
(2002) 08 CAL CK 0035
In the Calcutta High Court

Gemini Silk Limited

APPELLANT

Vs

Gemini Overseas Limited

RESPONDENT

Date of Decision : 08-08-2002

Acts Referred:

Companies (Court) Rules, 1959 — Rule 84
Companies Act, 1912 — Section 153, 153A
Companies Act, 1956 — Section 10, 235, 236, 237, 238
Income Tax Act, 1961 — Section 2(19AA), 47, 72A
Sales of Goods Act, 1930 — Section 4(1)
Stamp Act, 1899 — Section 2(10), 2(14), 24
Transfer of Property Act, 1882 — Section 29, 5, 54, 9

Citation : (2003) 53 CLA 328 : (2003) 114 CompCas 92 : (2008) 4 CompLJ 66

Hon'ble Judges : Girish Chandra Gupta, J

Bench : Single Bench

Judgement

Girish Chandra Gupta, J.—This is an application for confirmation of a scheme of amalgamation between the petitioner No. 1 and the petitioner No. 2. The assets and properties of the petitioner No. 1 including moveable, immovable, rights and powers of every description together with liabilities are sought to be transferred to the petitioner No. 2 in consideration of the petitioner No. 2, the transferee issuing to the shareholders of the transferor company being the petitioner No. 1, one equity share of Rs. 10/- each credited as fully paid up for every 15 fully paid up equity shares of Rs. 10/- each held by the shareholders of the transferor company the petitioner No. 1.

2. A question cropped up as to whether Stamp Duty is payable in a case of transfer like this. By an order dated 13-5-2002 the petitioners were directed to serve a copy of the petition upon the learned Advocate General and the matter was adjourned till 20-5-2002. On 20-5-2002 both the petitioners and the learned Advocate General made their respective submission. the matter was partly heard State of West Bengal was added as a party to this application. A large number of applications for sanction of scheme of reconstruction or amalgamation were subsequently tagged with this application in order to facilitate the learned

advocates appearing in other matters to appear and make their submissions on the common question raised in these cases. Accordingly, various learned advocates appearing in other matters also made their respective submissions against the issue whereas learned Advocate General made his submission for the issue. The issue debated before this Court is as follows:

Whether an order sanctioning a scheme of (SIC) or amalgamation u/s 394 read with Section 391 of The Companies Act, 1956 is liable to be stamped in accordance with the provisions of Indian Stamp Act in its application to the State of West Bengal.

3. An answer to this issue largely depends upon the answer to the question as to whether such an order amounts to a conveyance within the meaning of the provisions of Stamp Act if answer to this question is in the affirmative and order u/s 394 of the Companies Act is liable to be stamped.

4. The expression "conveyance" has been defined in Section 2 Sub-section (10) of the Indian Stamp Act as follows:

(10) Conveyance--"Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable is transferred inter vivos and which is not otherwise specifically provided for by Schedule I or by Schedule IA as the case may be.

5. There is a West Bengal Amendment by which an explanation has been added which provides as follows:

Explanation -- An Instrument-

(i) whereby a co-owner of a property having defined share therein transfers such share or part thereof to another co-owner of the (SIC) among co-owner or

(ii) whereby a partner transfer his share in the property of the partnership business to another partner or to other partners whether separately or together with transfer of other business assets or retirement or dissolution, or whereby he contributes to the capital of the partnership firm by transferring his right and rule to or interest in any property.

is for the purpose of this clause, an instrument by which property is transferred".

6. The explanation is not material for our purpose. We are concerned with the definition of the word "conveyance". From the aforesaid definition what emerges is "conveyance includes.....every instrument by which property whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I or by Schedule IA, as the case may be".

7. The expression "instrument" has been defined in Section 2 Sub-section (14) of the Indian Stamp Act as follows:-

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

or recorded."

8. Let us now examine the effect of an order sanctioning a scheme for reconstruction and/or amalgamation.

Sections 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, 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 u/s 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) had 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.

9. Section 394 of the Companies Act, 1956 insofar as the same is material for our present purpose provides as follows:-

"Provisions for facilitating reconstruction and amalgamation of companies.

394(1) Where an application is made to the Court u/s 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:-

?(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 liability of any transferor company;

(ii) the allotment or appropriation by the transferee company of any shares,

debenture, 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 transferor company of any legal proceedings pending by or against any transferor company;

(iv) the dissolution without winding up, of any transferor company;

(v) (SIC)

(vi) (SIC)

Provided (SIC)

Provided further (SIC)

(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.

(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.....

(4)"

10. It appears from Section 394(1) of the Companies Act 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 u/s 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 u/s 394(2) of the Companies Act.

"The Companies (Court) Rules, 1959-Form 42

Form No. 42 (See Rule 84)

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

THIS COURT DOETH ORDER

(1) That all the property, rights and powers of the transferor company specified in the first, second and third parties 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 to 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 proceedings 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.....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).

Dated this ...day of... 19

(By the Court)

Registrar."

.....

11. It appears that the transfer of assets and liabilities takes effect by an order of Court. The order also provides for passing of consideration from the transferee company to the shareholders of the transferor company. The well-settled law is that the properties belong to the company and the company belongs to the shareholders. Therefore, the owners of the company receive the consideration. An additional reason why the owners of the company receive the consideration is that by the same order provisions is also made for dissolution of the transferor company.

12. Is such a transfer a voluntary act of the parties? i.e. transferor company, the transferee company and their respective shareholders?

13. In the case of General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., a question arose as to whether a transfer of assets and properties by virtue of an order of Court u/s 394 of the Companies Act, 1956 is an involuntary transfer. Their Lordships answered this question in the negative. It would be appropriate to notice the relevant portion of the said judgment:-

"...The only question which falls for consideration in this appeals is whether in view of the order made by the High Court of Bombay on 27-2-1968 sanctioning the scheme of amalgamation proposed by the appellant No. 1 company under Sections 391 and 394 of the Companies Act in Company Petition No. 4 of 1963 and the subsequent transfer of tenancy right in the suit premises and vesting of the same in the 2nd appellant (SIC) be deemed to be subletting of the tenancy right of the appellant (SIC) transfer or assignment of (SIC) No. 1 to the appellant No. 2 within the meaning of Section 10(u)(a) of the said Act."

