

CASE NO.:

Appeal (civil) 8232 of 1996  
Appeal (civil) 8231 of 1996  
Appeal (civil) 9237 of 1996  
Appeal (civil) 10208 of 1996

PETITIONER:

Hindustan Lever & Anr.

RESPONDENT:

State of Maharashtra & Anr.

DATE OF JUDGMENT: 18/11/2003

BENCH:

R.C. Lahoti & Ashok Bhan.

JUDGMENT:

JUDGMENT

BHAN, J.

Civil Appeal Nos. 8232 of 1996, 8231 of 1996, 9237 and 10208 of 1996 arising from a common judgment of the High Court involving the same question of law are taken up for disposal together. Illustrative facts are taken from Civil Appeal No. 8232 of 1996.

Tata Oil Mills Co. Ltd. (Transferor Company) was incorporated on 10.12.1917 under the Companies Act, 1913. Hindustan Lever Ltd. (Transferee Company) was incorporated under the same Act on 17.10.1933. The scheme of amalgamation of transferor company with the transferee company was formulated and approved by the Board of Directors of respective companies on 19.3.1993. On 3.3.1994 the scheme of amalgamation of the transferor company with the transferee company was sanctioned with certain modifications by a Single Judge of the High Court. Appeal filed against the judgment and order of the Single Judge was rejected by the Division Bench on 18.5.1994. Special leave petition against the above judgment of the Division Bench was dismissed by this Court on 24.10.1994. This judgment is reported in Hindustan Lever Employees' Union Vs. Hindustan Lever Ltd. & Ors., 1995 Suppl. (1) SCC 499.

The drawn up order of amalgamation of transferor company with transferee company was approved by the High Court on 24.11.1994. On presentation of the certified copy of the Court's order the Registrar of Companies, Maharashtra issued a certificate amalgamating the two companies.

In view of the stamp duty sought to be levied on the order of amalgamation passed under Section 394 of the Companies Act, 1956 (hereinafter referred to as "the Act") the appellant filed writ petition in the Bombay High Court challenging the constitutional validity of the provisions of Section 2(g)(iv) of the Bombay Stamp Act, 1958 (hereinafter referred to as "the Stamp Act"). By the impugned order the Division Bench of the High Court has dismissed the writ petition. The validity of Section 2(g)(iv) of the Stamp Act has been upheld. Section 2(g) of the Stamp Act which defines "Conveyance" reads:

"2. In this Act, unless there is anything repugnant in the subject or context. -

(g) "Conveyance" includes,--

- (i) a conveyance on sale,
- (ii) every instrument,
- (iii) every decree or final order of any Civil Court,
- (iv) every order made by the High Court under

Section 394 of the Companies Act, 1956 in respect of amalgamation or reconstruction of companies; and every order made by the Reserve Bank of India under Section 44A of the Banking Regulation Act, 1949 in respect of amalgamation or reconstruction of Banking companies

by which property, whether movable or immovable, or any estate or interest in any property is transferred to, or vested in, any other person, inter vivos, and which is not otherwise specifically provided for by Schedule I;

Explanation.- An instrument whereby a co-owner of any property transfers his interest to another co-owner of the property and which is not an instrument of partition, shall, for the purposes of this clause, be deemed to be an instrument by which property is transferred inter vivos; "

It would be seen that conveyance includes a conveyance on sale as well as every instrument. Clause (g)(iii) was added by the Maharashtra Act No. 27 of 1985 which came into operation w.e.f. 10.12.1985. It provides that conveyance includes every decree or final order of any civil court. Clause (g)(iv) was added by the Maharashtra Act No. 17 of 1993 which came into operation w.e.f. 1.4.1993.

Section 2(g)(iii) came up for interpretation before this Court in the case of Ruby Sales and Services (P) Ltd. & Anr. Vs. State of Maharashtra & Ors., 1994 (1) SCC 531. It was held that the definition of "conveyance" and "instrument" starts with the expression "includes" which shows that the definition is very wide which would include a consent decree as well. That the sub-clause (iii) of Section 2(g) was introduced out of abundant caution and it does not mean that the consent decree was not otherwise covered by the definition in Section 2 (g) or 2(l) of the Stamp Act. That there was no particular pleasure in merely going by the label but what is decisive is the terms of the document. 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. It was observed:

"There is no particular pleasure in merely going by the label but what is decisive is by the terms of the document. It is clear from the terms of the consent decree that it is also an "instrument" under which title has been passed over to the appellants/plaintiffs. It is a live document transferring the property in dispute from the defendants to the plaintiffs.

