

(2012) 09 CAL CK 0003

Calcutta High Court

Case No: A.P.O. No. 114 of 2012, C.P. No. 398 of 2011, A.P.O. No. 136 of 2012 and C.P. No. 627 of 2011

ITP LTD. and Another

APPELLANT

Vs

Union of India
 Emami
Biotech Ltd. and Another Vs
State of West Bengal and
Another

RESPONDENT

Date of Decision: Sept. 12, 2012

Acts Referred:

- Companies Act, 1956 - Section 14, 2(g)(iv), 2(l), 391, 394
- Constitution of India, 1950 - Article 141
- Transfer of Property Act, 1882 - Section 1(A), 2, 29(e), 5, 9

Citation: (2013) 1 CHN 663 : (2012) 111 CLA 391 : (2012) 174 CompCas 492

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Abhrajit Mitra, Mr. Jishnu Chowdhury, Mr. Dipayan Chowdhury and Mr. Subhradal Chowdhury in A.P.O. No. 114 of 2012 and C.P. No. 398 of 2011 and Mr. S.N. Mukherjee, Mr. Ratnanko Banerjee, Mr. Krishna Raj Thakkar, Mr. K. Mallick and Mr. A.K. Mishra in A.P.O. No. 136 of 2012 and C.P. No. 627 of 2011, for the Appellant; Jayanta Mitra, Mr. Debangshu Basak, Advocate and Mr. Sakya Sen, Advocate For the State In A.P.O. No. 114 of 2012 and C.P. No. 398 of 2011, Mr. Jayanta Mitra, Mr. Debangshu Basak, Advocate For the Respondent No.1(State) In A.P.O. No. 136 of 2012, C.P. No. 627 of 2011, Mr. Somenath Bose, Advocate and Mr. Bhaskar Prasad Banerjee, Advocate For Union of India, for the Respondent

Final Decision: Dismissed

Judgement

Ashim Kumar Banerjee J

Preface

1. Both these appeals would relate to a short but important question as to whether a scheme of amalgamation and/or arrangement sanctioned by the High Court u/s 391 of the Companies Act, 1956 (hereinafter referred to as the said Act of 1956) would attract the mischief of Indian Stamp Act, 1899 in the State of West Bengal and, if so, to what extent. The appellants contended before the learned Judge, the order of sanction of the scheme of amalgamation or arrangement was nothing but an arrangement and/or re-alignment of business and/or trade activity of the company as per the wish of the body of shareholders that would not amount to transfer of any immovable or movable property either under the Transfer of Property Act or otherwise attracting Stamp Duty as per the said Act of 1899. The learned Judge held it otherwise. His Lordship held, it was a voluntary transfer hence, would attract appropriate Stamp Duty. Hence, this appeal by the appellants.

FACTUAL MATRIX

2. In the case of Emami Biotech Ltd., it was a transfer of a business by the transferor company in favour of the transferee company, both run by the common management having controlling block of shares. As per the scheme, all immovable properties and assets, liabilities of Oriental, the transferor company would automatically stand vested in Emami, the transferee company. As per Clause 15 of the scheme, since Emami would control ninety per cent of paid up capital of Oriental such vesting of properties including lease-hold land would exempt from payment of Stamp Duty as per the notification dated January 16, 1937 issued by the then Governor of Bengal applicable to the State.

3. In case of ITP Limited, the scheme would suggest amalgamation of the transferor company ITP in Laxmi Tea Company Limited which was its wholly owned subsidiary both being engaged in tea plantation having tea gardens.

4. Needless to mention, in both cases the shareholders of the transferor company would get appropriate shares in the transferee company as per the share exchange ratio suggested in the scheme. In both the cases meeting of the shareholders were held where the schemes were sanctioned by overwhelming majority. Pertinent to note, no shareholder came forward to oppose the scheme. The learned Judge considered the issue of Stamp Duty and decided the said issue by a common judgment and order dated February 8, 2012 in the case of Emami Biotech Ltd. as well as ITP Ltd. and held that the sanction would require appropriate Stamp Duty and the notification dated January 6, 1937 would have no application in the instant case. His Lordship directed the matters to appear on a subsequent date for appropriate order on the sanction. Hence, these appeals.

