

Bombay High Court *Li Taka Pharmaceuticals Ltd. vs State Of Maharashtra And Other* on 19 February, 1996 Equivalent citations: AIR 1997 Bom 7, 1998 91 CompCas 871 Bom Author: Shah Bench: M Shah, A Savant JUDGMENT Shah, C.J. 1. In this group of petitions, the petitioners have prayed that section 2(g)(iv) read with article 25 of Schedule I to the Bombay Stamp Act, 1958, be declared unconstitutional, ultra vires the Constitution of India and null and void. It is also prayed that the respondents be restrained from requiring the petitioners to pay stamp duty on the amalgamation orders passed by this court or from taking any steps against the petitioners under the provisions of the Bombay Stamp Act. 2. At the time of admission of the petitions, this court had granted interim relief by taking the usual undertakings that in the event this court directs the petitioners, the petitioners shall pay the entire amount of stamp duty assessed without prejudice to the rights and contentions of the petitioners. 3. For appreciating the contentions of the petitioners, it would be necessary to refer to section 2(g). Section 2(g) reads as under : “(g) ‘conveyance’ includes, - (i) a conveyance on sale, (ii) every instrument, (iii) every decree or final order of any civil court, (iv) every order made by the High Court under section 394 of the Companies Act, 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 vested in, any person, inter vivos, and which is not otherwise specifically provided for by Schedule I.” 4. Clause (g)(iii), which is added by the Maharashtra Act No. 27 of 1985 which has come into operation from December 10, 1985, provides that conveyance includes every decree or final order of any civil court. Clause (g)(iv) is added by the Maharashtra Act No. 17 of 1993 which has come into operation from April 1, 1993. Before appreciating the contentions raised, it would be appropriate to state that even prior to amendment, a conveyance would include every instrument by which the property is transferred to or vested in any other person inter vivos. Under clause (g)(ii), conveyance included every instrument by which whether movable or immovable property or asset or interest in any property is transferred to or vested in any other person, inter vivos, and which is not otherwise specifically provided. By adding section 2(g)(iii), it is made clear that “every instrument” would include a consent decree or final order of any civil court. 5. Section 2(g)(iii) came up for interpretation before this court and finally before the Supreme Court in the case of *Ruby Sales and Services (P.) Ltd. v. State of Maharashtra*. The Supreme Court in that case held that there is no particular pleasure in merely going by the label but what is decisive is 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 passed, it is a live document transferring the property in dispute from the defendants to the plaintiffs; and the consent decree falls under the definitions of “conveyance” as well as “instrument”. The court further held that the amendment in 1985 was made out of abundant caution and it does not mean that the consent decree was not otherwise covered by the definitions given in section 2(g) or 2(l) of the Act. The court further held that merely because an agreement is put in the shape of a consent decree, it does not change the contents of the document. It remains an agreement and it is