Thus the position becomes clear that the consent decree falls under the definitions of "conveyance" as well as "instrument"."

By Act No. 17 of 1993, the Legislature has added Section 2(g)(iv) to include every order passed by the High Court under Section 394 of the Companies Act in respect of amalgamation of the companies. Section 394 of

the Companies Act reads:

"394. Provisions for facilitating reconstruction and amalgamation of companies. \026 (1) Where an application is made to the Court under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court \026

- (a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies; and
- (b) that under the scheme the whole or any part of the undertaking, property or liabilities of any company concerned in the scheme (in this section referred to as a "transferor company") is to be transferred to another company (in this section referred to as "the transferee company");

the court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters:-

- (i) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of any transferor company;
- (ii) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;
- (iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- (iv) the dissolution, without windingup, of any transferor company;
- (v) the provision to be made for any persons, who within such time and in such manner as the Court directs, dissent from the compromise or arrangement; and
- (vi) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

(Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being woundup, with any other company or companies, shall be sanctioned by the Court unless the Court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest:

Provided further that no order for the dissolution of any transferor company under clause (iv) shall be made by the Court unless the Official Liquidator has,

on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest.)

(2) Where an order under this Section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Within {thirty} days after the making of an order under this section, every company in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration.

If default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to {five hundred rupees}.

(4) In this section\026

(a) "property" includes property, rights and powers of every description; and "liabilities" includes duties of every description; and

(b) "transferee company" does not include any company, other than a company within the meaning of this Act; but "transferor company" includes any body corporate, whether a company within the meaning of this Act or not."

[Emphasis supplied]

The issue which is debated before us is: (1) whether the State Legislature had the legislative competence to impose stamp duty on the order of amalgamation passed by a court? and (2) whether an order sanctioning a scheme of amalgamation under Section 394 read with Section 391 of the Companies Act, 1956, is liable to be stamped in accordance with the provisions of the Bombay Stamp Act in its application in the State of Maharashtra?

Section 394 provides that application and order of amalgamation under Section 394 is based on compromise or arrangement which has been proposed for the purpose of amalgamation of two or more companies. The amalgamation scheme, which is an agreement between the companies is presented before the Court and the Court passes an appropriate order sanctioning the compromise or arrangement. The foundation or the basis for passing an order of amalgamation is agreement between two or more companies. Under the Scheme of amalgamation, 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. The company whose property is transferred would be the transferor company and the company to whom property is transferred would be considered as the transferee company. The scheme of amalgamation has its genesis in an agreement between the prescribed majority of shareholders and creditors of the transferor company with the prescribed majority of shareholders and creditors of the transferee company. The intended transfer is a voluntary act of the contracting parties.

The transfer has all the trappings of a sale. The transfer is effected by an order of the Court. The proposed compromise or arrangement is subject to verification by the Court as provided therein. First is that the scheme of compromise or arrangement proposed for the purposes of amalgamation or in connection therewith, shall not be sanctioned unless the Court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interest of its Members or to public interest and; secondly that the order of resolution of transfer of company shall not be made unless official liquidator on scrutiny of the books and papers of the Company makes a report to the Court that the affairs of the company had not been conducted in a manner prejudicial to the interest of its members or to public interest.

By virtue of provisions of section 391 of the Companies Act a scheme sanctioned by the Court is statutorily binding on all its shareholders and creditors including those who dissented from or were opposed to the scheme being sanctioned. Since by law a procedure has been prescribed by which every shareholder and creditor in the absence of individual agreement, gets bound by the scheme, which would otherwise be necessary to give its validity, the two provisos have been introduced casting a duty on the Court to satisfy itself that the affairs of the company were/are not being conducted in a manner prejudicial to the interest of its members or to the public interest. The basic principle underlying these provisos is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties, the same being that it should not be unfair, contrary to the public policy, unconscionable or against the law. There is no adjudication as such. Any modification proposed by the Court in the scheme is also subject to its being accepted by the transferor and the transferee company. If any one of them objects to the modifications suggested by the Court then the scheme would not be sanctioned. The scheme would be sanctioned only if there is an acceptance to the modification proposed by the Court to the scheme by the transferor as well as transferee company. On acceptance of the same it gets incorporated in the compromise or arrangement arrived at between the two companies. Modification in the scheme becomes a part of the compromise or arrangement arrived at between the parties.

