
(2009) 01 AHC CK 0038
In the Allahabad High Court

Hero Motors Ltd.	Vs	APPELLANT
State of U.P. and Others		RESPONDENT

Date of Decision : 23-01-2009

Acts Referred:

Banking Regulation Act, 1949 — Section 14A
COMPANIES ACT, 1956 — Section 153A
Electricity Act, 1910 — Section 6, 7, 7A
General Clauses Act, 1897 — Section 3
Stamp Act, 1899 — Section 2, 24, 3, 5
State Bank of India Act, 1955 — Section 3, 36AE, 4, 6

Citation : AIR 2009 All 93 : (2009) 2 AWC 1336 : (2011) 7 RCR(Civil) 609 :
(2009) 106 RD 670

Hon'ble Judges : Janardan Sahai, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Janardan Sahai, J.—Heard S/Sri A.M. Singhvi, T.P. Singh, Rakesh Dwivedi, senior advocates and S/Sri Manish Goyal, S.D. Singh, Ritvik Upadhyay, V.K. Upadhyay, Vishal Kakkar, Shahid Rizvi, Rakesh Ranjan, Tripathi B.G. Bhai advocates for the petitioner and S/Sri Ravikant Sr. advocate, Sri Sanjay Goswami, learned standing counsel for the respondents.

2. On a difference of opinion between brother Yatindra Singh, J., and brother Ran Vijay Singh, J., in six connected writ petitions M/s. Hero Motors Ltd.; Dhampur Sugar Mills Ltd., M/s. Amar Ujala Publications Ltd.; M/s. Telesia Trading and Finance Ltd.; M/s. Prudential Merchants and Traders Ltd. and M/s. Padamshree Projects, this matter has been referred for opinion to me. In the other writ petitions the question involved was the same and as such it appears the Division Bench before which these cases were being heard has tagged those cases with M/s. Hero Motors or other connected cases in which there was a difference of opinion between Brother Yatindra Singh, J. and Brother Ran Vijay Singh, J. The question substantially involved in these writ petitions has been stated by brother

Yatindra Singh, J., as follows:

Whether any stamp duty can be charged under Article 23 of Schedule IB of the Indian Stamp Act as applicable in our State (the U.P. Stamp Act) on the scheme of arrangement sanctioned by the Court, which may be de-merger of going concern with another company or amalgamation/merger of one company with another company.

3. Three points for determination were framed by brother Yatindra Singh, J., in his judgment and have been answered by the two learned Judges:

(i) Whether the writ petitions are liable to be dismissed on the ground for alternative remedy ?

(ii) Whether the scheme of arrangement sanctioned by the Court, (which includes a scheme of de-merger and merger of the going concern with another company and a scheme for amalgamation/merger of a company with another company): is an instrument and a conveyance within the meaning of the U.P. Stamp Act ?

(iii) In case the answer to the aforesaid point is in the affirmative then, whether such scheme is covered by Article 23 of Schedule IB of the U.P. Stamp Act ?

4. Both the Judges have taken the view that the writ petition could not be dismissed on the ground of alternative remedy. On the second point also, both the Judges were agreed that the scheme of arrangement sanctioned by the Court is a conveyance and an instrument within the meaning of Sections 2(10) and 2(14) of the Indian Stamp Act as applicable in Uttar Pradesh. The difference of opinion is on the third point. Brother Yatindra Singh, J., has taken the view that the scheme of arrangement is not covered by Article 23, Schedule IB of the Stamp Act whereas in the opinion of Brother Ran Vijay Singh, J., it is covered under that article. It is only this third point upon which I have to give an opinion.

5. The facts of the various connected writ petitions have been set out in the judgment of brother Yatindra Singh, J. and brother Ran Vijay Singh, J. and it is not necessary to repeat them.

6. Section 3 is the charging section of the Stamp Act. Under this provision, the instruments mentioned in Schedule 1, 1A or IB are chargeable to duty. In order to appreciate the controversy it is necessary to refer to the definition of "conveyance" u/s 2(10) and of "instrument" u/s 2(14) of the Stamp Act as well as to Article 23, Schedule 1B.