THE JUDGMENT AND ORDER OF THE LEARNED JUDGE AN ANALYSIS

5. The judgment and order would appear at pages 276-296 of the paper book in the case of ITP Limited.

◆ In Gemini Silk Limited -VS- Gemini Overseas Ltd. 2003 Volume-114 Company Cases Page-92. the learned single Judge of this Court held that the scheme would require payment of appropriate Stamp Duty that was upset by the Division Bench in the case of Madhu Intra Ltd. & Another -VS- Registrar of Companies and Others 2006 Volume-130 Company Cases Page-510 However, the Madhu Intra Ltd. did not take notice of Hindustan Lever & Another -VS- State of Maharashtra & Another 2004 Volume-9 Supreme Court Cases Page-438 delivered by the Apex Court just before the delivery of the judgment. We find from the relevant dates, Hindusthan Lever was delivered after the hearing was concluded in Madhu Intra. However, the Madhu Intra was delivered subsequent to the said decision.

◆ Hindusthan Lever categorically held, transfer of property through sanction of a scheme of amalgamation of demerger would have "all trappings of a sale". The Apex Court judgment would have a greater force than Madhu Intra, that would be binding upon the Court under Article 141 of the Constitution of India.

◆ There had been evasion of Stamp Duty running into crores depriving the State and State lost revenue to a large extent. Similar provision in Maharashtra came into effect in 2010.

◆ Hindusthan Lever while considering Maharashtra amendment, considered Allahabad, Delhi and Madras decisions in the case of Hero Motors Limited -VS- State of Uttar Pradesh & Others All India Reporter 2009 All Page 93, Automac (Madras) Private Limited 2010 Volume-II Madras Law Journal Page-553 and Delhi Towers Limited -VS- GNCT of Delhi Volume-159 Company Cases Page-129. and observed that in the other States appropriate amendments were made to the said Act of 1899 which were yet to be imposed in the State, that was of no consequence as such amendments were superfluous in view of the provisions of Section 2(14) of the said Act of 1899 that was clear and unambiguous.

◆ Article 23 that would apply in case of conveyance as specified in the notification dated January 16, 1937, was not in Schedule 1 but in Schedule 1(A) in the State that would make the said notification not applicable in the State.

CONTENTIONS OF THE COMPANIES

Mr. S.N. Mukherjee

5. Mr. S.N. Mukherjee, learned senior counsel appearing for the Emami made the main submissions on behalf of the appellants. He raised the following issues :

◆ Competency of the Judge to take the plea of imposition of Stamp Duty.

◆ Transfer of business being a movable property would not attract any Stamp Duty as per the said Act of 1899.

◆ Hindusthan Lever would have no application because of the distinguishing feature involved in the case.

◆ Hindusthan Lever did not consider the holding-subsidiary relationship that would attract no duty.

