

(2004) 01 CAL CK 0016
In the Calcutta High Court

Case No : A.P.O. No's. 560 of 2002 and 54 and 76 of 2003

Madhu Intra Limited and Another, VAI Automation Private Limited and Another and Stuti Developers Private Limited and Others APPELLANT

Vs

Registrar of Companies and Others RESPONDENT

Date of Decision : 22-01-2004

Acts Referred:

Companies Act, 1956 — Section 391, 392, 393, 394, 394(1)

Stamp Act, 1899 — Section 2(10), 2(14)

Transfer of Property Act, 1882 — Section 2

Citation : (2004) 3 CHN 607 : (2006) 130 CompCas 510 : (2008) 4 CompLJ 50 : (2005) 58 SCL 160

Hon'ble Judges : Altamas Kabir, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : S.N. Mukherjee and Ratnanko Banerjee, in A.P.O. No. 76 of 2003, Anindya Mitra, Pratap Chatterjee and Sanjoy Basu, in A.P.O. No. 560 of 2002 and Ranjan Deb and Manju Bhutoria, in A.P.O. No. 54 of 2003, for the Appellant;Balai Chandra Ray, General, Debashis Kar Gupta, Somnath Dey, R.N. Bag, Mrinal Kanti Kundu and Asis Kumar Das, for the Respondent

Final Decision : Allowed

Judgement

Altamas Kabir, J.—These three appeals have been taken up together for hearing and disposal as they involve a common question as to whether an order passed by the Company Court u/s 394(1) of the Companies Act, 1956, is a "conveyance" and an "instrument" under the Indian Stamp Act, and therefore, liable to stamp-duty.

2. As will appear from the materials on record, an application was filed by Gemini Silk Limited and Anr. before the learned Company Judge, being company petition No. 74 of 2002, praying for sanction of a Scheme of Re-construction and/or Amalgamation pursuant to Sections 391, 392, 393 and 394 of the Companies Act, 1956. By his order dated 8th August, 2002, the learned Judge, inter alia,

held that an order sanctioning such a scheme u/s 394 of the said Act is covered by the definition of the expressions "conveyance" and "instrument" under the Indian Stamp Act and was, therefore, liable to payment of stamp-duty. The learned Company Judge directed that the Registrar of Companies shall not take on record an order sanctioning a scheme until the same was duly stamped. The concerned department of this Court was directed to engross the final order sanctioning a scheme u/s 394 of the aforesaid Act on appropriate stamp paper, before placing the same for final signature.

3. The appellants in these three appeals were not parties to C. P. No. 74 of 2002, or to the said order dated 8th August, 2002, but in the aforesaid facts and circumstances their rights have been affected by the said order which has compelled them to file the three appeals, along with connected applications for leave to appeal after condonation of the delay in filing the same.

4. The said applications having been allowed, the appeals were directed to be heard to resolve the question referred to hereinbefore at the very first instance.

5. In each of these three appeals, applications were made by the appellants for grant of sanction to schemes of arrangement and/or amalgamation and, although, the same have been allowed and sanction has been granted, such sanction is naturally subject to the order relating to assessment of stamp-duty in terms of the order passed in the application of Gemini Silk Limited.

6. Appearing for the appellants in A.P.O. No. 560 of 2002, Mr. Anindya Mitra submitted that the Company Court's jurisdiction to sanction a scheme and to provide for transfer of property in accordance with the scheme is derived from Sub-section (1) of Section 394 of the Companies Act, 1956.

7. Mr. Mitra urged that an order passed by the Court u/s 394 is sufficient to vest properties and liabilities in the transferee company without execution of any further document, having regard to the scheme embodied in Sub-section (2) of Section 394 of the said Act. Mr. Mitra submitted that it is by operation of law, as provided under Sub-section (2) of Section 394, that the assets and liabilities of the transferor company get transferred to and vests in the transferee company without the need for execution of any further document and had Sub-section (2) of Section 394 not been in the statute book the transferee company would have had to execute documents of transfer pertaining to the immovable property sought to be transferred by the scheme. Mr. Mitra submitted that in such an eventuality, the question of payment of stamp-duty may have arisen. However, when the transfer is effected by operation of law the properties and the liabilities of the transferor, company vests in the transferee company by virtue of the order u/s 394 in which case the question of payment of stamp-duty cannot or does not arise.

