relevant in this State. There can be no manner of doubt that in Article 23 no longer forming a part of Schedule I to the Stamp Act as applicable in this State and being included in Schedule IA thereto, the benefit under the 1937 notification is no longer available as the State Legislature by an overt act has taken it outside the purview of Schedule I without the State Government having extended the remission under the 1937 notification.

The judgment in Delhi Towers Ltd is of no assistance to the petitioners in the present context. In fact, the judgment recognised that the Central Government, the successor-in-interest of the Governor General-in-Council, has the legislative competence to legislate on the issue of stamp duty and there is no legislation by the State Government in Delhi in respect of orders sanctioning schemes of merger or demerger, whether or not they involve principal and holding companies.

An order sanctioning a scheme of amalgamation or demerger under Section 394 of the Companies Act, therefore, answers to the description of the words "instrument" and "conveyance" within the meaning of the Stamp Act applicable in this State and is, accordingly, exigible to stamp duty. As to the manner of assessment of the stamp duty and the mode of implementation of the obligation, nothing need be said at the present stage, save that no property transferred pursuant to any scheme of amalgamation of merger or demerger in this State would be effective unless appropriate stamp duty thereon has been paid. The notification dated January 16, 1937 providing for remission of stamp duty is not applicable in this State. It is left to the appropriate authorities to work out the procedure consequent upon this judgment and order.

All three petitions CP No. 627 of 2011, CP No. 398 of 2011 and CP No. 474 of 2011 will appear as "Company Matters (New)" a fortnight hence.

Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.)

Later :

The petitioners seek a stay of the operation of the order which is declined. (Sanjib Banerjee, J.)

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