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May 2016 / Issue – 57

An e-newsletter from
Lakshmikumaran & Sridharan, India

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Article

Amalgamation – Distinction between an instrument and instrument amounting to conveyance

By **Puneet Ganapathy**

In its recent judgment in *Chief Controlling Revenue Authority* v. *Reliance Industries Ltd.*, Bombay High Court has taken the view that stamp duty is payable on a High Court ('HC') order sanctioning a scheme of merger/ reconstruction ('scheme'), as an instrument of 'conveyance'. The bench of three judges of the Court came to the conclusion that it is the order of the High Court under Section 391-394 that constitutes an instrument as it results in the merger and vesting of properties inter se the merging parties. In addition to the above, the Bombay High Court has further taken the position that where a scheme of amalgamation requires sanction from multiple High Courts in India, (due to the registered offices of the merging companies being in different states), every order of the High Courts concerned sanctioning the same scheme would amount to a separate instrument for the purposes of the levy of stamp duty. In taking this view, the High Court rejected the contention that the scheme of amalgamation was itself the instrument.

Difficulties in the position that each order of each High Court is a separate instrument

There are certain obvious difficulties in the position taken by the Larger Bench of the Bombay High Court. The most prominent of them being the stamp duty outcome of a situation wherein the same scheme of amalgamation stands sanctioned by one High Court and rejected by another. The recent contest of the Indian Income Tax department against one such scheme pertaining to M/s Vodafone Ltd. in the Gujarat High Court is an example of the same. The High Courts of Bombay, Delhi, Calcutta and Madras had approved the scheme of merger between several telecom companies owned and controlled by the Vodafone group. However, a single judge of the Gujarat High Court had decided not to sanction the said scheme based on certain contentions of the Income Tax department. While this order was reversed in appeal, this is clearly a situation wherein four High Court orders sanctioned the particular scheme and one High Court order rejected the same.

In such a situation, as per the provisions of the Companies Act, and generally from express clauses in the scheme itself, the scheme of merger would not stand approved, on account of lack of approval of all the High Courts concerned. It would be difficult to imagine that in such infructuous mergers, the orders of the High Courts that sanctioned/approved the scheme would still amount to 'instruments' resulting in 'conveyance' of any property. While any such order of the High Court under Sections 391-394 could possibly still amount to an instrument, it would certainly not automatically amount to a 'conveyance'.

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Section 2(14) of the Indian Stamp Act, 1899, inclusively defines an 'instrument' to mean every document by which any right or liability is, or purports to be, created, transferred, limited, extended extinguished or recorded. This is an extremely wide definition and would include High Court orders that sanction/ approve schemes of amalgamation, even where another High Court rejects the same scheme. It is possible to argue that such orders would amount to 'a document by which rights and liabilities are purported to be created.'

However, 'conveyance' is separately defined under Section 2(10) of the Act, as including every instrument by which property, whether movable or immovable is transferred *inter vivos* and which is not otherwise specifically provided for in Schedule I. 'Conveyance' is similarly defined under Section 2(g) of the Bombay Stamps Act, 1958 to include all instruments and particularly every High Court order made under Section 394 of the Companies Act, 1956 by which transfer or vesting of property takes place. Therefore, while an order of the High Court may itself amount to an 'instrument', it can only amount to an instrument in the nature of 'conveyance' if the said order is capable of transferring or vesting properties *inter se* the merging parties.

Distinction between an 'instrument' and 'an instrument of conveyance'

The relevance of the distinction between an 'instrument' and 'an instrument of conveyance' lies in the fact that *ad valorem* stamp duty (i.e. on the value of the transaction) is payable only on the latter. Practically, in an ineffective merger due to contrary views taken by two different High Courts, the transaction is ineffective. However, to the extent that one High Court has accorded sanction to such an ineffective merger, an instrument comes into existence. Such instrument will however not be of the nature that results in the vesting of properties since the merger as a whole will be ineffective.

Contra distinctly, where there is an approval of two High Courts and the merger is effected, there will be two instruments that would have collectively resulted in the vesting of properties. The question put before the Bombay High Court was to be answered in a manner so as to identify which of the High Court orders would amount to an 'instrument' and which would amount to an 'instrument of conveyance'. The High Court has indirectly answered this question while also providing some scope for a contracting party to attempt mitigating the payment of stamp duty. The High Court held as follows:

> *"…the order of this court sanctioning the Scheme was not a conditional order, which was to operate after the scheme was also sanctioned by the Hon'ble Gujarat High Court. By this Order dated 7.6.2002 of this Court itself, it could be considered that the transfer was effected and therefore the said Order of this Court is the 'order made by the High Court under Section 394 of the Companies Act 1956………….'* as contemplated by Section 2(g) (iv) of the said Act.