".....In the instant case the appellant No. 1 i.e. M/s. General radio and appliance Co. (P) Ltd. is undoubtedly the tenant having taken lease of the premises in question from the respondent landlord by executing a rent agreement dated 12-1-1959 at a rental of Rs. 200/- per month the tenancy commencing from 7-1-1959. On the basis of the sanction accorded by order of the High Court of Bombay made on 27-3-1968 sanctioning the scheme of amalgamation in Company Petition No. 4 of 1968 filed by the 1st appellant, all the property, rights and powers of every description including all leases and tenancy rights etc. of the 1st appellant were transferred to and vested or deemed to be transferred and vested in 2nd appellant M/s. National Ekco Radio and Engineering Co. Ltd. It also appears that the appellant No. 1 company stood dissolved from 16-4-1968. This clearly goes to show that the General Radio and Appliances (P) Ltd. the tenant company has transferred all its interest in the tented premises in favour of the appellant No. 2 i.e. National Ekco Radio and Engineering Co. Ltd. (the transferee company). The order of amalgamation has been made on the basis of the petition made by the transferor company in Company Petition No. 4 of the 1968 by the High Court of Bombay. As such it cannot be said that this is an involuntary transfer effected by order of the Court."

(emphasis supplied)

The effect of an order u/s 153(A) of the Companies Act, 1912 which corresponds to Sections 391 and 394 of the Companies Act, 1956 has been very accurately stated in the case of *Sahayanidhi Virudhunagar Ltd. Vs. A.S.R. Subrahmanya Nadar and Others*, Section 153(A) of the Companies Act has been enacted with a view to facilitate arrangement and compromise between a Company and its creditors or shareholders which involve a transfer of its assets and liabilities to other companies as part of such arrangement. If any such scheme or arrangement is sanctioned by Court the Court is empowered by the section to make provisions by its order sanctioning the arrangement or any subsequent order, for the transfer of the assets and liabilities of a company in liquidation to another company styled in the section as transferee company. Where an order of Court made under the section provides for the transfer of the assets and liabilities of a company in liquidation to another company, the assets are, by virtue of that order, without more transferred to and vest in the transferee company and the liabilities of the former company are also cast upon the transferee company. Under the ordinary law of contract while assets are assignable, liabilities under contracts or duties arising thereunder are not assignable, but the effect of Section 153(A) is to some extent to override the ordinary law. Thus by an order sanctioning amalgamation the rights interest and liabilities of the transferor company are transferred and vested in the transferee company. It appears that by the order of amalgamation the interest, rights of transferor company in all its properties including leasehold interest and tenancy rights are transferred and vested in the transferee company."

14. The next question of some importance is "whether such a transfer is sale." In *Wall v. London and N. Assets Corporation*, reported in L.R. (1892) 2 Sh. 464 Lindley, M.R. observed inter alia that "..... I do not see how the company as a business transaction can practically amalgamate.....with companies carrying on business unless the company in some way or other sells its assets as a whole -- not for money for that would be a simple sale - but for shares in the purchasing company."

15. The consideration for sale in a transaction like this is shares. In the case in hand we have already noticed that the shareholders of the transferor company shall receive one fully paid up equity shares of Rs. 10/- each of the transferee company in lieu of every 15 fully paid up shares held by them in the transferor company. The share exchange ratio is decided on the basis of a large number of factors including the values of the net assets of the two, transferor and the transferee companies. In order to arrive at a figure of the net assets it is obvious that the liabilities have to be set off against the gross value of the assets. An Authoritative Treaty on this subject is Weinberg and Blank's *Take Overs and Mergers*. The paragraphs 2052 to 2060 of the 4th Edition of the aforesaid Authoritative Treaty has been summarised by the Apex Court in the case of *Hindustan Lever Employees' Union Vs. Hindustan Lever Limited and others*, in paragraph 41 of the aforesaid report which reads as follows:-

"This problem of valuation in the case of amalgamation of two companies has been dealt with by Weinberg and Blank in the book Take-overs and Mergers in which it has been stated that some or all of the following factors will have to be taken into account in determining the final share exchange ratio:

- (1) The Stock Exchange prices of the shares of the two companies before the commencement of negotiations or the announcement of the bid.
- (2) The dividends presently paid on the shares of the two companies. It is often difficult to induce a shareholder, particularly an institution, to agree to a merger or share-for-share bid if it involves a reduction in his dividend income.
- (3) The relating growth prospects of the two companies.
- (4) The cover (ratio of after-tax earnings to dividends paid during the year) for the present dividends of the two companies. The fact that the dividend of one company is better covered than that of the other is factor which will have to be compensate for at least to some extent.
- (5) In the case of equity shares, the relating gearing of the shares of the two companies. The gearing of an ordinary shares is the ratio of borrowings to the equity capital.
- (6) The values of the net assets of the two companies. Where the transaction is a thorough going merger, this may be more of a talking-point than a matter of substance, since what is relevant is the relative values of the two undertakings as going concerns.
- (7) The voting strength in the merger enterprise of the shareholders of the two companies.
- (8) The past history of the prices of the shares of the two companies."

16. In the case before Their Lordships Mr. Malagam the Valuer adopted a combination of three well-accepted methods to arrive at the fair value of the shares. The methods were : (i) the yield method; (ii) the asset value method; and (iii) the market value method. After considering all the relevant factors, the valuer recommended an exchange ratio of 2 equity shares of HLL for every 15 ordinary shares of "TOMCO".

17. In that case the scheme had been approved by the Trial Court. The Division Bench dismissed the appeal. The matter was taken up to the Apex Court. The Apex Court dismissed the Special Leave Petition. In other words, the method of valuation adopted in that case was approved. One of the methods taken into consideration was the asset valuation method.

18. The views expressed by Lindley M.R. in the case of Wall v. London (supra) that "the company in some way or the other sells its assets as a whole" find support from Section 494 of the Companies Act, 1956.