7. In Section 2(10) the definition of conveyance is as follows:

"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 1, Schedule 1A or Schedule IB, as the case may be.

The definition of instrument in Section 2(14) is as follows:

"Instrument". ? "Instrument" includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded.

Article 23, Schedule 1B is as follows:

Description of Instrument Proper Stamp

23. Conveyance. As defined by Section 2(10) not being a transfer charged or exempted under No. 62? (a) If relating to immovable property where the sixty rupees amount or value of the consideration of such conveyance, as set forth therein, or the market value of the immovable property, which is the subject of such conveyance whichever is greater, does not exceed Rs. 500. ...

(b) If relating to movable property? where the amount Twenty rupees or value of the consideration of such conveyance, as set forth therein, does not exceed Rs. 1,000, ...

8. Both the learned Judges have held that the scheme of amalgamation is an instrument and conveyance. The question is whether it is a conveyance covered under Article 23 of Schedule 1B. The answer to this question would much depend upon the nature of a scheme of arrangement. As to what is the nature of a scheme of arrangement has been described in paragraph 35 of the Judgment of Brother Yatindra Singh, J., quite clearly and as I agree with the description I borrow his words:

35. There are two kinds of schemes. In one, transferor company amalgamated/merges completely with the transferee company. In this case all assets, liabilities become that of the transferee company. In the second case, transferor company demerges a part of the business (including assets, liabilities and employees relating to that business) and merges it with the transferee company. In the second case, transferor company demerges a part of the business (including assets, liabilities and employees relating to that business) and merges it with the transferee company. In lieu of these transferee company and become its members shareholders. In all cases before us it has so happened.

9. Brother Yatindra Singh, J., has taken the view that a scheme of arrangement cannot be split up as conveyance of immovable and movable properties and is a class apart and does not fall under Article 23 of the U.P. Stamp Act. Brother Ran Vijay Singh, J., has taken the view that stamp duty is chargeable on transfer of assets and that assets include movable and immovable properties and a scheme of arrangement involves transfer of movable or immovable properties and that there is no provision in the Stamp Act for excluding liabilities.

10. In *Li Taka Pharmaceuticals Ltd. Vs. State of Maharashtra and other*, , the Bombay High Court described a transfer under a scheme of arrangement in the

following words:

By amalgamation scheme, what is transferred is a going concern and not assets and liabilities separately. As a going concern, what is the value of the property is to be taken into consideration. Normally, that would be reflected in an amalgamation scheme by the shares allotted to the share holders of the transferor company. It cannot be said that the assets are separately transferred and liabilities are separately transferred by the amalgamation scheme... For this purpose, what is to be kept in mind is that by sanctioning the amalgamation scheme, the Court is sanctioning not transfer of the assets or liabilities separately but the going concern is transferred which is valued at a particular amount and that valuation would be on the basis of share exchange ratio (Paragraph 32)

... ..

By the amalgamation scheme, the assets and liabilities are not separately transferred but the interest in a going concern is transferred. In this view of the matter, we hold that normally in a case of amalgamation of a scheme sanctioned by the High Court, its consideration under Article 25(1) should be based on its valuation arrived at on the basis of shares allotted by the transferee company to the transferor company.

11. A transfer under a scheme of arrangement involves a transfer of business of a going concern. The petitioners' case is that what has been transferred under the scheme of arrangement is a going concern and the transfer of a going concern cannot be split up as transfer of movable and immovable properties. To appreciate the contention it would be necessary for us to examine as to whether a going concern is "property", and whether it is an amalgam of two constituent parts into which it can be split up namely assets and liabilities, assets being the immovable and movable properties of the business; or is a going concern something more than a mere amalgam of assets and liabilities ?

12. In *Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc.*, the Apex Court in Para 42 has explained the concept of property in the legal sense. For the sake of convenience Para 42 of the judgment is quoted hereunder:

42. Property in legal sense means an aggregate of rights which are guaranteed and protected by law. It extends to every species of valuable, right and interest, more particularly, ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. The dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects is called property. The exclusive right of possessing, enjoying, and disposing of a thing is property in legal parameters. Therefore, the word "property" connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status.