8. Mr. Mitra pointed out that the order sanctioning the scheme becomes effective upon a certified copy thereof being filed with the Registrar of Companies under Sub-section (3) of Section 394 of the above Act.

9. Mr. Mitra submitted that an order of sanction u/s 394(1) provides for transfer of assets and liabilities. In terms of the sanctioned scheme, transfer and vesting take place by reason of the extraordinary provision of law contained in Sub-section (2) of Section 394 as a case of transfer by operation of law and not by any instrument of conveyance. Mr. Mitra submitted that unlike other orders and decrees of Court providing for transfer of property, for example, by way of decree for specific performance of an agreement for sale of immovable property, no conveyance or instrument is required to be executed, in respect of an order u/s 394 of the Act.

10. Mr. Mitra then urged that the provisions of the Transfer of Property Act, 1882, would not apply to a transfer by operation of law as indicated, in Section 2(d) of the said Act, which is the reason as to why there is no conflict between the provisions of Section 5 of the Transfer of Property Act and Section 394 of the Companies Act, 1956.

11. In this regard Mr. Mitra firstly referred to and relied on the Full Bench decision of the Madras High Court in the case of Sahayanidhi Virudhunagar Ltd. Vs. A.S.R. Subrahmanya Nadar and Others, , wherein while considering the scope of Section 153A of the Companies Act, 1913, which is similar to the provisions of Section 394 of the Companies Act, 1956, the Court observed that the same had been enacted to facilitate arrangements and compromises between a company and its creditors or shareholders which involve the transfer of its assets and liabilities to other companies. 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 by virtue of that order, without anything more stand transferred to and vested in the transferee company and the liabilities of the former company are also shifted to the transferee company.

12. Mr. Mitra also referred to the decision of the Hon'ble Supreme Court in the case of General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., , wherein following the aforesaid Full Bench decision of the Madras High Court regarding the effect of an order u/s 153A of the Companies Act, 1913, corresponding to Sections 391 and 394 of the Companies Act, 1956, the Supreme Court observed that the same to some extent had an overriding effect over the ordinary law. Thus by an order sanctioning amalgamation, the rights, interest and liabilities of the transferor company are transferred to and vest in the transferee company.

13. In this regard, Mr. Mitra lastly referred to a Bench decision of this Court in the case of L. Mullick & Company v. Binani Properties Private Limited and Ors., Vol. 53 Company Cases page 693, wherein in addition to other issues the provisions of Section 394 of the Companies Act, 1956 were also considered and it was held that an order u/s 394 of the Companies Act will include all the properties of the transferor company and, any property, to which it is proved that the transferor company had title at the time the order was made, should be deemed to have been transferred to the transferee company.

14. Mr. Mitra submitted that in none of the aforesaid cases was the scheme of amalgamation and/or the order sanctioning such scheme required to be stamped as has now been directed under the impugned judgment of the learned Company Judge.

15. Mr. Mitra submitted that mere right to sue cannot be transferred u/s 6 of the Transfer of Property Act, but u/s 394 of the Companies Act, 1956 even liability and the right to sue could be transferred which would take such an order out of the purview of the Transfer of Property Act, 1882.

16. Mr. Mitra then submitted that both Section 394 of the Companies Act, 1956 and the provisions of the Transfer of Property Act could be construed harmoniously and there is no reason to assume that Section 394 of the Companies Act was intended to override the provisions of the Transfer of Property Act. In fact, a scheme sanctioned u/s 394 of the Companies Act, 1956 effects a transfer by operation of law and the definition of "conveyance" contained in Section 2(10) of the Indian Stamp Act would not apply to transfers by operation of law. Mr. Mitra submitted that "conveyance" as defined u/s 2(10) of the above Act was confined to transfer inter vivos by voluntary execution of the document of transfer. Mr. Mitra submitted that in order to give a harmonious construction to the provisions of Section 2(10) of the Indian Stamp Act and the provisions of the Transfer of Property Act, the scope of Section 2(10) of the former Act should be interpreted to mean transfer of property by act of parties to which the Transfer of Property Act applies, having particular regard to the definition of "transfer" in Section 5 of the Transfer of Property Act.