While exercising its power in sanctioning a scheme of agreement, the Court has to examine as to whether the provisions of the statute have been complied with. Once the Court finds that the parameters set out in Section 394 of the Companies Act have been met then the Court would have no further jurisdiction to sit in appeal over the commercial wisdom of the class of persons who with their eyes open give their approval, even if, in the view of the Court better scheme could have been framed. This aspect was examined in detail by this Court in Miheer H. Mafatlal Vs. Mafatlal Industries Ltd., 1997 (1) SCC 579. The Court laid down the following broad contours of the jurisdiction of the company court in granting sanction to the scheme as follows:-

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.
2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).
3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the

class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 sub-section (1).

5. That all the requisite material contemplated by the proviso of sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not unconscionable, nor contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams

play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392. Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. The supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as *sui juris* with their open eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement.

Two broad principles underlying a scheme of amalgamation which have been brought out in this judgment are:

1. That the order passed by the Court amalgamating the company is based on a compromise or arrangement arrived at between the parties; and
2. That the jurisdiction of the company court while sanctioning the scheme is supervisory only, i.e., to observe that the procedure set out in the Act is met and complied with and that the proposed scheme of compromise or arrangement is not violative of any provision of law, unconscionable or contrary to public policy. The Court is not to exercise the appellate jurisdiction and examine the commercial wisdom of the compromise or arrangement arrived at between the parties. The role of the court is that of an umpire in a game to see that the teams play their role as per rules and do not overstep the limits. Subject to that how best the game is to be played is left to the players and not to the umpire.

Both these principles indicate that there is no adjudication by the court on the merits as such.

In Hindustan Lever Employees Union case (*supra*) it has been held by this Court that Section 394 casts an obligation on the Court to be satisfied that the scheme of amalgamation or merger was not contrary to the public interest; the basic principle of such satisfaction is none other than the broad and general principle inherent in any compromise or settlement entered between the parties that it should not be unfair or contrary to public policy or unconscionable or that the scheme should not be a device to evade the law.

The term "instrument" has been defined in Section 2(1) of the Bombay Stamp Act 1958 which is as under:-

" "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt;"

This definition of instrument is not amended by the Maharashtra Act of 17 of 1993. The word "Instrument" is defined to mean, every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded, but does not include bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of shares, debenture proxy and receipt. The recital in the scheme of

amalgamation as well as the order of the High Court under Section 394 of the Companies Act, declares, that, upon such order of High Court the undertaking of the transferor company shall stand transferred to the transferee company with all its movable, immovable and tangible assets to the transferee company without any further act or deed. Sub-section 3 of Section 394 provides that the certified copy of the Order of the Court has to be presented before the Registrar of companies within 30 days for registration. And in default any officer of the company, who is in default, becomes liable to be punished and fined, which may extend up to Rs.500/-. Section 391 (3) provides that an order made by the court under sub-section (2) of Section 391 shall not have effect till a certified copy of the order has been filed with the Registrar. On presentation of the certified copy of order, the Registrar of the Company certifies that the transferor company stands amalgamated with the transferee company along with all its assets and liabilities. Thus the amalgamation scheme sanctioned by the Court would be an "instrument" within the meaning of Section 2(i). By the said "instrument" the properties are transferred from the transferor company to the transferee company, the basis of which is the compromise or arrangement arrived at between the two companies.

Mr. Anil B. Diwan and. Mr. Andhyarajuna, learned senior counsels have appeared for the appellants in these appeals. The submissions made by them are on the similar lines.

It was contended by the learned counsels appearing for the appellants that an order of amalgamation under Section 394 is not an order simplicitor of transfer of property by an act of parties with imprimatur of the Court. It is an order made by the Court after judicial scrutiny and transfer of the property under such an order would not be an act of parties to which the Court puts its seal of approval. Stamp duty can be levied on "documents" or "instruments". The Order of the Court in exercise of its judicial functions is not "a document" or an "instrument". Once the Court passes an order or a decree, it is required to be implemented or executed as such. The same cannot be subjected to stamp duty otherwise the orders passed by the Courts would become subject to interference by the revenue authorities and would not be admissible in evidence unless the stamp duty is paid.