subject to all rights and liabilities which any agreement may suffer. 6. By Act No. 17 of 1993, the Legislature has also added section 2(g)(iv) to include every order passed by the High Court under section 394 of the Companies Act, 1956, in respect of amalgamation of companies. In our view, applying the ratio of the decision in the case of Ruby Sales and Services (P.) Ltd. v. State of Maharashtra, prima facie, it appears to be clarificatory. As such, an amalgamation order passed under section 394 is based upon the agreement between the two companies. In amalgamation, two or more companies are merged into one or one takes over the other. The proceedings under section 394 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 an appropriate order sanctioning the compromise or arrangement. But the foundation or basis for passing an order of amalgamation is the agreement between two or more companies. Section 394 makes this abundantly clear. It reads as under : “Provisions for facilitating reconstruction and amalgamation of companies. - (1) Where an application is made to the court under section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the court - (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 “the 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, debentures, policies, or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person; (iii) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company; (iv) the dissolution, without 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 has, on scrutiny of the books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. (2) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee company; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.” 7. Section 394 quoted above clearly provides that the application and order of amalgamation under section 394 is based upon a compromise or arrangement which has been proposed for the purpose of amalgamation of two or more companies. Under the said scheme of amalgamation, the whole or any part of the undertaking, property or liability of any company concerned in the scheme is to be transferred to another company. The company whose property is transferred would be a transferor-company and the company to whom the property is to be transferred would be considered as a transferee-company. The proviso to sub-section (1) of section 394 provides that the proposed compromise or arrangement would be subject to verification by the court as provided therein, particularly whether the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. Sub-section (2) further provides for transfer of any property or liabilities by virtue of the order and that property shall be transferred to and vest in the transferee-company. Sub-section (4) defines the word “property” so as to include property, rights and powers of every description. Hence, by the amalgamation order, which is based upon compromise or arrangement between the two or more companies, the property of the transferor-company vests in the transferee-company. 8. Further, under section 2(1) of the Bombay Stamp Act, the word “instrument” is defined to mean every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of shares, debenture, proxy and receipt. Therefore, the amalgamation scheme sanctioned by the court would be an instrument within the meaning of section 2(1). The said instrument is on the basis of agreement or arrangement between two or more companies. By the said instrument, properties are transferred. 9. Keeping the aforesaid provision in mind, we shall deal with the contentions raised by learned counsel for the petitioners. At the outset, we appreciate the fairness of learned counsel for the petitioners, Mr. Andhyarujina, in presenting the case as well as pointing out all the relevant judgments. It is no doubt commendable. Mr. Andhyarujina has raised the following contentions : (a) A State Legislature cannot impose a stamp duty on an order of amalgamation of companies under section 394 as it is not simpliciter an order on a transfer of properties by the act of parties with an imprimatur of the court. An order of the court approving a scheme of amalgamation under section 394 is an order made by the court after a judicial investigation and the transfer of properties in such an order is not by the act of the parties on which the court simply puts its approval. Stamp duty

can only be levied on documents (or instruments). Stamp duty on an order of the court which is not an order merely approving an act of the parties in transferring property would be ultra vires the Legislature as an order of the court in exercise of its judicial functions cannot be “a document” or an “instrument” and cannot become the subject of a levy of stamp duty in India. (b) The impugned duty is not a duty on a document or instrument but is in reality a duty on transfer of property which the State Legislature is not competent to impose. Such a tax can only be imposed by Parliament under List I, entry 97. (c) In the guise of a stamp duty, the State Legislature is imposing in reality a tax on the amalgamation of companies and has encroached on the field of Parliament under entry 44, List I, Seventh Schedule to the Constitution. (d) The provisions of clause (g)(iv) of section 2 read with section 34 of the Bombay Stamp Act are repugnant to sections 391 and 394 of the Companies Act and the State legislation cannot prevail over the provisions of the Companies Act.

10. *Re : Contention (a) :* Mr. Andhyarujina vehemently submitted that if court decrees and instruments are included and considered as conveyances, then, the result would be a startling one and that every order passed by this court or the Supreme Court or the civil court would be subject to interference by the Revenue authorities and would not be admissible under section 34 of the Bombay Stamps Act unless it is duly stamped. The consequence would be that there will be inroads in judicial orders passed by the courts. He contended that once the court passes an order or a decree, it is required to be implemented or executed and its execution or implementation cannot be subjected to payment of duty. He further pointed out that this would be in direct violation of article 142 of the Constitution which provides that every decree or order passed by the Supreme Court shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament.

11. In our view, it is difficult to accept the contention that inclusion of a court’s order or compromise decree or amalgamation scheme for subjecting it to the stamp duty would lead to startling results. It should be noted that this is not for the first time that orders passed by the court are subjected to levy of stamp duty. It is there from the date of the inception of the Indian Stamp Act, 1899. Section 2(m) defines “instrument of partition” to mean any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue authority or any civil court and an award by an arbitrator directing partition. This section specifically provides that any final order effecting partition passed by the civil court, revenue authority and an award passed by the arbitrator directing a partition would be an instrument of partition. Further, similar contentions were considered by the Queen’s Bench Division in the case of *IRC v. G. Angus and Co.* [1889] 23 QBD 579, 582 with regard to section 70 of the Stamp Act, 1870, which gives the interpretation to be placed upon the expression “conveyance on sale”, in the following language : “The term ‘conveyance on sale’ includes every instrument and every decree or order of any court or of any Commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction.”