19. Section 494 of the Companies Act also makes provisions for statutory

amalgamation when the Company is in voluntary liquidation. Section 494 specifically provides for sale. Section 494 insofar as the same is material for our purpose may be noticed hereinbelow:-

"Power of liquidator to accept shares, etc. as consideration for sale of property of company. 494.(1) Where-

(a) a company (in this section called "the transferor company") is proposed to be, or is in course of being, wound up altogether voluntarily; and

(b) the whole or any part of its business or property is proposed to be transferred or sold to another company whether a company within the meaning of this Act or not (in this section called the transferee company");

the liquidator of the transferor company may, with the sanction of a special resolution of that company conferring on the liquidator either a general authority or an authority in respect of any particular arrangement:--

(i) receive, by way of compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company for distribution among the members of the transferor company, or

(ii) enter into any other arrangement whereby the members of the transferor company (SIC) of receiving cash, shares policies or other like interests or in addition thereto, participate in the profits of or receive any other benefit from, the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3)

(4)

(5)

(6)"

(emphasis supplied)

In this regard Section 507 may also be noticed hereinbelow:-

"Application of Section 494 to a creditors" voluntary winding up 507. The provisions of Section 494 shall apply in the case of a creditors voluntary winding up with the modification that the powers of the liquidator under that section shall not be (SIC) except with the sanction either of the Court or of the committee of inspection."

20. A Division Bench of this Court in the case of Hari Krishna Lohia Vs. Hoolungooree Tea Co. Ltd. and Another, held "the provisions contained in Section 391 to 396 and 494 illustrate some instance of statutory power of amalgamation a company with another company without any specific in the Memorandum".

21. Sale of goods has been defined in Section 4(1) of the Sale of Goods Act as follows:

"4.(1) - A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another."

22. Section 2(10) of the Sale of Goods Act provides as follows:-

"2(10). - "Price" means the money consideration for a sale of goods."

23. Sale u/s 54 of the Transfer of Property Act is defined as follows:-

"54. "Sale" defined.- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

24. Benjamin's Sale of Personal Property (2nd Edition 1873) Page 1 was quoted in the judgment of the House of Lords reported in 1955(2) All.E.R. 345 as follows:

"By the common law a sale of personal property was usually termed a "bargain and sale of goods". It may be defined to be a transfer of the absolute or general property in a thing for a price in money. Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, viz:- (1st) Parties competent to contract; (2nd) Mutual assent; (3rd) A thing, the absolute or general property in which is transferred from the seller to the buyer; and (4th) A price in money paid or promised."

25. Security which is convertible in money may be the price contemplated hereinabove. I, therefore, conclude that a transaction like this u/s 394 of the Companies Act has all the trappings of a sale.

26. In the aforesaid background we have to find out answer to the question posed hereinabove. The fact that in a transaction like this properties together with liabilities are transferred which have all the trappings of a sale cannot be doubted. Such a sale or transfers effectuated by an order of Court passed u/s 394(2) of the Companies Act, 1956. Then the question which follows "is an order of Court sanctioning a scheme which effectuates the transfer a conveyance?" We have already noticed that conveyance includes every instrument by which property whether moveable or immovable is transferred inter vivos. A Company is a living person within the meaning of Section 5 of the Transfer of Property Act. The next pertinent question which follows "is such an order an instrument?" The word "instrument" has been defined in the Indian Stamp Act as follows:-

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

27. It is also an inclusive definition like the definition of the word "conveyance". Therefore, it is not an exhaustive definition. Reference in this regard can be made to the case of Krishi Utpadan Mandi Samiti and Ors. v. Shankar Industries

and Ors., reported in 1993 (3) SCC 361 wherein it was held that "it is a well settled rule of interpretation that where the legislature uses the words "means" and "includes" such definition is to be given a wider meaning and is not exhaustive or restricted to the items contained or includes in such definition. Thus the meaning of "agricultural produce" in the above definition is not restricted to any products of agriculture as specified in the Schedule but also includes such items which come into being in processed form and further includes such items which are called as gur, rab, shakkar, khandsari and jaggery".

28. A document creating or transferring a right is an instrument. Can it be said (SIC) effectuating the transfer is a document? An answer in the affirmative was given by the Apex Court in the case of Haji Sk. Subhan Vs. Madhora, wherein Their Lordships held "the question is whether the word "document" includes a decree of the Court. We do not see any 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."

29. In the case before the Apex Court the intermediary sought to evict the person in possession on the basis of a decree of Court declaring his title whereas prior to passing of the decree M.P. Abolition of Proprietary Rights (estates, mahals, alienated land) Act, 1950 came into force: Sub-section (1) of Section 4 of the aforesaid Act provided as follows:-

"When the notification u/s 3 in respect of any area has been published in the Gazette then notwithstanding anything contained in any contract, grant or document or in any other law for the time being in force save as otherwise provided in this Act, the consequences as hereinafter set forth shall from the beginning of the date specified in such notification be hereinafter referred to as the date of vesting), ensue, namely

all rights title and interest vesting in the proprietor in such area including land cultivable or barren (SIC) shall cease and be vested in the state for purposes of the state free of all encumbrances.

30. The question more pointedly cropped up before the Apex Court in the case of Ruby Sales and Services (P) Ltd. and Another Vs. State of Maharashtra and Others, . 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 in instrument and liable to be stamped. The consent decree contained a recital to the effect that "this decree does operate as the conveyance from defendants in favour of the plaintiffs in respect of the said property more particularly described in exhibit A to the plaint". Their Lordships held that "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".

31. The aforesaid decree was based on an agreement between the parties. So is the case with an order u/s 394 of the Companies Act which is also based on an agreement between the transferor and the transferee. In this regard reference may be made to the case of (SIC) Mills Co. Ltd. v. Rivers Steam Navigation Co. and Ors., reported in (SIC) at page 76 wherein a learned Single Judge of this Court opined that "it should be remembered that a vesting order as is contemplated by Sections 153 and 153A of the Indian Companies Act is made in order to facilitate the amalgamation or in other words. in aid of amalgamation or the scheme of arrangement; but the actual transfer is effected by the act of parties, that is, by the transferor company to the transferee company. The court merely accords its sanction to the arrangement entered into between the transferor company and the transferee company."