It is difficult to subscribe the view propounded by the learned counsels for the appellants. As stated earlier, the order of amalgamation is based on a compromise or an arrangement arrived at between the two companies. No individual living being owns the company. Each shareholder is the owner of the company to the extent of his share holding. By enacting Sections 391 to 394 a method has been devised to give effect to the will of the prescribed majority of shareholders/ creditors. Even in the absence of individual agreement by all the shareholders and creditors the decision of the majority prescribed in Section 391 (2) binds all the creditors and the shareholders. The Scheme after being sanctioned by the Court binds all its creditors, members and shareholders including even those who were opposed to the scheme being sanctioned. It binds the company as well. While exercising its power in sanctioning the scheme of amalgamation, the Court is to satisfy itself that the provisions of statute have been complied with. That the class was fairly represented by those who attended the meeting and that the statutory majority was acting bona-fide and not in an oppressive manner. That the arrangement is such as which a prudent, intelligent or honest man or a member of class concerned and acting in respect of the interest might reasonably would take. While examining as to whether the majority was acting bona-fide the Court would satisfy itself to the effect that the affairs of the company were not being conducted in the manner prejudicial to the interest of its members or to public interest. The basic principle underlying such a situation is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties the same being that it should not be unfair, contrary to public policy and unconscionable or against the law.

Orders passed by the Court resulting in transferring the rights in property have been subjected to levy of stamp duty in several situations. It is there from the date of the inception of the Indian Stamp Act 1899. Section 2 (m) of the Indian Stamp Act 1899 defines "instrument of partition" to mean 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. This provision specifically provide that any final order effecting partition by any Court, Revenue Authority or award made by the Arbitrator directing partition would be an instrument of partition.

This Court in Purshottam H. Jadve and Ors. Vs. V.B. Potdar, 1966 (2) SCR 353, considered as to whether an award made by the Industrial Tribunal could be considered as an instrument. After considering the relevant provisions of the law it was held that the word "instrument" would include awards made by the Industrial Tribunal.

In the case of The Commissioner of Inland Revenue Vs. G. Anous & Co. & Anr. (1891) \026 Vol. XXXIV Queen's Bench Division 579, considered as to what interpretation has to be placed upon the expression "conveyance on sale" with regard to Section 70 of the stamp Act, 1899 and held:-

"The term conveyance on sale includes every instrument and every decree or order of any Court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction."

The Court held that the thing, which is made liable to stamp duty is the "instrument". It is not a transaction of purchase and sale, which is struck at, it is the "instrument" whereby the purchase and sale are affected which is struck at. It is the "instrument" whereby any property upon the sale thereof is legally or equitably transferred and the taxation is confined only to the instrument whereby the property is transferred. If a contract of purchase or sale or a conveyance by way of purchase and sale, can be, or is, carried out without an instrument, the case would not fall within the Section and no tax can be imposed. Taxation is confined to the instrument by which the property is transferred legally and equitably transferred.

Point as to whether the stamp duty was leviable on the Court order sanctioning the scheme of amalgamation was considered at length in Sun Alliance Insurance Ltd. Vs. Inland Revenue Commissioners 1971 (1) All England Law Reports 135. The point which arose for determination as to whether the stamp duty was payable on the order of the Judge sanctioning the scheme of arrangement under Section 206 of the Companies Act, it was held:-

" It follows that it is the court order that effects the transfer; and this is nonetheless so because the scheme is not operative until an office copy has been delivered to the Registrar of Companies for registration, for the court order itself ordered that to be done and the Act so provides; nor because London has still to cause the name of Sun Alliance to be entered on to the register as the holder of the shares. The registration of the transferee occurs in every case where a transfer is executed, and merely perfects the title of the transferee. The same thing occurs in the case of registered land, where one finds a transfer and subsequent registration. I have therefore come to the conclusion that by the court order the shares were transferred to Sun Alliance, or, to use the words of s. 54, by that order property was transferred to a purchaser."

Expression "conveyance on sale" as provided in Section 54 of the Stamp Act, 1891 is similar to Section 2 (g) of the Bombay Stamp Act. The expression "conveyance on sale" as defined in the said Section includes every instrument, and every decree or order of any Court or any Commissioner,

whereby any property, or a estate or interest in any property, upon the sale thereof was transferred or vested in the purchaser, or any other persons on his behalf and on his direction.