6. Elaborating his argument he took us to the definition Clause u/s 2 of the said Act of 1899 particularly, Sub-section 10 and 14 by contending, it was not an inter vivos transfer. He also referred to Section 9, Schedule 1(A) and Article 23 to contend that the decision in the case of Hindusthan Lever would have no application. He cited the decisions in the case of Miheer H. Mafatlal -VS- Mafatlal Industrial Ltd. All India Reporter 1997 Supreme Court Page-506 to apprise us as to the scope of the Company Court considering a scheme of amalgamation u/s 391. He distinguished the Madras decision in Automac. He rather relied on the Single Bench decision of our Court delivered by one of us (Ashim Kumar Banerjee, J.) in Peerless General Finance & Investment Company Limited. -VS- Poddar Projects Limited & AnotherV. He also distinguished Allahabad decision in Hero Motors to say that the State of Uttar Pradesh had relevant amendments to attract Stamp Duty. He lastly distinguished Hindusthan Lever by placing paragraph 32 to 45 to say that the constitutional validity of the State amendment came up for consideration of the Apex Court. The Apex Court held the Maharashtra amendment intra vires. It would be premature for this Court to decide on the issue without law being enacted in the State. He lastly contended, Maharashtra, Uttar Pradesh, Madras did have appropriate amendments whereas the State was yet to amend the law. So long it is was done, it would be premature for this Court to say that the Stamp Duty was payable. He lastly relied on the decision in the case of State of Orissa -VS- Sudhansu Sekhar Misra & Others All India Reporter 1968 Supreme Court Page-647 to say, Madhu Intra would squarely be binding upon the learned Judge as also this Bench being a co-ordinate bench that would have no conflict with Hindusthan Lever. On the holding subsidiary issue, Mr. Mukherjee made elaborate submissions on the notification of 1937. He contended, Schedule 1(A) was introduced by way of amendment in the State in 1922. The notification being post amended law would make the said notification squarely applicable in the State unless specifically recalled by the legislature.

Mr. Abhrajit Mitra

7. Mr. Mitra adopted the submission that was advanced by Mr. Mukherjee. In addition, he contended as follows :

◆ In the case of ITP Limited, it was an amalgamation that would not have any trapping of sale as both the companies under the common management having controlling block of shares would amalgamate with each other that could not be said to be a "transfer" within the meaning of said Act of 1899. He relied on Article 31 and Section 29(e) of the said Act of 1899 in this regard. The issue would come squarely under Article 31 that could only be made applicable by a specific amendment that was available in the other States. The amalgamation, even if called as a transfer, would, at best, be between two groups of shareholders who were, in

effect, one and the same group. Hence, it would be no transfer at all. He relied on Vodafone International Holdings BV -VS- Union of India & Another 2012 Volume-VI Supreme Court Cases Page-613 particularly paragraphs 160, 257 and 269 in this regard.

◆ The Stamp Act, being a fiscal statute, should be strictly interpreted and any interpretation that would prejudice the person against whom it was imposed, would not be permissible. He would rely upon Hameed Zoharan (Dead) & Others -VS-Abdul Salam 2001 Volume-VII Supreme Court Cases Page-573

◆ The law as it would stand, would be available for judicial interpretation. The duty of the Court was not to correct the same but to give a plausible meaning as far as possible. The legislative duty to correct the law could not be usurped by Court. He would rely upon B. Premanand & Others -VS-Mohan Koikal & Others 2011 Volume-IV Supreme Court Cases Page-266 in this regard.

8. Mr. Mitra also distinguished Hindusthan Lever particularly paragraph 94 to find out the true meaning of phraseology "inter vivos". He would lastly rely upon Saraswati Industrial Syndicate Limited -VS- CIT Haryana, Himachal Pradesh-III, New Delhi All India Reporter 1991 Supreme Court Page-70 particularly paragraphs 4, 5 and 6 to support his contention that on amalgamation the transferor company would lose its identity hence, it could not be said to be a "transfer" within the meaning of the said Act of 1899.

CONTENTIONS OF THE STATE Mr. Jyanta Mitra

9. Mr. Mitra, learned senior counsel specially engaged by the State to defend them in these appeals made elaborate submissions on the proposition of law that would come for discussion as relevant in the present case. Mr. Mitra first drew our attention to page 27 of the paper book in case of Emami wherein the scheme itself would provide exemption of Stamp Duty on the strength of the notification hence, the learned Judge rightly decided the issue that would take care of the first contention of Mr. Mukherjee as to the competence of the learned Company Judge. On the second contention, Mr. Mitra drew our attention to the scheme involved in both the cases that would show that properties including immovable properties would be involved in the process of transfer through scheme. He contended that the scheme for merger or demerger would have the same effect of transfer that would attract appropriate duty. He referred to page 24 of the paper book to show that the intention of transfer was clear in the scheme.