17. By way of an alternative argument Mr. Mitra submitted that Section 2(10) of the Indian Stamp Act does not mention an order of Court. On the contrary it defines conveyance on sale and every instrument inter vivos by which property is transferred. Referring to Black's Law Dictionary Mr. Mitra submitted that the expression "inter vivos" meant a transaction where property passes by a conveyance from one living person to another in distinction from a case of succession or devise which happens by operation of law. Mr. Mitra also referred to Trayner's Latin Maxim where a similar definition of the expression has been mentioned.

18. Mr. Mitra also contended that an order of Court is not an instrument as explained by the Hon^{ble} Supreme Court in the case of Municipal Corporation of Delhi Vs. Pramod Kumar Gupta, , neither is a certificate of sale issued by a Court an instrument.

19. Mr. Mitra urged that an order of Court u/s 394 of the Companies Act is neither "conveyance" nor "instrument" inter vivos. It is not made between the transferor company and the transferee company, nor is it signed by the other". Mr. Mitra submitted that in *Jodrell v. Jodrell*, Volume VII Equity Cases, page 461, it had been held by Lord Romilly, M.R., That an order of Court is not an instrument within the meaning of the Apportionment Act.

20. Mr. Mitra also urged that Section 2(15) of the Indian Stamp Act specifically provides that the final order of Court for partition is an instrument under the Indian Stamp Act. In other words, it is not the intention of the legislature to treat all orders or decrees of the Court as instrument under the Indian Stamp Act. Mr. Mitra urged that the basis of the judgment passed by the learned Company Judge is that an order u/s 394 of the Companies Act, is covered by the definition of the words "conveyance" and "instrument" under the Indian Stamp Act, but nothing has been indicated in the judgment as to why an order and decree of the Court which is not specifically required to be stamped under the Indian Stamp Act, such as a partition decree, is to be treated as a "conveyance" or "instrument" inter vivos for the purposes of the Indian Stamp Act. Mr. Mitra urged that the learned Single Judge had not dealt with the expression "inter vivos" occurring in Section 2(10) of the Indian Stamp Act, nor had the aspect relating to transfer by operation of law been dealt with.

21. Mr. Mitra concluded his submissions on the note that the judgment and order of the learned Single Judge has the effect of modifying statutory Form No. 42 referred to in Rule 84 of the Companies (Court) Rules, 1959, requiring an order u/s 394 of the Companies Act to be in such form and renders it impossible to give effect to the provisions both of Sub-section (2) and Sub-section (3) of Section 394 of the above Act.

22. Mr. S. N. Mukherjee who appeared for the appellant in A.P.O. No. 76 of 2003, while adopting Mr. Mitra's submissions, sought to elaborate on the issue as to whether an order of Court could be brought within the definition of "conveyance" in Sub-section (10) of Section 2 of the Indian Stamp Act or the Explanation included by the West Bengal Amendment including the expression "instrument" by way of and Explanation to the definition of "conveyance", or for that matter within the scope of Sub-section (14) of Section 2 of the Indian Stamp Act which describes an instrument to include every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded.

23. Mr. Mukherjee urged that as would be supported by authority an order of Court sanctioning a scheme of reconstruction or amalgamation u/s 394 read with Section 391 of the Companies Act, 1956, is neither a "conveyance" nor an "instrument" so as to make it liable to be stamped in accordance with the provisions of the Indian Stamp Act in its application to the State of West Bengal. Mr. Mukherjee submitted that the aforesaid controversy was unnecessary in view of the provisions of Sub-section (2) of Section 394 which provides that where an order sanctioning a compromise or arrangement between two or more companies provides for transfer of any property or liabilities, then, by virtue of such 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, free from any charge, if so directed. In other words, an order u/s 394 of the Companies Act, 1956 operates to transfer properties and liabilities of a transferor company

to a transferee company by operation of law and, therefore, stands outside the provisions relating to transfer under the Transfer of Property Act, 1882.