The Court further considered as to whether the order of the judge is an 'instrument' executed in any part of the United Kingdom for the purposes of Section 14(4) of the Stamp Act, 1891; it was held that it was an instrument executed in the United Kingdom within the meaning of Section 14(4) of the Stamp Act 1891. It was further held that order of the Court was liable to stamp duty as it resulted in transferring the property and that the order passed by any Court which results in transfer of property would be an instrument as it includes every document.

Section 391 (2) of the Companies Act, 1956 provides as follows:

"391(2). If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed, under the rules made under Section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or in the case of a company which is being wound up, on the liquidator and contributories of the company:

Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like."

Section 394 (2) of the Companies Act, 1956 provides that the properties and liabilities of the transferor company stand transferred to the transferee company by virtue of an order of court. The statutory form of an order under Section 394 (2) of the Companies Act provides for three different Schedules in order to incorporate therein the properties transferred. It would be useful to take notice of the statutory form of an order under Section 394 (2) of the Companies Act.

"THE COMPANIES (COURT) RULES, 1959  
FORM NO. 42

(See rule 84)

Upon the above petition and application coming on for further hearing on\005 upon reading etc, and upon hearing, etc.

THIS COURT DOTH ORDER

(1) That all the property, rights and powers of the Transferor company specified in the first, second and third parts of the Schedule hereto and all other property, rights and powers of the transferor company be transferred without further act or deed to the transferee company and accordingly the same shall pursuant

to section 394(2) of the Companies Act, 1956, be transferred to and vest in the transferee company for all the estate and interest of the transferor company therein but subject nevertheless to all charges now affecting the same other than (here set out any charges which by virtue of the compromise or arrangement are cease to have effect); and

(2) That all the liabilities and duties of the transferor company be transferred without further act or deed to the transferee company and accordingly the same shall, pursuant to section 394(2) of the Companies Act, 1956, be transferred to and become the liabilities and duties of the transferee company ;and

(3) That all proceeding now pending by or against the transferor company be continued by or against the transferee company; and

(4) That the transferee company do without further application allot to such members of the transferor company as have not given such notice of dissent as is required by clause\005.of the compromise or arrangement herein the shares in the transferee company to which they are entitled under the said compromise or arrangement; and

(5) That the transferor company do within 14 days after the date of this order cause a certified copy of this order to be delivered to the Registrar of Companies for registration and on such certified copy being so delivered the transferor company shall be dissolved and the Registrar of Companies shall place all documents relating to the transferor company , and registered with him on the file kept by him in relation to the transferee company and the files relating to the said two companies shall be consolidated accordingly; and

(6) That any person interested shall be at liberty to apply to the court in the above matter for any directions that may be necessary.

#### SCHEDULE

##### Part I

(Insert a short description of the freehold property of the transferor company )

##### Part II

(Insert a short description of the leasehold property of the transferor company )

##### Part III

(Insert a short description of all stocks, shares, debentures and other charges in action of the transferor company )"

(Emphasis supplied)

The transfer of assets and liabilities takes effect by an order of the Court. The order also provides for passing of consideration from the transferee company to the shareholders of the transferor company. The consideration for sale in a transaction like this is the shares. The share exchange ratio is decided on the basis of number of factors including the value of net assets of the transferor and transferee company. To arrive at this figure of net assets the liabilities have to be set off against the gross value of the assets. The share value is fixed. The properties belong to the company and the company belongs to the shareholders. Once the shareholders of the transferee company receive the consideration it would be deemed as if the owner has received the consideration.