10. On the applicability of Hindusthan Lever, Mr. Mitra made elaborate submission. According to him, the decision in the Gemini Silk that merged in the decision in Madhu Intra would have no application in view of Hindusthan Lever coming into force. Hindusthan Lever considered Rubi Sales and Services Private Limited -VS- State of Maharashtra 1994 Volume-I Supreme Court Cases Page-531 and observed that the provision would, even without an amendment, have application in the

instant case. Rubi Sales considered a transfer through litigation that was held to be inter vivos. Such analogy was extended in Hindusthan Lever and made applicable in the case of scheme of amalgamation and/or arrangement. He contended, 1937 notification spoke about Schedule-I that would not be applicable in the State as Schedule 1(A) was in force at the time of issuance of the notification. He relied on M/s. General Radio & Appliances Company Limited & Others - VS- M.A. Khader All India Reporter 1986 Supreme Court Page-1218 to say that the scheme was nothing but sanction of the wishes of the shareholders that would have no binding effect on the persons outside the scope and purview. He relied on paragraph 6 of Hindusthan Lever to say that even without an amendment the mischief would squarely be applicable. Amendment would remove the doubt as an abundant caution. The learned Judge dealt with Madhu Intra, Gemini Silk and Hindusthan Lever in their true perspective that would deserve no interference by this Court. Commenting on Peerless he contended, the issue involved herein was not discussed or decided. He further contended, Hero Motors did not consider Hindusthan Lever in its true perspective and could not be a good law. He also distinguished Vodafone and contended that the scheme in ITP would clearly show, it was a transfer of immovable property as well hence, the observation of Vodafone could not help ITP either. He distinguished Hameed, B. Premanand and Saraswati by contending that Hindusthan Lever clearly held that the provisions, even without State amendments, would automatically come to play in case of merger or demerger being sanctioned by the Court as it was an intra vivos transfer.

UNION OF INDIA Mr. Somenath Bose

11. Mr. Bose being assisted by Mr. Bhaskar Prasad Banerjee adopted the submissions made by the State through Mr. Mitra learned senior counsel.

REPLY

Abhrajit Mitra

12. Mr. Mitra distinguished the State of Himachal Pradesh and contended, pre-amendment would not, in any way, support paragraph 13 of the judgment and order impugned. He would contend, the General Radio would have no application as it dealt with the tenancy law vis-a-vis the protection of the landlord as contained in Section 14 of the Tenancy Law.

Krishna Raj Thakkar

13. Mr. Thakkar replied on behalf of the Emami. According to him, even Gemini Silk made the 1937 notification applicable in the State. Such decision merged in Madhu Intra that would be squarely binding upon us and we could not avoid the same without referring it to a larger bench. He would further contend, J.K. Drugs & Pharmaceuticals Ltd. Unreported Judgment dated September 24, 2003 in C.P. No.31 of 2003/C.A. No.584 of 2002 of the High relied on the relaxation as available in the

notification.

OUR VIEW

14. We already referred to the cases cited by the parties including the brief proposition for which that were cited. We would however, restrict our discussion concentrating on Hindusthan Lever. If we look to paragraph 6, we would find, the Apex Court relied on their own decisions in Ruby Sales that interpreted "conveyance" and "instrument" to hold that a consent decree would attract appropriate Stamp Duty. While doing so, the Maharashtra amendment was considered wherein Ruby Sales held such amendment was introduced "out of abundant caution". It also held, such amendment would not mean that the consent decree was otherwise not covered by the definition of 2(g) or 2(e). The Apex Court held, "it was clear from the terms of the consent decree that it is also an instrument under which the property has been transferred by one person to another". Hindusthan Lever was nothing but an extension of Ruby Sales. The elaborate decision considered the State amendments. It also considered Mafatlal, General Radio. Section 2(l) would define "instrument" as per the Bombay Stamp Act that is pari materia with our Section 2(14). The Apex Court, in no uncertain terms held, the scheme of amalgamation was not in-voluntary. It rather reiterated its earlier view expressed in General Radio and Mafatlal. It is true, Hindusthan Lever considered Maharashtra amendment. We however, do not find any reason as to how the same would not be applicable in our State particularly the observation contained in paragraph 6. Paragraph 43 and 45 being relevant herein are quoted below:

43. Section 2(g)(iv) of the Act does not in any way describe any alternate procedure as compared to the one appearing in Section 394 of the Companies Act, 1956. The question of repugnancy of Section 2(g)(iv) of the Act vis-à-vis Section 394 of the Companies Act, 1956 is therefore irrelevant. Section 2(g)(iv) does not impinge or negate the judicial power because it merely defines the word "conveyance" in regard to the order passed by the High Court u/s 394 of the Companies Act, the basis of which is consent and voluntary acts which ultimately result in transfer of property for consideration.

Court at Calcutta.

45. It was contended that since the transaction was not between "living beings" the same was not "inter vivos" as the transfer of property had not taken place between living beings. We do not agree. "Transfer of property" has been defined in Section 5 of the Transfer of Property Act, 1882 to mean an act by which a living person conveys property, in present or in future to one or more other living persons. Company or association or body of individuals, whether incorporated or not, have been included amongst "living person" in this section. It clearly brings out that a company can effect transfer of property. The words "inter vivos" in the context of Section 394 of the Companies Act would include within their meaning also a transfer

between two "juristic persons" or a transfer to which a "juristic person" is one of the parties. The transaction between a minor or a person of unsound mind with the other person would not be recognised in law, though the same is between two living beings, as they are not juristic persons in the eye of the law who can by mutual consent enter in a contract or transfer the property. The company would be a juristic person created artificially in the eye of the law capable of owning and transferring the property. Method of transfer is provided in law. One of the methods prescribed is dissolution of the transferor company by merger in the transferee company along with all its assets and liabilities. Where any property passes by conveyance, the transaction would be said to be *inter vivos* as distinguished from a case of succession or devise.

15. The Apex Court held, it was "transfer of property" being "*inter vivos*". Section 5 of the Transfer of Property Act would squarely be applicable in a scheme of amalgamation or demerger. It was a transfer between two "juristic persons". Hence, it was nothing but one of the methods of transfer in corporate field that would certainly be *inter vivos*. An *inter vivos* transfer would definitely attract Stamp Duty as per the said Act of 1899 and/or the State amendments applicable therefor.

16. Lot was said on 1937 notification. Such notification would be applicable in case of Article 23 of Schedule 1. We do not know under what circumstance it was issued, particularly, when Schedule 1 was replaced by Schedule 1(A) in 1922. As Mr. Abhrajit Mitra says, we must interpret fiscal law rigidly. 1937 notification did not speak about Schedule 1(A). Hence, the same could not be made applicable.

17. On the question of "holding subsidiary" we are of the view, corporate entities are having distinctive features. Shareholders do not own the corporate entity. Lifting of the corporate veil might suggest otherwise.

18. In the eye of law, corporate entities are distinct. Hence, transfer from A to B would definitely a "transfer" to come within the scope of paragraph 45 of Hindusthan Lever quoted (Supra), attracting appropriate duty.

19. As per the proposed law that was pending for consideration of the President of India, scheme of amalgamation and/or arrangement would involve two per cent Stamp Duty whereas the "conveyance" as of date would require payment of duty at the rate of seven per cent. It is for the State to fix the rate. So long the new law does not come in force the existing law would prevail. The parties would have to adhere to the same.

20. Appeals fail and are hereby dismissed.

21. There would be no order as to costs.

22. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir Sinha, J.

I agree.