24. Mr. Mukherjee submitted that it would be absolutely clear that Section 394(2) of the Companies Act provides for properties and liabilities of a transferor company to stand transferred to the transferee company by virtue of an order of Court in the statutory form provided for in Form No. 42 framed in accordance with the Rule 84 of the Companies (Court) Rules, 1959. Mr. Mukherjee urged that nothing further was, in fact, required to be done to complete such transfer.

25. It was urged that in the case of Gemini Silk Limited v. Gemini Overseas Limited the question as to whether an order u/s 394(1) of the Companies Act was to be treated as a "conveyance" and/or "instrument" came to be considered having regard to the decision of the Supreme Court in the case of Ruby Sales and Services (P) Ltd. and Another Vs. State of Maharashtra and Others, , wherein it was held that a consent decree is also an "instrument" under which title passed to the appellants/plaintiffs. Drawing a parallel between such decree and an order u/s 394 of the Companies Act, the learned Company Judge came to hold that such an order was also based on an agreement between the transferor and the transferee companies.

26. Mr. Mukherjee submitted that such a parallel had been erroneously drawn mainly because the decision in the case of Ruby Sales and Services (supra) was based on the provisions of the Bombay Stamp Act, 1958, where under the expression "conveyance" had been amended on 10th December, 1984, to include every decree or final order of any Civil Court. Furthermore, by a subsequent amendment dated 1st April, 1993, every order made by the High Court u/s 394 of the Companies Act, 1956, in respect of amalgamation of companies was also included within the meaning of the expression "conveyance". It was pointed out that the matter had gone up to the Supreme Court against the decision of the Division Bench of the Bombay High Court which had disagreed with the finding of the learned Single Judge that the consent decree was neither "conveyance" u/s 2(g) nor "instrument" u/s 2(1) of the Bombay Stamp Act so as to make it liable for payment of stamp-duty. Mr. Mukherjee submitted that as will be evident from the judgment of the Hon'ble Supreme Court the learned Single Judge, while taking a view which was opposite to the view of the Division Bench, had relied on a Full Bench decision of the Bombay High Court in the case of Sharan Basappa Tippanna Indi v. Sangan Basappa Sridramappa Sahapur, considering a reference u/s 16 of the Indian Stamp Act on the question as to whether a consent decree creating a charge on immovable property, which was not the subject-matter of the suit, requires to be stamped. The Supreme Court while considering the matter took note of the fact that the Full Bench had no occasion to consider the consent decree as in the case before the Supreme Court where the parties intended that the consent decree was to operate as a "conveyance". Mr. Mukherjee submitted that it was in such circumstances that the Supreme Court had held that the decision of the Full Bench could not be taken to be an authority

for the proposition that where immovable property is, in fact, transferred under a consent decree, the same could be said to amount to "conveyance" within the meaning of the Indian Stamp Act, 1899.

27. Mr. Mukherjee pointed out that the relevant portion of the consent decree in consideration in the case of Ruby Sales and Services Pvt. Ltd. (supra) specifically mentioned that the decree was to operate as a "conveyance" from the defendants in favour of the plaintiffs in respect of the property mentioned in the schedule to the decree and also described in Exhibit A to the plaint. Mr. Mukherjee submitted that in the said context it was recorded by the Hon'ble Supreme Court that from the said recital in the consent decree there could be no manner of doubt that the parties to the transaction in the suit had agreed that the consent decree itself was to operate as a "conveyance" from the defendants in favour of the plaintiffs in respect of the suit property particularly described in Exhibit A to the plaint.

28. Mr. Mukherjee then urged that the learned Company Judge had also erroneously relied on the Single Bench decision of this Court in the case of Albion Jute Mills Co. Ltd. v. Rivers Steam Navigation Company and Ors., reported in 100 CLJ 17, wherein it had been observed 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 agreement entered into between the transferor company and the transferee company".