Strong reliance was placed by the counsel for the appellants on the judgment of this Court in M/s. General Radio and Appliances Co. Ltd. and Ors Vs. M.A. Khader (Dead) By Lrs., 1986 (2) SCC 656. Transferor-company had taken a premises on rent with the stipulation that the tenant would not sublet the premises without the written consent of the landlord. After sanctioning of the scheme for amalgamation by the Court, the tenanted premises came to be transferred to the transferee company. Landlord filed the eviction suit. The question before the Court was whether the amalgamation amounted to transfer of tenant company's right under the lease by way of subletting and as such violative of the provisions of Section 10(ii)(a) of the A.P. Buildings (Lease, Rent and Eviction) control Act as also the terms of the rent agreement. It was observed that the A.P. Act prohibited in specific terms both subletting as well as transfer or assignment of the interest of the tenant. By the order of amalgamation, the interest, rights of the transferor company in all its properties including leasehold interest tenancy rights and possession were transferred and vested in the transferee company voluntarily and the transferor company was dissolved and ceased to be exist for all practical purposes in the eye of law. This amounted to contravention of Section 10 (ii)(a) of the A.P. Rent Act as well as of the terms of the said rent agreement thereby making the transferee company liable to be evicted from the tenanted premises. Though, the court held that the transfer was voluntary but still to test the argument and treating it to be involuntary it was observed that there was no express provision in the A.P. Rent Act that in case of involuntary transfer or transfer of rights by virtue of a scheme of amalgamation sanctioned by the court under Section 394 of the Companies Act will not come within the purview of Section 10(ii) (a) of the A.P. Rent Act, and, therefore, the transferee company is required to be evicted. Even in the case of involuntary transfer or transfer of tenancy rights by virtue of scheme of amalgamation sanctioned by the court by its order under Sections 391 and 394 of the Companies Act the transfer will come within the purview of Section 10(ii) (a) of the A.P. Rent Act. It was observed that since the order of amalgamation had been made on the basis of a petition filed by the transferor company it could not be said that it was an involuntary transfer effected by the order of the Court. Instead of supporting the contention of the appellant this decision indicates to the contrary as the Court held that order of transfer of property by a scheme of amalgamation was not "involuntary" meaning thereby it was a voluntary act by agreement between the parties. In any case, the Court decided the dispute between the parties in the context of specific provisions of the A.P. Rent Act and would have no applicability to the point which is being examined by the present case.

A document creating or transferring a right is an instrument. Can it be said that an order effectuating the transfer is a document? The answer has been given in the affirmative by this in Court in Haji Sk. Subhan Vs. Madhorao, AIR 1962 SC 1230, wherein it was held that the question is whether the word "document" includes a decree of the Court. It was held that there was no good reason why a decree of the court, when it affects the proprietary rights and is in relation to them should not be included in this expression. This question more pointedly arose before this Court in Ruby Sales and services (P) Ltd., (supra). In that case in a suit for specific performance the property was conveyed to the vendee by a consent decree. The question arose whether the consent decree is an instrument and liable to be stamped. The consent decree contained a recital to the effect that "this decree does operate as the conveyance from the defendants in favour of the plaintiffs in respect of the said property more particularly described in exhibit A to the plaint." The Court held that "there is no particular pleasure in merely going by the label but which is decisive is by the terms of the document. It is clear from the terms of the consent decree that it is also an "instrument" under which title has been passed over to the appellant/plaintiffs. It is a live document transferring the property in dispute from the defendants to the plaintiffs." The aforesaid decree was based on an agreement between the parties. So is the case with an order under Section 394 of the Companies Act which is also based on an agreement between the transferor company and the transferee company.

Learned counsel for the appellants argued that the Ruby Sales and services (P) Ltd., (supra) was a case of consent decree where the term of the settlement was admittedly a conveyance, transferring property alone. That the order passed by the High Court under Section 394 of the Companies Act cannot be equated with a consent order. This submission cannot be accepted. The Court held that consent decree was an instrument. It was not held to be an instrument because it was a consent decree. It was held to be an instrument because it conveyed the title in the property in dispute from the defendant to the plaintiff. It was held to be an instrument because it had the effect of conveying the title and not because it was a consent decree. Once this definition is kept in view it would be clear that consent or no consent when the decree or order of the Court purports to transfer title in the property, it becomes an instrument. Court negatived the submission made, that, prior to introduction of Section 2 (g)(iii) the consent decree was not included in the definition of "conveyance" and "instrument" was negatived by observing "it appears to us that the amendment was made out of abundant caution and it does not mean that the consent decree was not otherwise covered." It clearly shows that the Court was of the opinion that consent decree which purports to convey the title in the property was in an instrument liable for stamp duty at all times and it was only by way of abundant caution that the Legislature had included the consent decree in the definition of the word "conveyance".

