
(2019) 05 CAL CK 0009
In the Calcutta High Court
Case No : Writ Petitions (WP) No. 284 Of 2018

Dalgreen Agro Pvt. Ltd

APPELLANT

Vs

State Of West Bengal & Ors

RESPONDENT

Date of Decision : 03-05-2019

Acts Referred:

Companies Act, 1956 — Section 391, 394

Indian Stamp Act, 1899 — Section 2(10), 31(1)

Indian Stamp Act, 1899 — Article 23, 23A, 23A(a), 23A(a)(i), 23(a)(ii)

Citation : (2019) 05 CAL CK 0009

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Sudeep Sanyal, Lopamudra Moitra, Anirudhya Dutta, Amitesh Banerjee, Ayan Banerjee

Final Decision : Disposed Off

Judgement

Debangsu Basak, J

The petitioner has assailed a writing dated February 8, 2018 issued by the Collector of Stamp Revenue, Kolkata adjudicating the stamp duty payable in respect of the order dated February 26, 2016 passed by the High Court in Company Petition No. 242 of 2016 connected with Company Application No. 137 of 2016 sanctioning a scheme of amalgamation between the transferor and the transferee companies.

Learned Advocate appearing for the petitioner has submitted that, the impugned order has proceeded on the basis of Article 23A of the Indian Stamp Act, 1899. He has submitted that, the transferee company is not the beneficiary of any immovable property being transferred to it by virtue of sanction granted to the Scheme of Amalgamation. Therefore, stamp duty for a conveyance of an immovable property is not payable by the transferee company. He has submitted that, Article 23A prescribes half per centum of the value of the issued paid up and subscribed share capital of the transferee company as the stamp duty

payable by the transferee company. The impugned order is therefore incorrect. He has drawn the attention of the Court to the proviso to Article 23A and submitted that, the main provision cannot be cut down by the proviso. He has relied upon All India Reporter 1963 Supreme Court page 1083 (Hindustan Ideal Insurance Co. Ltd. v. Life Insurance Corporation of India) in support of such contention. Relying upon 2012 Volume 3 Calcutta High Court Notes page 102 (In re: Emami Biotech Limited & Anr.) he has submitted that, stamp duty is payable by the transferee company even in absence of special provision requiring stamp duty to be payable. However, subsequent to the judgments of the Court rendered in 114 Company Cases 1992 (In re: Gemini Silk Ltd.), 130 Company Cases page 510 (Madhu Intra Ltd. v. Registrar of Companies) and 2004 Volume 9 Supreme Court Cases page 438 (Hindustan Lever v. State of Maharashtra) Article 23A was introduced to the Indian Stamp Act, 1899. The impugned order misconstrues and misapplies the provisions of Article 23A in the facts of the present case.

Learned Senior Standing Counsel appearing for the State has submitted that, the State has proceeded on the basis of the stamp duty attracted in the facts of the present case at the rate which is the highest in view of the words "whichever is higher" as appearing in Article 23A. He has submitted that, the impugned order cannot be faulted.

It is the contention of the parties that, the words "whichever is higher" used in the two sub-clauses in the column of proper stamp duty leviable, is causing problems, both for the person seeking to register the order sanctioning the scheme as also for the registering authority.

Dalgreen Agro Commodities Pvt. Ltd. and Dalgreen Agro Pvt. Ltd. applied under Sections 391 and 394 of the Companies Act, 1956 for grant of sanction of a scheme of amalgamation whereby and whereunder, Dalgreen Agro Commodities Pvt. Ltd. was sought to be transferred to and vested with Dalgreen Agro Pvt. Ltd. with all assets and liabilities. Such scheme of amalgamation was sanctioned by this Hon'ble Court by an Order dated April 26, 2016 passed in Company Petition No. 242 of 2016 connected with Company Application No. 137 of 2016. By virtue of the sanction of the scheme of amalgamation, the petitioner became obliged to apply before the registering authorities for registering the order granting the sanction of the scheme of amalgamation as also the scheme of amalgamation. The petitioner applied for adjudication of stamp duty under Section 31(1) of the Act of 1899. By the impugned writing dated August 31, 2017, the authorities informed the petitioner that, the stamp duty payable in respect of the deed would be six per cent of the value of the paid up share capital of the petitioner company as the transferee company, in terms of Article 23A.