12. In that case, the court observed that the first thing to be noticed is, that the thing which is made liable to the duty is an “instrument”. If a contract of purchase and sale, or a conveyance by way of purchase and sale, can be, or is, carried out without an instrument, the case is not within the section, and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at. The court further observed that it is the instrument whereby any property upon the sale thereof is legally or equitably transferred and the taxation is confined to the instrument whereby the property is transferred. 13. The next decision which deals with the amalgamation scheme is the case of *Sun Alliance Insurance Ltd. v. IRC* [1971] 41 Comp Cas 803; [1971] 2 WLR 432 (Ch D). In that case, the court observed that the question that arose for determination was whether relevant stamp duty was payable on the judge’s order sanctioning the scheme of arrangement under section 206 of the Companies Act, 1948, and held that since the scheme of arrangement had no force or effect unless or until it was sanctioned by the court, it was the judge’s order which transferred the outstanding shares notwithstanding the fact that the scheme did not become operative until an office copy of the judge’s order was lodged for registration with the Registrar of Companies. The court further considered whether the judge’s order was an instrument executed in any part of the United Kingdom for the purpose of section 14(4) of the Stamp Act, 1891, and it was held that it was an instrument executed in the United Kingdom within the meaning of section 14(4). In that case, the court considered the meaning of the expression “conveyance on sale” as provided in section 54 of the Stamp Act. It is to some extent similar to section 2(g) of the Bombay Stamp Act. The expression “conveyance on sale” as defined in the said section includes every instrument, and every decree or order of any court or of any Commissioners, whereby any property, or estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction. The court raised the question whether the order of the court was liable to stamp duty as conveyance for transfer under section 54 and held that it was liable because the court order effects the transfer and held that the order passed by any court would be an instrument as it includes every document. The court further held that it amounts to execution of a document. The court negatived the contention that it would be startling if the court could not look at its own order if it was not stamped by holding that it would be wholly startling if the only sanction provided by the Act for failure to stamp a document did not apply to a court order, some of which are clearly liable to stamp duty. 14. Further, the word “instrument” is construed by the Supreme Court and the court has held that in the context, it would include an award passed by the industrial court and the order passed by the President of India under article 359 of the Constitution of India. 15. On the question whether an award passed by the industrial court can be considered as an instrument, the Supreme Court in the case of *Purshottam H. Jadye v. V. B. Potdar* held that “instrument” normally indicates a document executed as between the parties to it. But if the intention of the Legislature was to confine the word “instrument” to such documents

alone, it would not have said “under any law, contract or other instrument”. The use of the word “instrument” is in a much larger sense and that context must be taken into account and a comprehensive interpretation must be placed upon that word. Therefore, having regard to the object which the Legislature had in mind in widening the scope of the definition, it would be unreasonable to hold that the word “instrument” has a wider denotation in the context and cannot be confined only to documents executed as between the parties and in that context, the court held that the scheme of the definition and the context of sub-clause (d) of section 2(vi) read with sub-clause (6) of the Payment of Wages Act, 1936, seem to suggest that the word “instrument” would include awards made by industrial courts of competent jurisdiction. 16. In the case of *Mohan Chowdhury v. Chief Commissioner*, , the court considered the question whether operation of the “order” passed under the provisions of article 359(1) of the Constitution was an instrument as provided under section 8(1) of the General Clauses Act. The court held that the General Clauses Act does not define “instrument”. Therefore, the instrument must be taken to have been used in the sense in which it is generally understood in legal parlance. The court referred to Stroud’s Judicial Dictionary of Words and Phrases (third edition, volume 2, page 1472), where “instrument” is described as follows : “An ‘instrument’ is a writing, and generally imports a document of a formal legal kind. Semble, the word may include an Act of Parliament (11) The Conveyancing Act, 1881 (44 and 45 Vict. c. 41), section 2(xiii), ‘instrument’ includes deed, will, enclosure, award and Act of Parliament” 17. The court, therefore, held that in the context of the General Clauses Act, it has to be understood as including reference to a formal legal writing like an order made under a statute or subordinate legislation or any document of formal character made under constitutional or statutory authority and the President’s order would be considered as an “instrument”. 18. In the case of *Hanuman Vitamin Foods (P.) Ltd. v. State of Maharashtra* , a Division Bench of this court considered an instrument under which there was a transfer of five shares of a co-operative society by which one of the incidents of membership of the said society was to occupy specific office premises in the same building and the court held that the document in question was a conveyance of property chargeable with stamp duty under article 25(b)(i) of Schedule I to the Bombay Stamp Act as amended in 1985 on the basis of the market value of the said property. The court observed that in effect, the document incorporated along with the transfer of shares is a conveyance of property. 19. Learned counsel further contended that the jurisdiction of levy stamp duty is in respect of a document or an instrument and, therefore, an order or decree of the court cannot be termed an instrument or a document unless it ratifies the act of the parties. As discussed above, the foundation of an order section 394 of the Companies Act is a compromise or arrangement between two or more companies and it involves transfer of assets and liabilities of one company to the other company. The proviso to sub-section (1) of section 394 provides that the court can sanction the scheme if the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest. The transfer of the assets of a transferor-company is based upon the