Property, therefore, within the constitutional protection, denotes group of rights inhering citizen's relation to physical thing, as right to possess, use and dispose of it in accordance with law. In Ramanatha Aiyar's *The Law Lexicon*, Reprint Edn., 1987, at p. 1031, it is stated that the property is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have. The term property has a most extensive signification, and according to its legal definition, consists in free use, enjoyment, and disposition by a person of all his acquisitions, without any control of diminution, save only by the laws of the land. In *Dwarkadas Srinivas* case this Court gave extended meaning to the word property. Mines, minerals and quarries are property attracting Article 300A.

13. In *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, , the Apex Court had occasion to consider the meaning of "property" and "undertaking of a going concern". Extract of para 38 and para 39 of that decision are quoted below:

38. ...In its normal connotation "property" means the "highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy; it includes ownership, estates and interests in corporeal things, and also rights such as trademarks, copyrights, patent and even rights in personam capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured". The expression "undertaking" in Section 4 of Act 22 of 1969 clearly means a going concern with all its rights, liabilities and assets - as distinct from the various rights and assets which compose it. In *Halsbury's Laws of England*, 3rd Edn., Vol. 6, Article 75 at p. 43, it is stated that "Although various ingredients go to make up an undertaking, the term describes not the ingredients but the completed work from which the earnings arise."

39. Transfer of an vesting in the State Corporations of the entire undertaking of a going concern is contemplated in many Indian Statutes; e.g., *Indian Electricity Act, 1910*, Sections 6, 7 and 7A; *Air Corporation Act, 1953*, Sections 16 and 17; *Imperial Bank of India Act, 1920*. Sections 3 and 4; *State Bank of India Act, 1955*, Section 6(2) & (3) and (4); *State Bank of India Subsidiary Banks) Act, 1959*; *Banking Regulation Act, 1949*, Sections 14A, 36AE and *Cotton Textile Companies Act, 1967*, Sections 4(1) and 5(1). Power to legislate for acquisition of "property" in Entry 42, List III therefore, includes the power to legislate for acquisition of an undertaking. But, says Mr. Palkhivala, liabilities of the banks which are included in the connotation of the expression "undertaking" cannot be treated as "property". It is however the assets, rights and obligations of a going concern which constitute the undertaking; the obligations and liabilities of the business form an integral part of the undertaking, and for compulsory acquisition cannot be divorced from the assets, rights and privileges. The expression "property" in Entry 42, List III has a wide connotation and it includes not only

assets, but the organisation, liabilities and obligations of a going concern as a unit. A law may, therefore, be enacted for compulsory acquisition of an undertaking as defined in Section 5 of Act 22 of 1969.

14. The definition of "property" given in these cases which are of binding authority is very wide. It connotes every thing which is subject of ownership, corporeal or incorporeal, visible or invisible everything which has an exchangeable value or which goes to make up wealth, estate or status.

15. Now a business or an undertaking as a going concern can be owned and possessed. It has a separate identity and an exchange value and can be transferred. It is therefore, property in the legal sense. But the transfer of a business as a going concern is not a mere amalgam of the transfer of assets in the form of movable and immovable properties.

16. In *Baytrust Holdings Ltd. v. Indian Revenue Commissioners* 1971 (3) All ER 76, the nature of transfer of goods in which a business is carried was considered by Plowman, J., in the following words, which have been quoted in Weinberg and Blank on Take-overs and Mergers:

A greengrocer's business is no doubt to sell fruit, but the pound of apples which you buy can hardly be described as a purchase of a part of the greengrocer's business.

There is something organic about the whole or part of a business which is different and greater than the assets comprised in it.