Gemini Silk Ltd. (supra), Hindustan Lever (supra) and Emami Biotech Limited & Anr. (supra) have held that, a scheme of amalgamation sanctioned by the Court under the Companies Act, 1956 is required to be registered when, transfer of immovable properties are involved. Madhu Intra Ltd. (supra) however held a different view. Such view is no longer good law in view of the pronouncement of

the Supreme Court in Hindustan Lever (supra). Emami Biotech Limited & Anr. (supra) after noticing Gemini Silk Ltd. (supra), Madhu Intra Ltd. (supra) and Hindustan Lever (supra) has held that, the order sanctioning the scheme of amalgamation is registrable notwithstanding any amendment being made to the Act of 1899. Apparently, the State Legislature introduced Article 23A to the Schedule IA as applicable to the State of West Bengal subsequent to the pronouncements of Gemini Silk Ltd. (supra), Madhu Intra Ltd. (supra) and Hindustan Lever (supra). Article 23A is as follows:-

Description of Investments

Proper Stamp Duty

"23A. Conveyance, in respect of amalgamation, merger, reconstruction, or demerger, of companies, other than amalgamation, merger, reconstruction or demerger, of two banking companies or a banking company with a nonbanking financial company, executed on the basis of decree or final order of any Civil Court or every order made by the Tribunal under section 394 of the Companies Act, 1956 (1 of 1956), as defined by section 2(10), not being a transfer charged or exempted under No. 62, on the market value of the property which is the subject-matter of the conveyance, when the property of the transferor company located in the State of West Bengal is transferred to the transferee company by way of such amalgamation merger, reconstruction, or

The same duty as a Conveyance (No. 23) on the aggregate of the market value of the shares issued or allotted, in exchange or otherwise, and the amount of consideration paid- (a) by the transferee company, for such amalgamation or merger:

Provided that the amount of such duty chargeable under this article shall not exceed-

(i) an amount equal to two per centum of the true market value of the immovable property located within the State of West Bengal of the transferor company, or

demerger of companies under the decree or final order of any Civil Court or every order of the Tribunal under section 394 of the Companies Act, 1956:

(ii) an amount equal to half per centum of the aggregate of the market value of the shares issued or allotted, in exchange or otherwise, and the amount of consideration paid by such transferor company, for such amalgamation,

Provided that on and after the constitution of the National Company Law Tribunal, the expression 'High Court' shall be read as 'Tribunal'.

Whichever is higher;

(b) by the resulting company, for such reconstruction or demerger:

Provided that in case of reconstruction or demerger, the amount of such duty

chargeable under this item shall not exceed-

(i) an amount equal to two per centum of the true market value of the immovable property located within the State of West Bengal of the transferor company, or

(ii) an amount equal to half per centum of the aggregate of the market value of the shares issued or allotted, to the resulting company and the amount of consideration paid for such demerger, Whichever is higher;"

Article 23A treats an order sanctioning a scheme of amalgamation or reconstruction as a conveyance. It exempts an order sanctioning a scheme of amalgamation or reconstruction between banking companies or a banking company with a non-banking financial company. It takes into its fold orders of sanction passed by a Court or a Tribunal exercising jurisdiction under the Companies Act, 1956 or the Companies Act, 2013.

Article 23A deals with the schemes that Companies can enter into each other, namely a scheme of amalgamation and scheme of reconstruction. There is a third type of scheme which Companies can enter into each other. The third type is a combination of the two types noted. Three Companies may enter into a scheme between them whereby and whereunder, the first company may merge with the third company and the second company may demerge one of its units to the third company. Such third type is also exigible to stamp duty. Any order sanctioning a scheme involving transfer of immoveable property was compulsorily registrable even under the unamended provisions of the Act of 1899. The amended Article 23A introduced, recognises and reinforces such obligation.

A scheme of amalgamation as well as a scheme of reconstruction is divided into two eventualities. The eventualities are on the basis of the transferor company or companies as the case may be having any immoveable property in the State of West Bengal or not. The two eventualities are for the purpose of calculating the quantum of stamp duty payable. One eventuality is the value of the immoveable property lying in the State of West Bengal and the other is the value of the consideration for the transfer other than the immovable property involved. The transferor company or the sanctioning company is to pay the highest of the two eventualities in the type of scheme involved. Article 23A(a)(i) calculates stamp duty at the rate of two percent of the true market value of the immovable property located within the State of West Bengal of the transferor company, if the scheme of amalgamation has a transferor company which possesses immovable properties in the State of West Bengal. Article 23(a)(ii) calculates stamp duty at the amount equal to half per centum of the aggregate of the market value of the shares issued or allotted, in exchange or otherwise, and the amount of consideration paid by the transferor company if the transferor company in a scheme of amalgamation does not have any immoveable property within the State of West Bengal. The two quantums are first arrived at and by virtue of the