compromise and while sanctioning the scheme the court is not substituting or changing the compromise or arrangement. It only verifies whether it is a lawful act and is in accordance with the prescribed procedure. 20. This would be clear from Palmer's Company Law, 23rd edition (paras 79.13 to 79.16), wherein, with regard to amalgamation schemes, it is stated that the court has to be normally satisfied on four matters : (i) the statutory provisions must have been complied with; (ii) the class must have been fairly represented; (iii) the arrangement must be such as a man of business would reasonably approve; and (iv) the arrangement must be compatible with legal provisions. 21. Similarly, in Buckley on the Companies Acts, 14th edition, reads (pp. 473, 474) : "In exercising its power of sanction, the court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and, thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the scheme." 22. Further, while exercising the powers under section 394, it is also settled that it is not for a court to substitute its judgment for the collective wisdom of the shareholders/creditors of two companies who, by and large, are not strict illiterates but are well informed men of the practical commercial world. In the case of Navjivan Mills Co. Ltd., In re [1972] 42 Comp Cas 265, the Gujarat High Court has reiterated the above principles and has further observed as under (headnote) : "There are certain well recognised limitations on the court's power to sanction a scheme. The first limitation is that the court would not sanction a scheme which would be invalid without the court's sanction even if every creditor or member concerned agreed to it. In other words, the court has no power to sanction something which the parties could not do by agreement. The second fetter on the court's power is that the court cannot sanction an act being done if the law permits it only subject to conditions and the agreement seeks to dispense with those conditions, such as where the scheme of compromise and arrangement also includes within its ambit reduction in share capital in respect of which special procedure provided in the Act and the rules has not been carried out. The third fetter on the court's power is that the court would not ordinarily sanction a scheme which includes something which can ordinarily be effected by resort to other provisions of the Companies Act. Within the limitations set out above, the court will allow the companies the greatest freedom in devising schemes to suit their requirements and will approve those schemes if they are fair to all whose interest are affected" 23. This is further made abundantly clear by the Supreme Court in the case of the petitioning company Hindustan Lever Employees' Union v. Hindustan Lever Ltd. [1995]