29. Mr. Mukherjee submitted that the said decision had been subsequently overruled by the Division Bench in New Central Jute Mills Co. Ltd. Vs. Rivers Steam Navigation Co. Ltd. and Others, , in which the provisions of Section 153A of the Indian Companies Act, 1913, which are similar to those in Section 394 of the Companies Act, 1956, fell for consideration and it was held that the argument that the transfer infringes the provisions of Section 6(e) of the Transfer of Property Act overlooks the plain language of Section 153A and that the transfer takes place by virtue of a vesting order without any further act or deed. The Division Bench went on to observe that it is not necessary to obtain a formal conveyance from the transferor company and that the transfer being by an order of Court of competent jurisdiction, Section 6(e) of the Transfer of Property Act has no application having regard to Section 2(d) of the Transfer of Property Act which deals with transfer by operation of law.

30. Mr. Mukherjee submitted that the learned Company Judge had on an erroneous appreciation of the matter and on being influenced by the form of Form No. 42 indicated that it was well-settled law that the properties of a company belong to the company and the company belongs to the shareholders. Therefore, by virtue of the transfer effected by an order u/s 394, the owners of the company receive the consideration, which gave rise to the further question

as to whether such a transfer was a voluntary act of the parties, namely, the transferor company, the transferee company and their respective shareholders. Mr. Mukherjee urged that the learned Company Judge had mistakenly placed reliance on the decision of the Supreme Court in the case of General Radio and Appliances Co. Ltd. and Others Vs. M.A. Khader (Dead) by Lrs., , wherein the question had arisen 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.

31. Mr. Mukherjee urged that the decision in the said case had been rendered on the question as to whether the transfer effected by an order sanctioning the scheme of amalgamation had also resulted in the transfer of tenancy from the transferor company to the transferee company which was held to be illegal and hit by the provisions of A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960.

32. Mr. Mukherjee urged that the aforesaid decision would have little or no bearing on the facts of the present case in view of the fact that the transfer effected by virtue of an order u/s 394 of the Companies Act, 1956, amounted to transfer by operation of law and not merely by voluntary act of the parties. Mr. Mukherjee submitted that the learned Company Judge apparently mixed up the two concepts relating to transfers in general within the meaning of the Transfer of Property Act and other related Acts and transfer by operation of law.

33. Mr. Mukherjee then urged that the learned Company Judge had also allowed himself to be prejudiced and/or influenced by another question as to whether a transfer effected by virtue of an order u/s 394 of the Companies Act amounted to sale or not. Mr. Mukherjee submitted that in answering the said question the learned Company Judge relied on an observation made by Lord Lindley, Master of the Rolls, in *Wall v. London Northern Assets Corporation*, reported in LR 1892(2) Ch.464, to the following effect:

"I do not see how a company as a business transaction can practically amalgamate with persons or companies carrying on business unless the company in some way or the other sells its assets as a whole not for money, for that would be a simple sale - but for shares in the purchasing company".

34. Mr. Mukherjee submitted that in this connection the learned Company Judge also took into account the provisions of Section 494 of the Companies Act which deals with the power of the Liquidator to accept shares etc. as consideration for sale of properties of the company in liquidation and in this regard the concept of sale as defined under the Sale of Goods Act as also Transfer of Property Act, was sought to be examined.

35. Mr. Mukherjee also pointed out that the learned Company Judge while considering the aforesaid proposition and finally come to the conclusion that a transaction such as one u/s 394 of the Companies Act has all the trappings of a sale. In the said background, the learned Company Judge also posed a question as to whether an order of Court u/s 394, sanctioning a scheme, which

effectuates sale or transfer, is a "conveyance" or not. In this regard the learned Company Judge took note of the definition of "conveyance" under the Indian Stamp Act that includes every instrument by which property, whether movable or immovable, is transferred inter vivos and also posed another question as to whether such an order u/s 394 of the Companies Act is an "instrument" or not.