17. In an ordinary sale, assets alone are transferred and not the liabilities. Debt however being movable property can be transferred. Under the law of contracts, the liabilities cannot be transferred except with the consent of the licensee although rights can be transferred. In *Khardah Co. Ltd. v. Baymon and Co. (India) Private Ltd.* AIR 1962 SC 1810, the law upon the point was stated thus:

19. ...An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognized distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

18. In the case of a going concern too the liabilities cannot be transferred by contract except as stated above with the consent of the promisee. Under a scheme of amalgamation however liabilities too can be transferred. The nature of a transfer effected by a scheme of amalgamation has been succinctly explained by a Full Bench of the Madras High Court in *Sahayanidhi Virudhunagar Ltd. v. A.S.R. Subramanya Nadar* AIR 1951 Mad 209. In that case Section 153A of the Companies Act which was a provision relating to scheme of arrangement in the

Companies Act, 1913 was the subject-matter of consideration. Vishwanata Sastri, J., who delivered the judgment said:

4. Before considering the terms and stipulations in the two deeds of transfer referred to as A-2 and A-3 we would like to refer to Section 153A Companies Act, which has been enacted with a view to facilitate arrangements and compromises between a company and its creditor 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 provision 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 the 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 contracts while assets are assignable, liabilities under contracts or duties arising thereunder are not assignable but the effect of Section 153A is some extent to override the ordinary law. There is not only a vesting of assets and property but also the imposition of a liability to discharge the debts of the transferor company as a result of the order of Court passed u/s 153A....

19. It appears from the aforesaid discussion that business of a going concern is property and can be owned and transferred but cannot be regarded as a mere amalgam of movable and immovable properties. One difference in the incidents of mere contractual transfer of a going concern on the one hand and a transfer under an arrangement scheme on the other is that in the case of an ordinary contractual transfer the liabilities are not transferred except with the consent of the promisee whereas in the case of a transfer under an arrangement scheme liabilities can also be transferred even without consent of the promisee. A scheme of arrangement therefore, involves transfer of a business as a going concern. A scheme of arrangement involves transfer of assets and liabilities as one transaction. The consideration of this transfer is the allotment of shares of the transferee company. The ratio of allotment of shares depends not only upon the value of the assets and the quantum of liabilities but also upon the market potentiality. I agree with Brother Yatindra Singh, J., that a scheme of arrangement cannot be split up as a transfer of movable and immovable properties.

20. It was submitted on behalf of the State that even though a transfer under a scheme of arrangement may include transfer of assets in the form of movable and immovable properties and liabilities too, stamp duty is chargeable on the transfer of the movable and immovable properties and there is no provision under the Indian Stamp Act for deduction of the liabilities from the assets for the purpose of computation of stamp duty. Rather by applying the provisions of

Section 24 of the Indian Stamp Act read with Section 5 thereof, the value of movable and immovable properties have to be added for the purpose of stamp duty. According to the State a scheme of amalgamation is an instrument relating to several distinct matters and Section 5 of the Indian Stamp Act is a provision applicable to instruments relating to several distinct matters. In my opinion this contention does not have merit. In view of the concept of a going concern discussed above and about the nature of transfer effected under a scheme of arrangement, it cannot be said that the scheme of arrangement is an instrument relating to several distinct matters.

21. Section 24 of the Indian Stamp Act reads as follows:

24. However transfer in consideration of debt, or subject to future payment, etc., to be charged. Where any property is transferred to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with ad valorem duty:

Provided that nothing in this Section shall apply to such certificate of sale as is mentioned in Article No. 18 of Schedule I.

Explanation. In the case of a sale of property subject to a mortgage or other incumbrance, any unpaid mortgage money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration of the sale.

Provided that, where property, subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.

22. It was submitted on behalf of the State that take over of liabilities although constitutes a facet of consideration for the property transferred the liabilities would in view of Section 24 be added back to the actual consideration specified in the deed of merger/amalgamation. I am unable to agree with the submission.