32. Reference may also be made to the case of Sharat Hardwre Industries P. Ltd. reported in 48 Company Cases 23 at page 27 wherein it was held that "in essence, a scheme is a contract between two or more parties. It requires the necessary approval in accordance with section 391 of the Act, if it is a scheme covered by that provision, otherwise any other contract entered into by a company dos not require such approval. The essential features of the present scheme under consideration are that two companies are merging with each other. Therefore, it is a contract between the companies. Such a contract does not require the approval of the court. But as one of these companies will merge into the other and will thereafter have to be dissolved u/s 394 of the Companies Act, 1956 considered from the point of view of that company which is to cease to exist, the scheme or arrangement between the two companies is also a scheme or arrangement between the transferor company and its shareholders and creditors etc. That is why the scheme requires to be placed for consideration in the manner required by Section 391. It also requires the sanction of the Court Seen from the point of view of the transferee company, the agreement is essentially a contract which does not affect the creditors or members of the transferee company in any manner. Therefore, the scheme does not require to be sanctioned from the point of view of the transferee company u/s 391 of the Act. However, if the scheme had some flaws whereby the rights of the transferee company were affected, it would require the approval of these persons at a meeting or meetings held in accordance with Section 391 and would also require the sanction of the court having jurisdiction which in this case would be the Calcutta High Court. In the analysis. I have considered also one possible case which might arise which is, let us assume that the scheme is approved by the members of the transferor company but, later, the transferee company refuses to give effect to the scheme. That is the position also analysed in the case of In Re: Union Services Private Ltd., referred to earlier and decided by the Madras High Court. Obviously, if the transferee company refuses to give effect in the scheme the purpose and object of the scheme would be demolished..... In fact, without the approval of the transferee company, the scheme could not have been passed by the members of the petitioner company. Secondly, the scheme could not have

been put forward as a proposal unless there was an arrangement between the petitioner company and M/s. Choudhary Metal Industries (P) Ltd." (the transferee). Reference may also be made to Palmer's Company Law, 25th Edition Vol. 2 at page 12014 where the learned author opined as follows:-

"A compromise approved by a great majority of creditors might be rendered ineffective if a comparatively small creditor were to object and to stand out against it. It is one of the purposes of Section 425 to meet this situation.

The effect of scheme under this section is: to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity."

33. The case referred to by the learned author is in (SIC) Guardian Assurance Company (1917) 1 Ch. 431. The aforesaid commentary of the learned author was quoted with approval by the Apex Court in the case of J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, thereof.

34. In the case of Murlidhar Deonath Samel Vs. Sadashiv Deonath Samel and others, the question pointed arose whether an order u/s 394 of the Companies Act is an instrument and therefore liable to be stamped. This case is however distinguishable because the State of Maharashtra has made an amendment to the Stamp Act by which an order passed u/s 394 is specifically brought within the meaning of the word "conveyance". We shall deal with that aspect of the matter hereafter when the respective submissions made by the learned advocates will be noticed. At this stage what is to be notice is the finding of the Division Bench that an order u/s 394 of the Companies Act is based on agreement between the transferor and the transferee. The Division Bench opined as follows:

"As such the amalgamation order passed u/s 394 of the Companies Act is based upon the agreement between the two companies. In amalgamation two or more companies are merged into one or one taking over the other. The proceedings u/s 394 of the Companies Act would commence because of the agreement entered into by two companies. The amalgamation scheme which is an agreement between the companies, is presented before the Court and the Court passes appropriate order sanctioning the compromise or arrangement. But the foundations or basis for passing an order of amalgamation is the agreement between the two or more companies. Section 394 of the Companies Act makes this abundantly clear. It reads as under:

(SIC) an application is made to the Court u/s 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-

(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 transferred 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 liability of any transferor company:

(ii) the allotment or appropriations 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 the 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 winding up 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 wound up, 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 or 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 and vest in and those liabilities shall be transferred to and become the liabilities of the transferee company, and in the case property if the order so directs free from any charge which is by virtue of the compromise or arrangement to cease to have effect

(Emphasis supplied)

35. From the aforesaid survey of the statutory provisions and the decided cases

law appears to be that an order sanctioning a scheme of reconstruction or amalgamation has its genesis in an agreement between the shareholders of the transferor and 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 Court and that the order of court is an instrument by which the transfer is effected. Once the order is held to be an instrument the irresistible conclusion is that it is a conveyance. Let us now consider the submission to commendably advanced by the learned advocates against the issue.

36. Mr. S.N. Mukherjee, learned advocate after conclusion of his submissions submitted a brief note of his submissions. I shall set out his written note itself lest(SIC) omit any of his points. His first submission is as follows:

"Companies (Court) Rules 1959 (SIC) Form 42 have statutory force (SIC). The Companies Act 1956 came into force after the Indian Stamp Act, 1899. The Companies Act is a later enactment and in the event of any inconsistency, the latter will prevail. An order-sanctioning scheme of compromise or amalgamation can provide for transfer of assets without any further act or deed. As such no stamp is liable to be paid on such order.

37. This submission of Mr. Mukherjee cannot be accepted because:

(a) Section 394 of the Companies Act does not provide that an order sanctioning a scheme is not liable to be stamped.

(b) The provision for transfer of assets without any further act or deed does not mean more than that a formal document is not necessary in order to effectuate the transfer.

(c) But that does not mean that if the order sanctioning scheme itself is an instrument the same will not attract Stamp Duty.

38. His second submission is as follows:

"An order sanctioning a scheme is not a conveyance within the meaning of Section 2(10) of the Indian Stamp Act. Such an order is not a sale and thus, cannot be construed to be a conveyance on sale. Further an order u/s (SIC) of the Companies Act is not an Instrument by which property is (SIC) vivos. This is so for following reasons:-

i) A Court order is not an instrument (7 Equity Cases Act ILR 1887 11 Bom 506 at 512).