words "whichever is higher" used in Article 23A(a), the transferee company is required to pay the highest of the two calculations, as the stamp duty under Article 23A. Similar provisions are there for a resulting company where there is a scheme of reconstruction or demerger involved. The opening words of Article 23A in the column 'proper stamp duty' are qualified by the subsequent two sub-clauses. The opening words require stamp duty to be payable at the same rate as that of a conveyance under Article 23. Article 23 levies stamp duty at varying rates on different situations in respect of conveyances relating to immovable properties other than those described in Article 23A. None of those situations are applicable to Article 23A. In any event, the situations contemplated to be governed under Article 23A are defined in the column of descriptions as well as in the column prescribing the proper stamp duty payable. There is no ambiguity in those two columns of Article 23A. For example, an order sanctioning a scheme of amalgamation, merger, reconstruction or demerger of two banking companies or a banking company with a non-banking financial company is not required to pay any stamp duty. All other companies are required to pay stamp duty at the rates prescribed in the column of proper stamp duty. Companies other than banking companies however, have been segregated into two portions. One portion is the transferee company coming into being pursuant to an order sanctioning a scheme of amalgamation or merger. Such situation is dealt with sub-clause (a) of Article 23A. The words "whichever is higher" used in sub-clause (a) should be read to mean that when, (i) and (ii) of sub-clause (a) are attracted in a fact scenario then, the highest rate of the two prescribed rates would be attracted. For example, where, in a scheme of amalgamation or merger, the transferor company has an immovable property located in the State of West Bengal, then, the two per cent of the true market value of the immovable property and half per cent of the aggregate of the market value of the shares issued or allotted and the amount of consideration paid, have to be considered to find out whichever is higher. In a given case, the true market value of the immovable property of the transferor company located in the State of West Bengal may be Rs. 10 Lakhs only whereas, the aggregate of the market value of the shares issued or allotted, in exchange or otherwise and the amount of consideration paid by the transferor company is, let's say Rs. 100 Crores, then obviously, half per centum of Rs. 100 Crores will be higher than two per centum of Rs. 10 Lakhs. In such a situation, the amount of stamp duty payable would be on the basis of the aggregate of the market value of the shares and the consideration paid and not on the value of the immovable property. Similarly, the stamp duty payable by the resulting company would be determined as obtaining in the fact situation of a given case. In the present case, a scheme of amalgamation is involved. The transferor company does not have any immovable property located within the State of West Bengal. The issued share capital of the transferee company is Rs. 13,75,00,000/-. The value paid by the transferee company is Rs. 2,94,25,000/-. Therefore, in my view, the amount of stamp duty payable would be half per cent of Rs. 2,94,25,000/-.

The opening words of Article 23A in the column under proper stamp duty specifies that the same stamp duty as a conveyance in terms of Article 23 is payable on the aggregate of the market value of the shares issued or allotted in exchange or otherwise. Article 23 deals with conveyance which is not charged under Article 23A. It deals with various situations of immovable properties and prescribes various quantum of stamp duty payable in respect of such situations. None of the situations prescribed in Article 23 are attracted in the facts of the present case. Moreover, Article 23A is specific with regard to the description of the instrument as also the quantum of stamp duty payable in relation to a specific act. As noted above, a transferee company in a scheme of amalgamation is required to pay a particular stamp duty in two circumstances. A resulting company is required to pay stamp duty in two circumstances. The circumstances are specified. Such circumstances do not appear in Article 23. When there is a specific circumstance governing the field and the same is attracted, then, the department cannot take the benefit of another article which does not deal with such specific scenario. Therefore, the contention of the respondents that, the highest stamp duty of six per cent prescribed in Article 23 stands attracted by virtue of the user of the words "whichever is higher", is without any basis. Moreover, the words "whichever is higher" are used in relation to the two sub-clauses namely (a) and (b). The two sub-clauses are self contained in themselves. Therefore, in my view, the words "whichever is higher" used in those two sub-clauses cannot be read to mean that, the highest stamp duty of six per cent as prescribed in Article 23 is payable in respect of the four scenarios noted in Article 23A. Giving such an interpretation will render the entirety of Article 23A where it prescribes proper stamp duty as otiose, surplusage and redundant. An interpretation which does not allow such an eventuality to happen should be preferred to that which renders words used in a statute as otiose, surplusage and of no consequence.

Hindustan Ideal Insurance Co. Ltd. (supra) has held that, where the impugned provision is clear, its effect cannot be cut down by the proviso. In the facts of the present case, Article 23A by itself is unambiguous. The quantum of stamp duty payable in the specific scenarios enumerated in Article 23A is not governed by the highest stamp duty payable in respect of Article 23.

The authorities have adjudicated the stamp duty payable in respect of the scheme of amalgamation, by the impugned writing dated February 8, 2018, at Rs. 17,65,500/-. The authorities have arrived at a figure, after calculating the value paid by the transferee company to be at Rs. 2,94,25,000/-. The authorities have applied 6 per cent rate on the sum of Rs. 2,94,25,000/- to arrive at the figure of Rs. 17,65,500/-. In view of the discussions above, the rate applicable would be half per cent on the value paid by the transferee company. In such circumstances, the impugned writing dated February 8, 2018 is quashed. The registering authority will allow the petitioner to present the document accompanied by stamp duty payable at the rate of half per cent on Rs. 2,94,25,000/-. In the event, such instrument is accompanied by such stamp

duty, the registering authority, shall register the same, in accordance with law.
W.P. No. 499 of 2018 is disposed of accordingly. No order as to costs.