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## **Court order sanctioning a scheme of amalgamation or demerger is an instrument and conveyance liable to stamp duty**

In the case of Emami Biotech Ltd and others<sup>1</sup> (collectively referred to as 'petitioners'), the Calcutta High Court (HC) held that a Court order sanctioning a scheme of amalgamation or demerger under section 391 to 394 of the Companies Act, 1956 (the Companies Act) is an 'instrument' within the meaning of the Stamp Act applicable to the state of West Bengal and is subject to stamp duty.

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<sup>1</sup> Emami Biotech Ltd. and others v. State of West Bengal [Company Application No. 777 of 2011]

### **Issue**

Whether stamp duty would be payable in State of West Bengal on property transfers pursuant to high court order under section 391 -394 under the Companies Act?

### **Petitioners' contentions**

- In the case of Madhu Intra Ltd. v. the Registrar of Companies<sup>2</sup>, the HC held that the stamp duty would not be payable on orders sanctioning schemes

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<sup>2</sup> Madhu Intra Ltd v. Registrar of Companies [2008] 130 Comp Cas 510 (Cal.)

under the Companies Act. Hence, the company judge of this court cannot give a contrary judgment in the present case.

- The Supreme Court (SC) judgment in the case of Hindustan Lever Ltd. v. State of Maharashtra<sup>3</sup> (Hindustan Lever Ltd), holding that the stamp duty will apply on schemes irrespective of any specific charge in the State Stamp Act, should be read against the backdrop of the consequent amendment in the Bombay Stamp Act, 1958. However, no such amendment has been made in the West Bengal Stamp Act, 1964.
- There is a distinction between definitions of an ‘instrument’ and an ‘instrument of partition’ as defined in the West Bengal Stamp Act, 1964.

Section 2(14) defines – ‘Instrument’ includes every document by which any right or liability is, or purports to be, created, transferred, limited extended, extinguished, or recorded.

Section 2(15) defines – ‘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.
- 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.

The assessee contended that the definition of ‘instrument of partition’ clearly indicates inclusion of court orders. Accordingly, an order of the court will not amount to an ‘instrument’ unless specifically provided for, and consequently, no order of the court can amount to a conveyance.

<sup>3</sup> Hindustan Lever Ltd. v. State of Maharashtra [2004] 9 SCC 438(SC)

## Court’s observation and ruling

- To determine the applicability of the SC’s decision in the case of Hindustan Lever on the present case, the Court compared the relevant provision of the Bombay Stamp Act, 1958 with the West Bengal Stamp Act, 1964. It observed that the definition of an ‘instrument’ in the two Acts was similar. Section 3 of the Stamp Act, as amended in various states, is the charging provision for stamp duty. The charging section operates on the ‘instrument’ as defined in the Act. Accordingly, every instrument described is chargeable to stamp duty. Neither the Act nor the relevant schedule carves out any exceptions for orders sanctioning schemes under the Companies Act.
- The Court observed that nothing in the West Bengal Stamp Act, 1964 was at variance with the corresponding provisions of the Bombay Stamp Act, 1958 to hold that the principle recognised in the Hindustan Lever Ltd. case was not applicable in West Bengal.
- The Court referred the SC ruling in Ruby Sales and Services Pvt. Ltd.<sup>4</sup>, which considered the Bombay Stamp Act prior to the 1985 amendment and concluded that a consent decree was subject to stamp duty even before the amendment. Further, the SC held that a subsequent amendment to include a consent decree in the definition of ‘conveyance’ in the relevant statute was merely clarificatory and did not imply that any such decrees passed prior to amendment in the Bombay Stamp Act were not subject to stamp duty. The Court also referred to its earlier judgment in the case of Gemini Silk Ltd<sup>5</sup> where it held that orders sanctioning the schemes in the state of West Bengal would be subject to stamp duty notwithstanding that the clarificatory amendment in the Bombay Stamp Act, 1958 was absent in the West Bengal Stamp Act, 1964.

<sup>4</sup> Ruby Sales and Services Pvt. Ltd. v. State of Maharashtra and others [1994] 1 SCC 531 (SC)

<sup>5</sup> Gemini Silk Ltd v. Gemini Overseas Ltd. [2003] 114 Comp Cas 92 (Cal.) , judgment set aside in the case of Madhu Intra

- The SC observed in the case of Hindustan Lever Ltd (above), that an order passed under section 394 of the Companies Act is based on the agreement (consent) which would make such an order an instrument as defined under the Bombay Stamp Act, 1958. On sanctioning the scheme of amalgamation under scheme 394 of the Companies Act, the properties including liabilities are transferred and on that transfer instrument, stamp duty is levied. Therefore, it cannot be said that the legislature has no jurisdiction to levy such a duty.
- The Court observed that the division bench of this Court did not consider the SC pronouncement in Hindustan Lever while pronouncing the judgment in the case of Madhu Intra. Had the bench noticed the SC case and then rendered the judgment of Madhu Intra, it would have been binding on the Court. This not being the case, the SC decision has to be followed.
- The Court also referred to judgments of the Allahabad, Delhi and Madras High Courts, rendered after the SC's pronouncement in the Hindustan Lever case. Two of the courts held that Madhu Intra case runs contrary to the SC's pronouncement:
- In the case of Delhi Towers Ltd. v. GNCT of Delhi<sup>6</sup>, the Hindustan Lever judgment was followed. Further, it was held that the relevant amendment made to the Bombay Stamp Act was merely clarificatory and orders sanctioning schemes were exigible to stamp duty unless specifically exempted.
- In the case of Automatic (Madras) Pvt. Ltd<sup>7</sup>, the Madras High Court observed that it was premature, at the time of sanctioning a scheme, to hold whether an order is subject to stamp duty. Further, it held that nothing in the order should be construed as an exemption from the liability to pay stamp duty, if applicable.

- The Allahabad High Court in the case of Hero Motors<sup>8</sup> also held that an order sanctioning the scheme is both an instrument and a conveyance within the meaning of the applicable Stamp Act.
- On the aspect of notification dated 16 January 1937, providing remission of stamp duty under Article 23 (which applies to conveyance) of Schedule I to the Indian Stamp Act, 1889, the Court held that the said notification is not applicable in West Bengal as the State Legislature by an overt act has taken Article 23 outside the purview of Schedule I and placed it in Schedule IA to the West Bengal Stamp Act, 1964.

### Conclusion

The Court held that an order sanctioning a scheme under section 394 of the Companies Act falls within the description of the words 'instrument' and 'conveyance' within the meaning of the West Bengal Stamp Act, 1964. Accordingly, it is subject to stamp duty. The Court also observed that no property transferred pursuant to any scheme in the State of West Bengal would be effective unless appropriate stamp duty is paid. This ruling may be relevant in the States which do not have a specific clause for merger/demerger under sections 391-394 of the Companies Act, 1956 in the conveyance entry in the Stamp duty schedule.

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<sup>6</sup> Delhi Towers Ltd v. GNCT of Delhi [2009] 159 Comp Cas 129 (Delhi)

<sup>7</sup> Automatic (Madras) Pvt. Ltd. *In re* [2010] 2 MLJ 553 (Mad.)

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<sup>8</sup> Hero Motors Ltd. v. State of UP (CMWP No. 41811 of 2006)

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