In view of the aforesaid discussion, we hold that the order passed by the Court under Section 394 of the Companies Act is based upon the compromise between two or more companies. Function of the Court while sanctioning the compromise or arrangement is limited to oversee that the compromise or arrangement arrived at is lawful and that the affairs of the company were not conducted in a manner prejudicial to the interest of its members or to public interest that is to say it should not be unfair or contrary to public policy or unconscionable. Once these things are satisfied the scheme has to be sanctioned as per the compromise arrived at between the parties. It is an instrument which transfers the properties and would fall within the definition of Section 2 (1) of the Bombay Stamp Act which includes every document by which any right or liability is transferred. The State Legislature would have the jurisdiction to levy stamp duty under Entry 44, List III of the seventh Schedule of the Constitution of India and prescribe rates of stamp duty under Entry 63, List II.

It was next contended that the impugned duty is not a duty upon instrument but it is in reality a duty on transfer of property which the State Legislature is not competent to impose.

In Welfare Association, A.R.P., Maharashtra & Anr. Vs. Ranjit P. Gohil & Ors., 2003 (2) Scale 288, it was held that there is a presumption that the Legislature does not exceed its jurisdiction. A statute should be construed so as to make it effective and operative on the principle expressed in the maxim "ut res megis valeat quam pereat". (It is better to validate a thing than to invalidate it). The burden of establishing that the Act is within the competence of the Legislature, or that it has transgressed other constitutional mandates is always on the person who challenges its vires. That the fountain source of legislative power exercised by the Parliament or the State Legislature is not Schedule Seven; the fountain source is Article 246 and other provisions of the Constitution. The function of the three Lists in Seventh Schedule is merely to demarcate legislative fields between Parliament and State Legislatures and not to confer any legislative power. The several entries mentioned in the three Lists are fields of legislation. While exercising the legislative competence of a Legislature in regard to a particular enactment with reference to the entries in the various lists it is necessary to examine the pith and substance of the Act and to find out if the matter comes substantially within the item in the list. The express words employed in an entry would necessarily include incidental and ancillary matters so as to make the legislation effective. The scheme of the Act under scrutiny, its object and purpose, its true nature and character and the pith and substance of the legislation are to be focused at.

If the matter is within the exclusive competence of State Legislature, i.e., List II then the Union Legislature is prohibited to make any law with regard to the same. Similarly, if any matter is within the exclusive competence of the Union, it becomes a prohibited field for the State Legislatures. The concept of occupied field is relevant in the case of laws made with reference to entries in List III. The doctrine of covered field has to be applied only to the Entries in List III. This proposition of law is well settled in a number of decisions of this Court including State of A.P. & Ors. Vs. McDowell & Co. & Ors., 1996 (3) SCC 709; State of Rajasthan & Ors. Vs. Vatan Medical & General Store & Ors., 2001 (4) SCC 642 and Shri Krishna Gyanoday Sugar Ltd. & Anr. Vs. State of Bihar, 2003 (2) Scale 226.

The relevant entries of the Constitution Schedule VII are as follows:

List II Entry 63:

" Rates of Stamp duty in respect of documents other than those specified in provisions of List I with regard to the rates of stamp duty."

List III Entry 44:

"Stamp duties other than duties or fees collected by means of judicial stamps but not including rates of stamp duty"

List I Entry 91:

"Rates of stamp duty in respect of Bill of Exchange, cheques, promissory notes, Bill of landing, letter of credit, policies of insurance, transfer of shares, debentures, proxies and receipts."

List I Entry 43:

"Incorporation, regulation winding up of trading corporation including banks insurances and finance corporations but not including corporative societies."

List I Entry 44:

" Incorporation, Regulation and winding up of corporations, whether trading or not with object not confined to one state but not including universities."

List I Entry 97:

"Any other matter not enumerated in List II and List III, including any tax not mentioned in either of any those lists."

Union under Entry 91 of List I can prescribe rates of stamp duty in respect of Bill of Exchange, cheques, promissory notes, Bill of landing, letter of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. In exercise of power conferred by Entry 63 List II it is open for the State Legislature to make amendment in the Act in regard to the rates of Stamp duty in respect of documents other than those specified in provisions of List I.

As discussed above, the order passed under Section 394 is founded on consent and this order is an instrument as defined under Section 2 (1) of the Bombay Stamp Act. The State Legislature would have the jurisdiction to levy stamp duty under Entry 44 List III of the Seventh Schedule of the Constitution and prescribes rate of stamp duty under Entry 63 List II. It does not in any way impinge upon any entry in List I. Entry 44 of List III empowers the State Legislature to provide for stamp duties other than duties or fees collected by means of judicial stamps. Along with this, Entry 63 of List II empowers the State Legislature to prescribe rates of stamp duty in respect of documents other than those specified in the provisions of List I, that is to say, rates of stamp duty in respect of Bill of Exchange, cheques, promissory notes, Bill of landing, letter of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. 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.