83 Comp Cas 30 (SC). The court held that section 394 casts an obligation on the court to be satisfied that the scheme of amalgamation or merger was not contrary to the public interest; the basic principle of such satisfaction is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties that it should not be unfair or contrary to public policy or unconscionable or that the scheme should not be a device to evade law. The court further held that when the court is concerned with a scheme of merger with a subsidiary of foreign company, then the test is not only whether the scheme shall result in maximising profits of the shareholders, or whether the interest of employees was protected but it has to ensure that merger shall not result in impeding the promotion of industry or obstruct the growth of national economy. 24. However, learned counsel, Mr. Andhyarujina, relied upon the decision rendered by the Calcutta High Court in the case of Sailendra Kumar Ray v. Bank of Calcutta Ltd. [1948] 18 Comp Cas 1. The court has held that transfer of assets of one company to another company in a scheme of amalgamation sanctioned by the court under section 153A of the Indian Companies Act, 1913, is not a transfer by assignment within the meaning of Order 21, rule 16 of the Code of Civil Procedure, 1908. In that case, the court held that transfer is accomplished by statutory provision and that it takes place by virtue of the order passed by the court. The transferor-company makes no assignment at all, either in substance or in form. It only makes a proposal and submits it to the court. Nor does the transfer take place by the scheme as sanctioned by the court. But the only transfer is by sub-section (2) of section 153A of the Indian Companies Act. In our view, the aforesaid judgment, on the contrary, would indicate that by the order passed by the court sanctioning the scheme or agreement or compromise between the two companies and because of sub-section (2) of section 394, the transfer of assets and liabilities takes place. Therefore, that document would be covered by “instrument” as conveyance since it transfers movable or immovable property even in the ordinary sense. 25. Learned counsel further referred to the decision of the Supreme Court in the case of General Radio and Appliances Co. Ltd. v. M. A. Khader . In that case, the transferee-company was put in possessing of the tenanted premises by the transferor-company which was the tenant of the premises under its scheme of amalgamation sanctioned under section 394 of the Companies Act. A suit was filed by the landlord of the transferor-company for taking possession of the premises under the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, by contending that the tenant has transferred his right under the lease without written consent of the landlord. In that context, the court observed that the order of amalgamation has been made on the basis of the petition made by the transferor-company and as such, it cannot be said that this is an involuntary transfer effected by order of the court. The court further observed that there was no express provision in the Rent Act that in the case of any involuntary transfer or transfer of right by virtue of a scheme of amalgamation sanctioned by the court by its order under section 394 of the Companies Act, such transfer will not come within the purview of section 10(ii)(a) of the Rent Act and, therefore, the transferee-company was required to be evicted. In our

view, this decision also indicates that because of the order passed by the court sanctioning the scheme of amalgamation, the transfer of property takes place and is not involuntary. 26. Learned counsel for the petitioners further relied upon the decision rendered by the Supreme Court in the case of *State of Tamil Nadu v. M. Rayappa Gounder*, wherein the court has held that the provision providing that notwithstanding any judgment of the court, the reassessment invalidity made must be deemed to be valid as it attempts to invalidate the assessment without removing the basis of its invalidity and in that context, the court relied upon its earlier decision in the case of *Municipal Corporation of the City of Ahmedabad v. New Shrock Spg. and Wvg. Co. Ltd.*, where the court has observed that the provision which commands the Corporation to refuse to refund the amount illegally collected despite the orders of the court and the High Court is a strange provision and it attempts to make a direct inroad into the judicial powers of the State. The court further observed that no Legislature in the country has the power to ask the instrumentalities of the State to disobey or disregard the decision given by the courts. By exercise of those powers, the Legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective. 27. In our view, the above case has no application to the facts in the present case. The Legislature is not making any direct or indirect inroads into the judicial powers. It has only provided that if an instrument including an order passed by the court transfers movable or immovable property, then on the same instrument, stamp duty as provided under the Act is required to be paid. This cannot be stated to be in any manner making direct inroads into the judicial function of this court or of the Supreme Court. It cannot be said that article 261(3) of the Constitution, which provides that final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law, is violated. This article itself provides that it could be executed anywhere within the territory according to law and law includes law which prescribes payment of stamp duty on such instrument if it transfers or conveys movable or immovable property. 28. Learned counsel further cited the decision of the Supreme Court in the case of *P. Sambamurthy v. State of Andhra Pradesh*, AIR 1987 SC 663, wherein the Supreme Court held that clause (5) of article 371D of the Constitution which empowers the State Government by special order made in writing for the reasons to be specified therein modifying or annulling an order of the Administrative Tribunal before it became effective to be ultra vires and violative of the basic principles of justice. In our view, in the present case, the State Legislature nowhere provides that the order would be modified or annulled. It only states that it would be taken into consideration if it is properly stamped. Therefore, the aforesaid judgment has no application to the present controversy. 29. February 20, 1996 : Learned counsel further referred to the decision of the Supreme Court in *Cauvery Water Disputes Tribunal, In re*, wherein the court has held that the principle which emerges from the authorities is that the Legislature can change the basis on which a decision is given by the court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual

decision inter-parties and affect their rights and liabilities alone. Such an act on the part of the Legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or the Tribunal. In our view, the aforesaid observations of the court are totally inapplicable in the present case. Section 2(g)(iv) of the Bombay Stamp Act only provides that conveyance would include every order made by the High Court under section 394 of the Companies Act in respect of amalgamation of companies by which movable or immovable property is transferred to any other person inter vivos which is not otherwise specifically provided by Schedule I to the Bombay Stamp Act. Section 34 of the Bombay Stamp Act provides that no instrument chargeable with duty shall be admitted in evidence. This section does not invalidate the document if not duly stamped. It only provides that it would not be admissible in evidence if it is not properly stamped. Therefore, the court's order is not invalidated by the said section. 30. In view of the aforesaid discussion, we hold that the order passed by the court under section 394 of the Companies Act is based upon compromise between two or more companies. The entire section 394 provides to that effect. It also provides that the court may either by order sanctioning the compromise or arrangement make provisions for all or any of the matters specified therein. It also provides that no compromise or arrangement proposed for the purposes shall be sanctioned unless the court has received a report from the Company Law Board or the Registrar of Companies that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest, that is to say, it should not be unfair or contrary to public policy or unconscionable. The court's function while sanctioning the compromise or arrangement is a limited one and it does not substitute the compromise arrived at between two or more companies. It is an instrument which transfers the properties. Therefore, an order under section 394 is founded or based upon compromise or arrangement between the two companies of transferring assets and liabilities of one company to another company known as "transferor-company" and that order is an "instrument" as defined under section 2(1) of the Bombay Stamp Act which includes every document by which any right or liability is transferred. The State Legislature has jurisdiction to levy stamp duty under entry 44, List III of the Seventh Schedule to the Constitution and prescribe rates of stamp duty under entry 63, List II. 31. Re : Contention (b) : Learned counsel submitted that the levy of stamp duty is not on the document but on the transfer of property which arises out of amalgamation. He submitted that under the guise of prescribing stamp duty, the State Legislature has imposed duty on the transfer of property which includes the assets and liabilities of a going concern. It is his contention that this cannot be done by the State Legislature and is beyond the scope of entry No. 63. 32. As stated above, entry 44 of List III empowers the State Legislature to provide for stamp duties other than duties or fees collected by means of judicial stamps. Along with this, entry 63 of List II empowers the State Legislature to prescribe rates of stamp duty in respect of documents other than those specified in the provisions of List I, that is to say, rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares,

debentures, proxies and receipts. By the sanctioning of amalgamation scheme, the property including the liabilities are transferred as provided in sub-section (2) of section 394 of the Companies Act and on that transfer instrument, stamp duty is levied. Therefore, it cannot be said that the State Legislature has no jurisdiction to levy such duty. 33. Further, the charging section, viz., section 3 of the Bombay Stamp Act provides that subject to the provisions of the Act and the exemption contained in Schedule I, the instrument shall be chargeable with the duty of the amount indicated in Schedule I as the proper duty therefor. Hence, duty charged by the State Legislature is on the instrument and is on the instrument and is on the execution of the instrument. The measure of charging stamp duty may be fixed or ad valorem and that is to be determined by the Legislature. The basis for computation of stamp duty can be determined by the Legislature and it may be a fixed amount. This is a well-established principle with regard to the stamp duty. In the case of *Himalaya House Co. Ltd. v. Chief Controlling Revenue Authority*,¹ the Supreme Court observed as under : “On a conspectus of these authorities it is, therefore, apparent that in the exercise of powers conferred on it by entry 63 of List II and entry 44 of List III, it was open to the State Legislature not only to make an amendment in the Act in regard to the rates of stamp duty but also in regard to the mode of computation of stamp duty. In other words, it was open to the State Legislature to lay down that the basis for computing stamp duty shall not be the amount or value of the consideration for the conveyance as set forth therein but it shall be the market value of the property which is the subject-matter of conveyance.”