36. Mr. Mukherjee submitted that while raising the said question the learned Company Judge had also referred to the definition of the expression "instrument" in the Indian Stamp Act which defines an instrument to include every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded. Exploring the meaning of the said expression further the learned Company Judge observed that since a document creating or transferring a right is an "instrument", could it therefore be said that an order effectuating a transfer is a document. Mr. Mukherjee submitted that the question as raised by the learned Company Judge was answered by the learned Judge himself in the light of the decision of the Supreme Court in the case of Haji Sk. Subhan Vs. Madhoroa, . The learned Company Judge observed that the Supreme Court had answered the question in the affirmative by holding that the word "document" includes a decree of the Court. Accordingly, as already noticed above, the learned Company Judge then went on to refer to the decision of the Hon"ble Supreme Court in the case of Ruby Sales and Services Pvt. Ltd. (supra) where a consent decree was under consideration and the same was held to be an "instrument".

37. While not directly on the subject, the case of Li Taka Pharmaceutical Ltd. v. State of Maharashtra, reported in AIR 1992 Bombay page 7, was also referred to by the learned Company Judge who recorded that the question whether an order u/s 394 of the Companies Act is an "instrument" and, therefore, liable to be stamped, had pointedly arisen in the said case. Of course, it was also noticed that the case was distinguishable because the State of Maharashtra had brought an amendment to the Indian Stamp Act where-under an order passed u/s 394 was specifically brought within the meaning of the word "conveyance".

38. Mr. Mukherjee pointed out that on a consideration of the statutory provisions and the judicial pronouncements relied upon, the learned Company Judge came to the conclusion that an order sanctioning a Scheme of Reconstruction or Amalgamation is an "instrument" by which the transfer of properties and liabilities of the transferor company to the transferee company is effected and the same, therefore, must lead to the irresistible conclusion that the order which is an "instrument" is a "conveyance" which is required to be stamped under the provisions of the Indian Stamp Act.

39. Mr. Mukherjee submitted that the aforesaid conclusion arrived at by the learned Company Judge was contrary to the Bench decision of this Court in the case of Sailendra Kumar Ray and Anr. v. Bank of Calcutta Limited, reported in 18 Company Cases (1948) Page 1. In the said decision while considering an order sanctioning a Scheme of Amalgamation u/s 153A of the Indian Companies Act,

1913, in relation to the provisions of Order 21 Rule 16 of the Civil Procedure Code, the Division Bench was of the view that such an order was not a transfer within the meaning of Order 21 Rule 16 of the Code and the order of the High Court sanctioning the scheme could not be regarded as an "instrument" of transfer.

40. Mr. Mukherjee also contended that no reliance should have been placed on the decision of the Supreme Court in the case of Ruby Sales and Services Pvt. Ltd. (supra) where the parties to the transaction and the suit had agreed that the consent decree passed in the suit would itself operate as "conveyance" from the defendants in favour of the plaintiffs in respect of the suit property. It was, therefore, immaterial as to whether the amended provisions of Section 2(g) and (1) of the Bombay Stamp Act, 1958 were considered by the Court or not. Expanding his said submission Mr. Mukherjee referred to another decision of the Hon'ble Supreme Court in the case of Pulavarthi Venkata Subba Rao and Others Vs. Valluri Jagannadha Rao and Others, , wherein it was held that a decree passed on compromise is not a decision by the Court but is an acceptance by the Court of something to which the parties had agreed and does not, therefore, operate as res judicata.

41. As to the decision in the case of Li Taka Pharmaceutical Ltd. (supra) Mr. Mukherjee urged that the said decision had been rendered in the light of the amended provisions of Section 2(g)(iv) of the Bombay Stamp Act, 1958, wherein an order made by the High Court u/s 394 of the Companies Act was specifically included within the expression "conveyance". Mr. Mukherjee urged that in the absence of a similar provision in the Indian Stamp Act, in its relation to West Bengal, no comparison could be or ought to have been drawn between the facts of the said case and those of the instant case.

42. Certain other decisions were also referred to, including the decision in the case of Jodrell v. Jodrell (supra) referred to and relied upon by Mr. Anindya Mitra, in support of the proposition that an order of Court cannot be said to be an "instrument" inter vivos and/or a "conveyance" so as to attract the provisions of the Indian Stamp Act.