(ii) An order u/s 394 of the Companies Act not an instrument of transfer 18 Comp. Cases).

(iii) In the event it is held that an order u/s 394 is an instrument even then it will not be a conveyance within the meaning of Section 2(10) of the Stamp Act as:-

(a) Section 2(10) of the Stamp Act only covers instrument by which property

alone is transferred. It does not deal with instruments by which liabilities are transferred.

(b) There is no transfer inter vivos where the order u/s 394 of the Act provides for dissolution of the transferor company as well as vesting of its properties upon the transferor company."

39. This submission is not acceptable for the following reasons:

(a) For reasons discussed hereinabove I am inclined to hold that the transaction has all the trappings of a sale.

(b) Definition of the word "instrument" includes every document by which any right or liability is created or transferred. A decree has been construed by the Apex Court to be a document (See Haji v. Madho [supra]). A decree effectuating a transfer of title has been held by the Apex Court to be an instrument. (See Ruby Sales v. State of Maharashtra [supra]).

(c) 7 Equity Cases 461 does not apply because that was a case decided under the provisions of Apportionment Act. The provisions of the said act are not available in the report. Therefore, this judgment does not advance the submission of Mr. Mukherjee

(d) ILR 1887 (11) Bom 506 does not apply because what was held in that case was that an unregistered decree is admissible in evidence. Registration and stamp are two different things governed by two different acts. Therefore, this judgment is of no assistance.

(e) 18 Company Cases 1 is only an authority for the proposition that a transfer of decree u/s 153 and 153A of the Companies Act, 1913 takes place by virtue of an order of court and is not by way an assignment. I shall have occasion to deal with this aspect of the matter in greater detail when I shall deal with the submissions of Mr. Dev

(f) I am unable to accept that Section 2(10) of the Indian Stamp Act does not apply where properties are transferred along with liabilities. Such a case in my view, would be clearly covered by Section 24 of the Indian Stamp Act. The object of Section 24 has been very succinctly laid down in the case of Somaiya Organics (India) Ltd. Vs. Board of Revenue, U.P., wherein Their Lordships stated the object of the section as follows:

"The object of Section 24 of the Act is very clear. That section means that when a purchaser purchases a property for a certain amount subject to the payment of another debt, actual or contingent, he is virtually purchasing the property for the said amount plus the amount of the debt and the aggregate of the two amounts ought to be treated as the true amount for which the property is being sold. Otherwise there is bound to be a difference between the true consideration and the consideration which is made liable to stamp duty. To illustrate, take the present case itself. The properties which had been treated as sufficient security

by the Bank for the liability of Rs. 65,00,000/- must be ordinarily much more valuable than Rs. 65,00,000/- but on the date of conveyance stamp duty would have become payable only on Rs. 7,76,000/- but for the above rule in Section 24 of the Act. In this case the amount of Rs. 7,76,000/- must have been fixed by the parties taking into consideration the liability to the bank under the mortgage which might arise in future."

(g) It is true that an order for dissolution of the transferrer company can be passed simultaneously with the sanction of the scheme provided the transferor company has got a cleanchit from the Company Law Board or the Registrar or the Official Liquidator as the case may be. But that does not mean that the company stands dissolved prior to completion of the transfer. In that case, the transfer will never be completed. The transferor company gets dissolved upon the certified copy of the order dissolving the company being delivered to the Registrar of Companies as would appear from Form No. 42 extracted hereinabove whereas the scheme of amalgamation relates back to the date when the scheme was agreed upon between the parties. Reference in this regard can be made to the case of *Raghubar Dayal v. Bank of Upper India*, reported in 46 LA. 135 wherein Their Lordships of the Privy Council held as follows:-

"When u/s 153 of the Indian Companies Act 1913 compromise or arrangement between a company and its creditors has been agreed by a three-fourths majority and has been sanctioned by the Court, it is binding upon all the creditors from the date at which it was agreed."

40. The reason is that Section 191(2) provides "the compromise or arrangement shall if sanctioned by the Court be binding on all the creditors..... or all the members". (See in this regard 1916 (32) Indian Cases 451 at page 453 where it was held that the words would have been "when it has been sanctioned by the Court" instead of "if sanctioned by the Court" if the intention of the Legislature were that the agreement would become binding from the date of sanction.)

41. The third submission of Mr. Mukherjee is as follows:

" *Ruby Sales and Services (P) Ltd. and Another Vs. State of Maharashtra and Others*, deals with a case of consent decree where the terms of settlement was admittedly a conveyance, transferring property alone. The amendment to the Bombay Stamp Act of 10-12-1985 was considered irrelevant. The observation in the Supreme Court judgment regarding the 1985 amendment to the Bombay Stamp Act is obviously not its ratio *Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd.*, . Decision reported in in so far as in purports to hold that the amendment to the Bombay Stamp Act incorporating an order u/s 394 within the definition of conveyance in Section 2(g) of the Bombay Stamp Act was clarificatory amounts to a misinterpretation of the Supreme Court judgment. The issue before the Supreme Court was act whether the concerned amendments to the Bombay Stamp Act were clarificatory. Further the Bombay High Court equates an order u/s 394 of the Companies Act to a consent order, which is

contrary to Supreme Court decision regarding orders u/s 394 of the said Act (40 C.C. 68) at J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others,

42. The aforesaid submission of Mr. Mukherjee cannot be accepted for the following reasons

(a) In the case of Ruby Sales the Apex Court held that the 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. Therefore it is obvious that it was held to be an instrument because it had the effect of conveying the title and not because it was a consent decree (SIC) this distinction is realised it would be clear that consent or no consent when a decree or order of Court purports to transfer title, it becomes an instrument.

(b) I am unable to accept that the observation of the Apex Court in the case of Ruby Sales "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 is not the ratio of the said judgment. From paragraph 14 of the said judgment it would appear that it was submitted before the Apex Court "that prior to amendment the consent decree was not included in the definition of conveyance and instrument". It is this specific question which was answered by Their Lordships by the aforesaid observation.

(c) At this juncture it would be useful to notice the original definition of the word "conveyance" as appearing in the Maharashtra Act and the amendments made thereto.