23. I have already taken the view that by the very nature of a transfer under a scheme of arrangement, the assets and liabilities cannot be split up. Therefore, the question of adding back the liabilities to the consideration under the scheme of arrangement does not arise. The consideration of the transaction is allotment of shares of the transferee company. The ratio of allotment of share is arrived at after considering the net assets transferred (assets minus liabilities) as well as future market potentialities. The ratio of allotment of share is what the company regards the best and most equitable bargain for them. In my opinion Section 24 of the Indian Stamp Act would have no application to a transfer under a scheme of arrangement.

24. In Hindustan Lever and Another Vs. State of Maharashtra and Another, , it

was held that a scheme of arrangement was subject to the Stamp Act. This case is however distinguishable in view of the amended provisions of Indian Stamp Act applicable to Maharashtra State.

25. Now if a business of a going concern transferred under an arrangement scheme is "property", the question is whether it can be classified as immovable or movable property. Immovable property has been defined in Section 3(26) of the General Clauses Act, 1897 as follows:

"Immovable" property shall include land, benefits to arise out of land, and things attached to the earth, or permanently, fastened to anything attached to the earth.

26. Movable property has been defined in Section 3(36) of the General Clauses Act, 1897 as follows:

"Movable property" shall mean property of every description, except immovable property.

27. There is nothing in the scheme of the Stamp Act to suggest that the definition of immovable and movable properties under the General Clauses Act would not be applicable in the context of the Stamp Act. From the definition of immovable property in the General Clauses Act, it is clear that the business of a going concern would not fall in the definition of immovable property. The definition of movable property indicates that all property which is not immovable property would fall under the description of movable property. The business of a going concern would include assets consisting of immovable and movable properties, liabilities, privileges etc. It would not fall in the definition of immovable property. It would therefore, fall in the category of movable property. A scheme of arrangement involves transfer of business of a going concern. The consideration of transfer under a scheme of arrangement would be the shares allotted by the transferee company to the shareholders of the transferor company. The valuation of the shares would therefore, be the consideration upon which stamp duty would be payable at the rate provided for conveyance of movable property. A going concern or an undertaking transferred under a scheme of arrangement would therefore be "movable property".

28. In view of the aforesaid discussion, I am of the opinion that the scheme of arrangement is covered by Article 23(b) of Schedule IB of the Indian Stamp Act as applicable in U.P.

29. In view of the aforesaid, findings the Civil Misc. Writ Petition." No. 41811 of 2006 M/s. Hero Motor Ltd., Civil Misc. Writ Petition No. 71022 of 2006, Dhampur Sugar Mills Ltd., Civil Misc. Writ Petition No. 2888 of 2007, M/s. Amar Ujala Publications Ltd., Civil Misc. Writ Petition No. 8114 of 2007, M/s. Telesia Trading and Finance Ltd., Civil Misc. Writ Petition No. 8119 of 2007, M/s. Prudential Merchants and Traders Ltd. and Civil Misc. Writ Petition No. 8139 of 2007, M/s. Padamshree Projects Ltd. are allowed. The order dated 8.6.2006 in Writ Petition No. 41811 of 2006 of M/s. Hero Motors Limited is quashed. The petitioners of M/

s. Hero Motors Limited may appear before the authority which had passed the order and petitioners in the other five connected cases may appear before the authority, which had issued notices to the petitioners on the date that may be intimated to them by the authority concerned. The authority shall decide the case in accordance with the decision given in these writ petitions. As other points may be involved in the other writ petitions which are cognizable by a Division Bench, the record of the other writ petitions, namely, Writ Petition No. 25313 of 2007, Jagram Prakashan Limited, Writ Petition No. 37843 of 2007, M/s. Hardayal Ice and Cold Storage Private Limited, Writ Petition No. 22949 of 2007, M/s. Radico Khaitan Limited, Writ Petition No. 33956 of 2008, Jaiprakash Associates Limited, Writ Petition No. 32480 of 2007, M/s. Unitech Limited and another, Writ Petition No. 30763 of 2007, M/s. Radico Khaitan Limited, Writ Petition No. 22187 of 2007, M/s. Hindalco Industries Limited and Writ Petition No. 25461 of 2007, Reliance Communications Limited may be returned for decision to the appropriate Division Bench.