43. Mr. Mukherjee concluded his submissions on the note that the decisions relied upon by the learned Company Judge in arriving at the conclusion that an order u/s 394 of the Companies Act, 1956 was an "instrument" and a "conveyance", were on the basis of the provisions of the Bombay Stamp Act, 1958, which were different from the provisions of the Indian Stamp Act, in their application to West Bengal. Mr. Mukherjee submitted that no comparison could, therefore, be drawn between the two provisions unless the provisions of the Indian Stamp Act, in their relation to West Bengal, were also similarly amended to include orders u/s 394 of the Companies Act, 1956, to be "conveyances" for the purposes of transfer of the assets of the transferor company to the transferee company. Mr. Mukherjee urged that the order of the learned Company Judge was not sustainable in law and was liable to be set aside.

44. As will appear from the opening paragraphs of the judgment of the learned Company Judge on the application for confirmation of a Scheme of Amalgamation between Gemini Silk Ltd. v. Gemini Overseas Ltd., notice was issued to the learned Advocate General when the question arose as to whether stamp-duty is payable in respect of an order u/s 394 of the Companies Act, 1956. Thereafter, the State of West Bengal was added as a party to the said application and several other similar applications were tagged with the main application for settlement of the issue which had cropped up. In such circumstances, the State of West Bengal, represented by the learned Advocate General, was also called upon to make submissions with regard to the question as to whether an order of the Company Judge sanctioning a Scheme of Amalgamation u/s 394 of the Companies Act, 1956, was required to be stamped for the purposes of the Indian Stamp Act.

45. The learned Advocate General submitted that the transfer of assets from the transferor company to the transferee company does not take place u/s 394 of the Companies Act but on the basis of the scheme itself. It was urged that it is the scheme which provides for the transfer of assets and liabilities and an order u/s 394 merely sanctions such transfer. Accordingly, as was held by the Supreme Court in the case of Ruby Sales and Services Pvt. Ltd. (supra) the order of the Court would not change the nature of the scheme and would merely facilitate its implementation.

46. The learned Advocate General also referred to the case of Li Taka Pharmaceutical Ltd. (supra) where on the basis of the inclusion of Section 2(g) (iv) in the Bombay Stamp Act, 1958, an order u/s 394 also treated to be an "instrument" for the purpose of payment of stamp-duty.

47. The learned Advocate General, however, submitted that as in the case of the Bombay Stamp Act, appropriate amendment would also have to be made in the Indian Stamp Act, in its application to West Bengal, to include orders u/s 394 of the Companies Act within the definition of "instrument" which would then make the position clear and unambiguous.

48. While dealing with the submissions of the respective parties, it has to be kept in mind that the question as to whether an order u/s 394 of the Companies Act, 1956, amounted to a "conveyance" and, therefore, liable to payment of stamp-duty, arose in an application filed before the learned Company Judge for sanction of a Scheme of Amalgamation. As will appear from the trend of decisions cited by Mr. S. N. Mukherjee, the consistent view of this Court has been that the transfer of assets and liabilities of the transferor company to the transferee company was by operation of law in view of the provisions of Sub-section (2) of Section 394 of the aforesaid Act, and apart from complying with the provisions of Sub-section (2) of Section 394, nothing further was required to be done in order to complete the transfer of liabilities and assets from the transferor company to the transferee company. The entire exercise appears to have been influenced by the decision of the Supreme Court in the case of Ruby Sales and Services Pvt. Ltd.

(supra) and that of the Bombay High Court in the case of Li Taka Pharmaceutical Ltd. (supra) referred to and relied upon by the learned Company Judge in answering the question referred to hereinabove. The entire fabric of the judgment of the learned Company Judge has been woven around the said two decisions and the concept of the order u/s 394 being a "conveyance" and an "instrument" was tailored to fit the said two decisions.

49. In our view, the moot question which falls for consideration in these appeals, is not whether an order u/s 394 is a "conveyance" or an "instrument", but as to whether in view of the provisions of Sub-section (2) of Section 394 an order under Sub-section (1) sanctioning a Scheme of Amalgamation or Arrangement, is liable to be stamped under the Indian Stamp Act.