Unamended provision	Amended provision
"Conveyance includes a conveyance on sale, whether moveable or immovable, is transferred (ii) every instrument. inter vivos and which is not otherwise (iii) every decree or final order of specifically provided for by Scheduled. any Civil Court. specifically (iv) every order made by the High Court u/s 394 of the Companies Act, in respect of amalgamation of companies, by which property, whether moveable or immovable, or any (SIC) or interest in any property transferred to or vested in. any person, inter vivos, and which is not otherwise specifically provided for by Schedule I.	"Conveyance includes: on sale and every instrument by which property (i) a conveyance on sale, whether moveable or immovable, is transferred (ii) every instrument. inter vivos and which is not otherwise (iii) every decree or final order of specifically provided for by Scheduled. any Civil Court. specifically (iv) every order made by the High Court u/s 394 of the Companies Act, in respect of amalgamation of companies, by which property, whether moveable or immovable, or any (SIC) or interest in any property transferred to or vested in. any person, inter vivos, and which is not otherwise specifically provided for by Schedule I.

Clause III was brought in by way of amendment on 10-12-1984 and Clause IV was brought in by way of amendment on 1-4-1993. Clause IV was not there before the Apex Court in the case of Ruby Sales.

(d) I am unable to accept that the decision reported in holding that by Act No. 17 of 1993 the Legislature has also added Section 2(g)(iv) of the Companies Act in respect of amalgamation of companies. In our view applying the ratio of the decision in the case of Ruby Sales Service prima facie it appears to be

clarificatory proceeds on the basis of misinterpretation of the judgment of the Apex Court in the case of Ruby Sales Act order sanctioning a scheme u/s 394 does effect conveyance of title and therefore such a conveyance was all along covered by the original definition of the word conveyance. That is why the Division Bench held that the amendment to the definition of the word "conveyance" was clarificatory.

(e) I have already discussed hereinabove that an order passed u/s 394 is based on agreement of the transferred and the transferee. Therefore, I am unable to accept that equation of an order u/s 394 with a consent order is misplaced. Therefore, reference in J.K. (Bombay) P. Ltd. Vs. New Kaiser-I-Hind Spg. and Wvg. Co. Ltd. and Others, cannot alter the situation.

43. The fourth submission of Mr. Mukherjee was as follows:

"A scheme of amalgamation or demerger is not a transfer for the purposes of the Income Tax Act. (See Sections 2(194AA), 47, 72A and Chapter XXCI. An order sanctioning a scheme is not a consent order. It binds dissenting parties and can operate as res judicate. In effect an order sanctioning such scheme is a dissolution of the transferor company. (In the case of amalgamation) and a dissolution of the concerned unit of a transferor company (in case of demerger) and distribution in specie to the shareholders of the transferor company by allotment of shares in the transferee company. There is no sale or exchange involved in amalgamation or demerger. Transfer of properties and liabilities takes place by operation of law. No provision has been made in the Schedule to the Stamp Act to include such an order as an instrument liable to stamp duty. Only a Court order with regard to partition is included in the Schedule to be subject to stamp duty. In such circumstances, it cannot be said that court order u/s 394 is liable to stamp duty. Sahayanidhi Virudhunagar Ltd. Vs. A.S.R. Subrahmanya Nadar and Others, , New Central Jute Mills Co. Ltd. Vs. Rivers Steam Navigation Co. Ltd. and Others, , Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others,

44. I am unable to accept the aforesaid submissions for the following:

- (a) We are not concerned here with the provisions of Income Tax Act.
- (b) An order sanctioning a scheme of amalgamation is based on agreement between the parties to the scheme.
- (c) Dissolution of the transferor company is not the object of amalgamation. The object is to transfer the assets and liabilities in lieu of shares. As a result of the transaction the assets, liabilities including the shareholders disappear. What is left is the corporate shell. The corporate shell is extinguished by the order of dissolution. Therefore, the order of dissolution cannot be the object. It is a consequence.
- (d) I have already held that the transaction has all the trappings of a sale.

(e) Moreover, ratio of share exchange is decided inter alia on the basis of the networth of the assets of the transferor and the transferee companies.

(f) None of the cases referred to hereinabove is an authority for the proposition that an order sanctioning a scheme is not liable to stamp duty.

45. The fifth submission of Mr. Mukherjee is as follows:-

"(SIC) passed u/s 394 of the Act is an appealable order and also operates as res judicata. However, a consent order is not appealable and also does not operate as res judicata. A consent order is a mere agreement between the parties. Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others,

46. I am unable to accept this submission because I have already held that the judgment of the Apex Court in the case of Ruby Sales has to be understood in its proper prospective Consent or no consent an order would become an instrument if it purports to effectuate transfer to title.

47. The sixth submission of Mr. Mukherjee contained in his note is as follows:

Being a fiscal statute the Stamp Act is to be construed strictly. Schedule makes no provision for stamping of orders u/s (SIC) of the Act (SIC) that the word conveyance as defined in the Stamp Act (SIC) as order u/s 394 will put two (SIC) persons at par and thus mere (SIC) unjustify which ought not to be permitted S.K. Dutta, Income Tax Officer and Others Vs. Lawrence Singh Ingty., , The State of Karnataka Vs. Shivappa Gurusiddappa and Others Etc., States which have required stamp act to be paid on order u/s 394 of the Act have provided for the same expressed (SIC) that such an enactment was necessary as there (SIC) to providing for payment of stamp duty on orders (SIC) so the Court is not to fill the lacunae as that of (SIC)

48. No submissions were advanced as to how two dissimilarly situated period would be placed at par or how would it operate unjustly in the event it is held that an order u/s 394 is covered by the definition of the word "conveyance". I am unable to follow the logic of this submission. The cases reported in The State of Karnataka Vs. Shivappa Gurusiddappa and Others Etc., are in respect of a trial concerning murder. The relevance of these two judgments is not appreciated by me. The case reported in S.K. Dutta, Income Tax Officer and Others Vs. Lawrence Singh Ingty., in my view militates against the contention of Mr. Mukherjee. This was a case in which the Apex Court upheld the decision of the High Court striking down the taxation upon a member of the Scheduled Tribe, who enjoyed general exemption from tax, solely on the ground that he was a Government servant Members of the Tribe earning more in different walks of life were exempted from the liability to pay income tax whereas the writ petitioner was based on the ground that he was a government servant. The Apex Court held that for a valid classification what is required is not some imaginary difference but a reasonable and substantial distinction having regard to the purpose of law. In the present case, I fail to find any real difference between a

transfer u/s 394 and 494 of the Act. Then again there is no real difference between a transfer u/s 394 and 494 of the Act so the one hand and a transfer u/s 291 of the Act. If duty is payable in the case of a transfer u/s 293 of the Act, there is no valid reason why it should not be payable in the case of a transfer u/s 394 of the Act.