34. Learned counsel for the petitioners then relied upon the decision rendered by the Supreme Court in the case of *R. R. Engineering Co. v. Zila Parishad*,² wherein the court, after upholding the validity of the tax has observed that an excessive levy on circumstances will tend to blur the distinction between a tax on income and a tax on circumstances. Income will then cease to be a mere measure or yardstick of the tax and will become the very subject-matter of the tax. Restraint in this behalf will be a prudent prescription for the authorities to follow. The aforesaid judgment of the Supreme Court is considered in the case of *Buxa Dooars Tea Co. Ltd. v. State of West Bengal*.³ In that case, the Supreme Court dealt with rural employment cess levied under section 4 of the West Bengal Rural Employment and Production Act, 1976. After considering the various decisions, the court in paragraph 10 of the judgment observed that if the levy is regarded as one in respect of tea estates and the measure of the liability is defined in terms of the weight of tea despatched from the tea estate, there must be a nexus between the two indicating a relationship between the levy on the tea estate and the criteria for determining the measure of liability. If there is no nexus at all then it can conceivably be inferred that the levy is not what it purports to be. The court also referred to previous observation by the Supreme Court in the case of *Union of India v. Bombay Tyre International Ltd.* [1984] 1 SCR 347; [1986] 59 Comp Cas 460 to the effect that any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy. In that case, on the basis of the relevant provisions, the court observed that if the levy

was regarded as one in respect of tea estates and the measure of the liability was defined in terms of the weight of tea despatched from the tea estate there must be a nexus between the two indicating a relationship between the levy on the tea estate and the criteria for determining the measure of liability. In the present case, as stated above, the levy of stamp duty is on the instrument. The measure of duty is on the basis of the valuation of the property. There is direct relationship for determining the measure of the stamp duty. The measure of tax is not determinative of its essential character or of the competence of the Legislature. Therefore, the true nature and character of the stamp duty is on the instrument or the document which transferred the property and it does not cease to be a duty on instrument because for determining the rates, the measure adopted by the Legislature is the valuation of the property. 35. In the case of *Goodricke Group Ltd. v. State of West Bengal* [1995] 98 STC 32; [1995] 1 Suppl. SCC 707, after referring to various decisions the court held that merely because a tax on land or building is imposed with reference to its income or yield, it does not cease to be a tax on land or building. The income or yield of the land/building is taken merely as a measure of the tax; it does not alter the nature or character of the levy; it still remains a tax on land or building. The court further held that there is no set pattern of levy of tax on lands and buildings - indeed there can be no such standardisation. No one can say that a tax under a particular entry must be levied only in a particular manner, which may have been adopted hitherto. The Legislature is free to adopt such method of levy as it chooses and so long as the character of the levy remains the same, i.e., within the four corners of the particular entry, no objection can be taken to the method adopted. The court further observed that in that case, the cess is, no doubt, calculated on the basis of the yield - for every kilogram of tea leaves produced in a tea estate, a particular cess is levied. But that is a well-accepted mode of levy of tax on land. The tax is upon the land - upon the "tea estate" which is classified as a separate category, as a separate unit, for the purpose of levy and assessment of the said cess quantified on the basis of the quantum of produce of the tea estate. It cannot be characterised as a tax on production for that reason. The court further observed that there cannot be a uniform levy unrelated to the quality, character or income/yield of the land. And such levy has not been held to be arbitrary and discriminatory. Therefore, in our view, the measure of stamp duty on the basis of the value of the property is valid and would not mean that what is taxed by the Legislature is not the instrument but the property. In this view of the matter, it is not possible for us to accept the petitioner's contention that in the guise of stamp duty, the State Legislature is imposing in reality a duty on transfer of property which the State Legislature is not competent to do. 36. *Re : Contention (c)* : The next contention is that in the guise of stamp duty, the State Legislature is in reality imposing a tax on the amalgamation of companies and has encroached on the field of Parliament under entry 43, List I of the Constitution. In our view, for the reasons recorded above, the stamp duty is levied on the instrument and the measure is the valuation of the property transferred. Therefore, there is no question of encroachment on the field of Parliament under entry 43 of List I of the Constitution which