50. Sub-section (2) of Section 394 of the Companies Act, 1956, reads as follows:

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

51. In the case of Bombay, the law has been amended so as to include orders made u/s 394 of the aforesaid Act within the definition of "conveyance" in the Bombay Stamp Act. The ratio of the decision in the Ruby Sales and Services Pvt. Ltd. (supra) case, cannot, also, in our view, be generally applied to all orders u/s 394 of the Companies Act, since the said decision was based on the consideration that the parties had themselves agreed on the basis of the consent decree that the order u/s 394 was to operate as a "conveyance" for transfer of the assets and liabilities of the transferor company to the transferee company. It should not be lost sight of that in the case of Ruby Sales and Services Pvt. Ltd. (supra), the learned Single Judge of the Bombay High Court, following a Full Bench decision of the same Court had come to the conclusion that an order u/s 394 was not liable to stamp- duty. The Division Bench took a contrary view on account of the fact that in the consent decree itself it had been indicated that the same was to operate as a "conveyance". It is in the said special facts of the case that the decision in Ruby Sales and Services Pvt. Ltd. (supra) was rendered by the Hon"ble Supreme Court.

52. As to the decision in Li Taka Pharmaceutical Ltd. (supra), as indicated hereinabove, the same was based on the amended provisions of Section 2(g)(iv) of the Bombay Stamp Act, 1958, which included within the meaning of the expression "conveyance" every order made by the High Court u/s 394 of the Companies Act in respect of amalgamation of companies by which property, whether movable or immovable or any estate or interest in any property is transferred to, or vest in, any person, inter vivos, and which is not otherwise specifically provided for by Schedule I. The facts of both the two aforesaid cases

are completely distinguishable from the facts of matters generally relating to orders u/s 394 of the Companies Act, 1956. Even if the order u/s 394 is to be taken to be a "conveyance" or an "instrument" the transfer of assets and liabilities effected thereby is purely by operation of law which on account of Section 2(d) of the Transfer of Property Act also excludes the operation of Section 6(e) thereto. Notwithstanding the definition of the expression "instrument" in Section 2(14) of the Indian Stamp Act, the unamended provisions of the Indian Stamp Act in relation to such definition and the definition of "conveyance" and/or "instrument" does not apply to an order u/s 394 of the Companies Act for the purpose of stamp-duty. We agree with the view expressed by the Division Bench of this Court in New Central Jute Mills Co. Ltd. (supra), that the transfer of assets and liabilities from the transferor company to the transferee company takes place by virtue of subsection(2) of Section 394, without any further act or deed.

53. We are, therefore, inclined to agree with the submissions made on behalf of the appellants in these appeals that the learned Company Judge erred in importing the concept of transfer as explained in the case of Ruby Sales and Services Pvt. Ltd. (supra) and Li Taka Pharmaceutical Ltd. (supra) to the case of amalgamation and/or compromise governed simply by the provisions of Sub-section (2) of Section 394 of the Companies Act, 1956. In our view, the transfer of assets and liabilities of the transferor company to the transferee company takes place on an order being made under Sub-section (1) of Section 394 by operation of Sub-section (2) thereof.

54. The judgment and order of the learned Company Judge in the case of Gemini Silk Limited v. Gemini Overseas Limited, and the directions contained therein are accordingly set aside and the department is directed to draw up and complete the orders passed u/s 394 of the Companies Act, 1956, as if the judgment of the learned Company Judge in Gemini Silk Limited v. Gemini Overseas Limited, had not intervened. In the event any orders u/s 394 have been stamped consequent upon the decision rendered in the case of Gemini Silk Limited v. Gemini Overseas Limited, the parties will be entitled to apply for and to obtain refund of such stamp-duty, in accordance with law.

55. The appeals are accordingly allowed. There will, however, be no order as to costs.

56. All parties to act on the signed copy of the operative portion of this judgment on the usual undertakings.

Alok Kumar Basu, J.

57. I agree.