49. Simply because the Gujarat Legislature thought in its wisdom to call the absence of clarification in the definition of the word "conveyance" a lacuna, for the purpose of bringing an amendment, it cannot justifiably be contended that there is a lacuna in the Stamp Act or that until the so called lacuna has been filled up by the State Legislature an order sanctioning a scheme should not be held to be covered by the definition of the words "conveyance" and "investment". Interpretation of statute is decisively in the domain of judiciary and not in the domain of legislature.

50. The seventh submission of Mr. Mukherjee appearing in the note is as follows:

"Section 24 of the Stamp Act does not apply for the following reasons:

(i) Consideration for a Scheme is not the take over of liabilities of the (SIC) companies by the transferee companies.

(ii) Section 24 applies when transfer is made in consideration of liquidation or an outstanding debt owed by the transferor to the transferee which is not the case in case of amalgamation or demerger.

(iii) Even in case of mortgages as inferred (SIC) order made Section 394 is not a sale.

(iv) Section 24 of the Stamp Act applies to voluntary transfers."

51. I am not impressed by this argument for the following reasons:-

(a) This point has already been answered hereinabove and I need not reiterate the reasons. Suffice it say that in consideration of the transfer the shareholders of the transferor company are allotted shares in the transferee company. The ratio of the share exchange is decided inter alia on the basis of networth of the assets of the concerned companies. I am unable to accept that the taking over of the liability of the transferor company is not a part of the consideration. I have already held that a transfer of this nature has all the trappings of a sale.

(b) Section 24 of the Indian Stamp Act is not restricted in its operation to a transaction of sale between the mortgagor and mortgagee.

(c) Transfer u/s 394 is also a voluntary transfer. See in this regard General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., discussed hereinabove.

52. The eighth submission of Mr. Mukherjee is as follows:-

"The English Case cited have no application as Section 54 of the English Stamp

Act specifically includes an order of court within the definition of conveyance. Further the decision reported in (1891) - 41 All England Report 1094 was a case where the Act of Parliament itself provided for payment of stamp duty."

53. This submission is correct.

54. I have therefore refrained from making reference to any of the English decisions.

55. The ninth submission of Mr. Mukherjee is as follows:-

"The two decisions cited on behalf of the State is AIR 1997 SC 1096 and Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc., have no application to the facts of the case for the following reasons.

i) The instant case is not concerned with any contract in the provisions contained in the same statute as was the case in the Supreme Court decision.

ii) None of the cases deal with the interpretation of the Indian Stamp Act or any fiscal statute."

56. I have not taken into consideration any of the said two judgments for the purpose of deciding the issue.

57. The tenth and last submission of Mr. Mukherjee as in the notes is as follows:-

"Without specific provision for an order of Court u/s 394 of the Companies Act, 1956 being made liable to stamp duty. Such orders should not be made liable to stamp duty. Without such provisions the matter would be unworkable particularly where properties of the transferor companies are situate outside the State. The Stamp Act being a complete Code what is not provided for is excluded. Gauri Singh Vs. Ramlochan Singh and Others, ."

(a) This Court is called upon to decide whether or not an order sanctioning a scheme is liable to stamp duty on the basis of the provisions of the Stamp Act as it is. This Court is not called upon to decide as to how the same will become operational or whether there will be any difficulty in applying the provision. If any such difficulty is faced, the same would be taken care of by the Legislature.

(b) Gauri Singh Vs. Ramlochan Singh and Others, is a judgment concerning Arbitration Act, 1940. Relevance of this judgment was not indicated at the hearing nor does this judgment appear to have any bearing to the question in hand.

58. The aforesaid notification shall apply to an order sanctioning a scheme for reconstruction or amalgamation u/s 394 read with Section 391 of the Companies Act.

59. Mr. Sudipta Sarkar, learned senior advocate adopted the submissions made by Mukherjee. Mr. Ranjan Dev learned senior advocate made his submission and subsequently submitted a brief note of his submissions. The points urged by him

as appearing from the said note are as follows:

"1. Section 9 of the Transfer of Property Act, 1882 provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law.

2. By virtue of Section 2(d) of the Transfer of Properties Act, transfers by "Operation of Law" are not affected by the Transfer of Properties Act, except as provided in Section 57 and Chapter IV of the Transfer of Property Act.

3. (SIC) Section 5 of the Transfer of Property Act preserves laws relating to transfer of properties to or by companies.

58. Mr. Mukherjee may have inadvertently omitted to refer in his note to a notification dated 16-1-1937 to which attention of the Court was drawn by him Pursuant to his request the learned Advocate General was requested to ascertain from the department whether the aforesaid notification continues to be in existence to which his reply was in the affirmative. The said notification provides as follows:-

"Central Board of Revenue, Notification No. 1 dated the 16th January, 1937, which is in the following terms:-

"To remit the stamp duty chargeable under Article 23 and 62 of Schedule 1 to the said Act on instruments evidencing transfer of property between companies limited by shares as defined in the Indian Companies Act, 1913 in cases -

(i) Where at least 90 per cent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or

(ii) Where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 per cent of the issued share capital of the order, or

(iii) Where the transfer takes place between two subsidiary companies in each of which not less than 90 per cent of the share capital is in the beneficial ownership of a common parent company:

Provided that in each case a certificate is obtained by the parties from the officers appointed in this behalf by the Local Government concerned that the conditions above prescribed are fulfilled."