empowers the Central Government to enact laws for incorporation, regulation and winding up of corporations. This legislation is totally different from levy of stamp duty and prescribing the rates of stamp duty on such documents. It is open to the State Legislature to fix the rates of stamp duty in respect of documents specified in entry 43, List I. The Bombay Stamp Act nowhere provides for any legislation with regard to incorporation, regulation and winding up of corporations. It only levies the stamp duty and prescribes the rates of stamp duty in respect of documents by which companies transfer their assets. 37. Re : Contention (d) : Lastly, it is contended that the provisions of section 2(g) read with section 34 of the Bombay Stamp Act are repugnant to section 394 of the Companies Act and the State legislation cannot prevail over the provisions of the Companies Act. In this regard, learned counsel submitted that in view of section 394(2) of the Companies Act, the property of the transferor-company vests in the transferee-company as soon as the order is passed by the court sanctioning the amalgamation scheme. Therefore, the State Legislature cannot say that such transfer would be of no consequence if no stamp duty is paid. In our view, this submission is also without any substance because the Bombay Stamp Act nowhere provides that the property which is transferred to the transferee-company shall be divested. It only provides that such document is required to be stamped. If it is not stamped, it would not be admissible in evidence as provided under section 34 of the Bombay Stamp Act. 38. However, learned counsel further submitted that the respondents have not laid down any uniform policy for valuing the movable and immovable properties transferred under the amalgamation scheme. He submitted that under the amalgamation scheme, companies as going concerns are transferred and such transfer would include movable and immovable property, including goodwill and other intangible assets or liabilities. For this purpose, he referred to the various letters received by the company from the general stamp office directing the company to furnish the description of movable and immovable assets separately along with a certificate by the chartered accountant in support thereof. 39. In our view, it would be a question of fact what stamp duty would be payable by the party on an amalgamation scheme. It is not to be forgotten that by the 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 shareholders of the transferor-company. It cannot be said that the assets are separately transferred and liabilities are separately transferred by the amalgamation scheme. As such, by an amalgamation scheme, virtually a transferee-company in effect purchases the transferor-company for a specified sum which is paid in terms of the shares of the transferee-company to the shareholders of the transferor-company. For this purpose, what is to be kept in mind is that by sanctioning the amalgamation scheme, the court is sanctioning not a 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. Therefore, it would be difficult for us to accept the contention of the learned Advocate-General that while assessing

the amalgamation document, the stamp authority is entitled to recover stamp duty on the following two components separately : (a) The market value of shares (per-determined as per the exchange ratio or the one prevailing on that day the scheme of amalgamation comes into operation, as the case may be) of the transferee-company allotted to the shareholders of the transferor-company and any other form in which the net amount of consideration is paid; and (b) The liabilities of the transferor-company which are being transferred to and are going to become liabilities of the transferee-company (liabilities are also certified). 40. This contention is devoid of any substance because by the scheme of amalgamation, what is transferred is assets minus liabilities and there is no question of any transfer of these two components of a going concern separately. Further, this submission would be contrary to the meaning of the word “conveyance” as provided under section 2(g)(iv). Section 2(g)(iv) itself provides that (it includes) every order made by the High Court in respect of amalgamation of a company by which property, whether movable or immovable, or any estate or interest in property is transferred to or vested in any other person. 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) of Schedule I to the Stamp Act should be based on its valuation arrived at on the basis of shares allotted by the transferee-company to the transferor-company. In the case of Hindustan Lever Employee’s Union v. Hindustan Lever Ltd. [1995] 83 Comp Cas 30 (SC) at the time of making valuation of the share exchange ratio, the court itself took into consideration the valuation report based on three well-known methods, viz., (i) the net worth method, (ii) the market value method, and (iii) the earning method. It is also established that the quotation of shares in the share market provides a larger reliable index of the assets of the company. 41. Hence, we accept the contention of learned counsel for the petitioners that valuation under article 25(1) of Schedule I on the instrument of the amalgamation scheme sanctioned by the court, after due verification, is to be determined by the stamp authority only on the basis of the price of the shares allotted to the transferor-company or other consideration, if paid, but not by separately valuing the assets and the liabilities. 42. In view of the aforesaid discussions, these petitions praying that section 2(g)(iv) read with article 25 of Schedule I to the Bombay Stamp Act be declared as unconstitutional and ultra vires the Constitution are dismissed. Rule in each of the petitions is discharged with no order as to costs. Interim reliefs stand vacated. 43. However, at the request of learned counsel for the petitioners, interim reliefs granted by this court to continue up to April 20, 1996.