Charging Section, i.e., Section 3 of the Bombay stamp Act reads:

"3. Instrument chargeable with duty.

Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in Schedule I as the property duty therefor respectively, that is to say \026

- (a) every instrument mentioned in Schedule I, which not having been previously executed by any person, is executed in the State on or after the date of commencement of this Act;
- (b) every instrument mentioned in Schedule I, which not having been previously executed by any person, is execute out of the State on or after the said date, relates to any property situate, or to any matter or thing done or to be done in this State and is received in this State:

xxx

xxx

xxx"

The duty charged by the State Legislature is on the instrument and is on the execution of the instrument. The measure of charging stamp duty may be fixed or ad-valoram which is to be determined by the Legislature. The basis for computation of stamp duty can be determined by the State Legislature and it may be on the basis of the market value of the property transferred or at a fixed amount.

In Himalaya House Co. Ltd. Vs. The Chief Controlling Revenue Authority, & Anr. AIR 1972 SC 899, it was observed:

"On a conspectus of these authorities it is, therefore, apparent that in the exercise of powers conferred on it by Entry 63 of List II and Entry 44 of List III, it was open to the State Legislature not only to make an amendment in the Act in regard to the rates of stamp duty but also in regard to the mode of computation of stamp duty. In other words, it was open to the State Legislature to lay down that the basis for computing stamp duty shall not be the amount or value of the consideration of the conveyance as set forth therein but it shall be the market value of the property which is the subject matter of conveyance."

{Emphasis supplied}

Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 1997 was enacted whereby in Article 25 of the Schedule I of the Bombay Stamp Act, 1958 Clause (da) and Explanation III were added with retrospective effect prescribing the rates at which the duty was to be calculated and levied. Vires of this provision of this Act were not challenged in the writ petition.

It was next contended that provisions of Section 2(g)(iv) read with Section 34 of the Bombay Stamp Act which provides that the instrument not duly stamped would be inadmissible in evidence are repugnant to Section 394 of the Companies Act and that the State Legislation cannot be prevail over the provisions of the Companies Act. It was also contended that in the guise of the stamp duty the State Legislature is in reality imposing a tax on the amalgamation of the companies and has therefore encroached on the field of the Parliament under Entry 43, List I of the Constitution. We do not find any substance in this submission as well. Stamp duty is levied on the instrument and the measure is the valuation of the property transferred. There is no question of encroachment on the field of Parliament under Entry 43, List I of the Constitution which empowers the Union to make laws re: incorporation, regulation winding up of trading corporation including banks insurances and finance corporations but not including corporative societies. The follow up legislation under Entry 43 List I is totally different from the levy of stamp duty and of prescribing rate of stamp duty on such documents. The Bombay Stamp Act does not provide for any Legislation with regard to incorporation, regulation and winding up of corporations. It only levies the stamp duty and prescribes the rate of stamp duty in respect of documents by compromise or arrangement.

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 visa-a-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 under Section 394 of the Companies Act, the basis of which is consent and voluntary act which ultimately result in transfer of property for consideration.

Under the Bombay Stamp Act conveyance includes any instrument by which property, whether movable or immovable, or any estate or interest in any property is transferred to, or vested in, any other person, inter vivos. The word "inter vivos" has not been defined in the Act or in the General Clauses Act. The meaning assigned to the word "inter vivos" in the Black's Law Dictionary, 6th Edn., is:

"Between the living; from one living person to another. Where property passes by conveyance, the transaction is said to be inter vivos, to distinguish it from a case of succession or devise. So an ordinary gift from one person to another is called a "gift inter vivos"

It was contended that since the transaction was not between the 'living beings' the same was not "inter vivos" as the transfer of property had not taken place between the 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 individual, whether incorporated or not, have been included amongst the "living person" in this Section. It clearly brings out that a company can effect transfer of property. The word "inter vivos" in the context of Section 394 of the Companies Act

would include within its 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 eyes of law who can by mutual consent enter in a contract or transfer the property. The company would be juristic person created artificially in the eyes of 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.

No other point was urged.

For the reasons stated above, we do not find any merit in these appeals and dismiss the same with no order as to costs.