4. An order of Court passed u/s 394 of the Companies Act, 1956 itself transfers the property of the transferor company to the transferee company. This transfer is therefore by "Operation of Law".

5. A proposed scheme of amalgamation u/s 394 of the Companies Act, 1956 is not an "instrument" or "conveyance" attracting stamp duty. A proposed scheme of amalgamation does not by itself transfer anything or create, limit, extend, extinguish or record any right.

6. An order of Court passed u/s 394 is also not an "instrument" or a "conveyance". It becomes operative as soon as it is pronounced even though not written or signed. Smt. Basanti Devi and Others Vs. Abdul Sattar and Others, , Surendra Singh and Others Vs. The State of Uttar Pradesh,

7. Section 17 of the Stamp Act stipulates as to when instruments are to be stamped. An oral is incapable of stamping."

60. The first submission of Mr. Deb is in aid of his sixth and seventh submission noted above, the sum and substance of which is that there can be an oral transfer, an order sanctioning a scheme becomes effective as soon as it is pronounced; it is as it were a transfer effected orally and an oral transfer cannot be stamped because in order to become stampable there should be in existence an instrument which can be stamped before or at the time of execution.

61. This submission in my view totally overlooks the provisions contained in Section 391(3) of the Companies Act which provides that "an order made by the Court under Sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar". Therefore, the transfer does not become effective until filing of the copy with the Registrar. It is well-settled that an order or decree, required to be stamped under the Stamp Act, in order to be operative must be engrossed on paper as required by that Act, and until the Judge signs the order or decree so engrossed a certified copy cannot be issued. Not only that the copy cannot be issued but also the proceedings are not terminated until the judge has signed the engrossed order. If any authority is needed for this view of mine reference may be made to *Jatindra v. Bejoy*, reported in ILR 32 Cal. 483. This submission is made out of desperation. His third submission is that u/s 5 of the Transfer of Property Act the provisions thereof do not affect any law for the time being in force relating to transfer of property to or by companies. If that it so, how can he seek to take advantage of Section 9 of the Transfer of Property Act in order to avoid payment of Stamp duty. However, I have already indicated that the submission otherwise is devoid of any merit. I need not reiterate that an orders sanctioning a scheme has already been held by me to be an instrument. Thus, the 1st, 3rd, 6th and 7th submissions of Mr. Deb are disposed of.

62. His (SIC) noted above is that it is a transfer by operation of law. Let us (SIC) What is a transfer by operation of law? The preamble of the Transfer of Property Act states that it is an Act "to define and amend certain parts of the law relating to the transfer of property by act of parties....." Therefore, in order to be a transfer by operation of law it has to be an involuntary act. Reference in this regard can be made to a judgment of the House of Lords in the case *Kirkness v. John* (SIC) reported in 1955 (2) All.E.R. 345. In that case the Wagons of the Coal merchants were (SIC) by the Minister of Transport and the property in the wagons vested in the (SIC) Transport Commission. Subsequently compensation was paid. Question arose whether it was a sale. The question was answered in the negative because the transaction took place without any act of assent by either party. Let us quote the relevant portion ".....the word sold is quite

inappropriate to describe the transfer or ownership of the wagons in question from the tax (SIC) to the Transport Commission, which occurred automatically by process of law when they vested in the Commission u/s 29 of the Transport Act, 1947 without any act of assent by either party. The payment of compensation on the scale provided in the Act cannot be regarded as a sufficient substitute for the (SIC) element which (SIC)

63. The Apex Court in the case of General Radio v. M.A. Khader (supra) held that a transfer pursuant to an order u/s 394 of the Companies Act is not involuntary in nature. In the case of Indian Steel and Wire Products Ltd. Vs. State of Madras, it was held "so long as mutual assent is not completely excluded in any dealing in law it is a contract". I have demonstrated above that the entire edifice culminating in an order u/s 394 of the Companies Act is based on agreement. Therefore, the submission of Mr. Deb cannot be accepted.

64. The second submission of Mr. Deb does not in any way affect the answer to the question posed before us.

65. The fifth submission of Mr. Deb is correct. I can only add that a scheme is the stepping stone for an ultimate order u/s 394 of the Companies Act.

66. Mr. Ratnanka Banerjee learned advocate submitted that the transfer in such a case is not of the rights alone but is also a transfer of liability. He submitted that there is no specific provision in the Stamp Act contemplating such a situation whereas Legislature of Maharashtra had made necessary amendments in the Stamp Act in order to take in its fold an order passed u/s 394 of the Companies Act. The sum and substances of the submission was that the Stamp Act as applicable to the State does not provide that an order u/s 394 of the Companies Act sanctioning a scheme is liable to stamp duty. Therefore, this Court should refrain from holding so. This submission of Mr. Banerjee has been reiterated by Mr. Mukherjee and has been duly dealt with by me hereinabove. Therefore, I refrain from giving my reasons over again for rejecting this contention. Mr. Banerjee cited 50 Comp. Cases 95. This judgment, in my view, is no authority for the proposition advanced by him.

67. I have not dealt with submissions made by the learned Advocate General separately because his submissions are reflected in the entire reasoning given by me.

68. Considering the view that I have taken I hold that an order sanctioning a scheme of reconstruction amalgamation u/s 394 is covered by the definition of the words "conveyance" and "instrument" under the Indian Stamp Act and therefore liable to stamp duty. I therefore direct that the Registrar of Companies shall not take on record an order sanctioning a scheme until the same has been duly stamped. The department of this Court is directed to engross the final order sanctioning a scheme u/s 394 of the Companies Act on an appropriate stamp paper and thereafter the order should be placed for final signature. No copy of the order should be issued without complying with the aforesaid direction.

However, remission of stamp duty shall be available in the case of a transfer envisaged under the notification N. 1 dated 16-1-1937. The cases covered by the said notification shall therefore form an exception to the aforesaid direction issued to the Registrar of Companies as well as the department of this Court. Let a copy of this judgment be forwarded to the Registrar of Companies by the Registrar, Original Side of this Court.