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For the same reason the order dated 7.6.2002 of this Court is the 'instrument', as contemplated by the provisions of the said Act…

Thus, the implementation of the order of this court was not made dependent upon passing of an appropriate order sanctioning the Scheme by the Hon'ble Gujarat High Court. This is the step contemplated by the provisions of sub-section 3 of section 394 of the Companies Act."

Therefore, the High Court fell back on the fact that the single judge of the Court had not made its order conditional. Indirectly, the Court stated that the order of approval of the Bombay High Court itself resulted in a transfer or vesting of properties, as far as the petitioners to that order were concerned. Since the Gujarat High Court had also sanctioned the scheme, and none of the two orders were conditional, it leads to the peculiar position that both High Court orders independently resulted in a transfer or vesting of properties. This is despite the fact that the order of the Gujarat High Court was made or executed after the order of the Bombay High Court.

Section 394 being within the domain of company law, the question has never arisen as to which of the High Court orders sanctioning a scheme have a greater legal effect *vis a vis* the other, as long as all High Courts sanctioned the same. Therefore, it has been held that both High Court orders are instruments in the nature of conveyance. The High Court accordingly laid considerable emphasis on the fact that the order of the High Court was not conditional to that of another. This would be one arguable method of determining which of the two or more orders would take precedence as being the more complete instrument of conveyance.

It is not uncommon to notice many High Court orders sanctioning a scheme of amalgamation expressly made conditional to the sanction to be obtained from another High Court. For example see Delhi High Court Order dated 23-12-15 in CP No. 430/2015 – *LMS India Engineering;* Gujarat High Court Order dated 2-7-2015 in CP No.112/2015 – *Tanti Holdings Pvt. Ltd.*; Karnataka High Court Order dated 9-1-2013 in CP No. 175/2012 – *Ingersoll Rand Industrial Products Pvt. Ltd.*; Madras High Court Order dated 27-4-11 in CP No. 54/2011 – *Claro India Ltd.*

In such a case, the order and accordingly the instrument would be conditional. The final or the last of the orders of the relevant High Courts concerned would therefore become the instrument of conveyance by which the vesting of properties took place. The slight flaw in the above approach is that the nature of the direction made by the Single judge of the High Court would determine the amount of stamp duty leviable on an instrument of merger. However, there is some theoretical support for the same. Since the Bombay High Court has implied that the High Court is the executing party to an instrument of merger, it could theoretically be imagined that the Single Judge of the High Court is also postulating a term or stipulation of the instrument of merger

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and therefore making a material condition in the instrument itself. Accordingly, the Single Judge can be theoretically seen to be making the instrument conditional and consequently, that expression will decide whether or not the instrument is one of conveyance.

However, on a practical note it is impossible to predict as to whether or not a judge will make such a condition in an order under Section 391, as there appears to be no uniformity of practice on the same. Obviously, the regular approach of changing the registered offices of all the merging entities to one state, will bypass the entire controversy. This is of course subject to the application of the unfortunate legal principle of 'looking through the instrument' as done by the Supreme Court in *Chief Controlling Revenue Authority* v. *Coastal Gujarat*, wherein the Supreme Court determined the amount of stamp duty payable based on what the instrument should have or could have been, and not simply on the basis of the instrument before the court.

While there are many obvious flaws in the above approach, the same may be used advantageously by parties in leading to the following conclusions:

- That in a case of ineffective mergers, no stamp duty will be payable on any of the sanctioned/approved High Court orders as 'instruments of conveyance'.
- That stamp duty will be payable only on one of the High Court orders as an 'instrument of conveyance' by seeking a request to record a direction in all other HC orders that the latter are expressly made conditional to the orders of one High Court.
- In the extreme fortuitous situation where one High Court order is conditional to the order of a High Court where stamp duties on mergers is exempt or *not at ad valorem basis* (for ex: Delhi), no *ad valorem* stamp duty will be payable anywhere.

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Notifications & Circulars

New Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016 notified: The Reserve Bank of India, in supersession of the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000, has issued new Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2016, dealing with receipt from and payment to a person resident outside India. As per the said Regulations, in case of import of goods, the manner of payment now includes payment in rupees (INR) using international credit card/ debit card through a credit/ debit card servicing bank in India, against the charge slip signed by the importer, as prescribed by the RBI. Further, guidelines for manner of payment by person resident in India have also been introduced through the said Regulations. Similarly, company or resident in India has

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been allowed to make payment in rupees (INR) to its non-whole time director who is resident outside India and is on a visit to India for the company's work. The said Regulations have been issued through Notification No. FEMA 14(R)/2016-RB, dated 2-5-2016.

New Foreign Exchange Management (Deposit) Regulations, 2016 notified:

The Reserve Bank of India, in supersession of the Foreign Exchange Management (Deposit) Regulations, 2000, has issued new Foreign Exchange Management (Deposit) Regulations, 2016, in order to regulate deposits between a person resident in India and a person resident outside India. As per the said Regulations, definition of 'Non-resident Indian (NRI)' has been revised to exclude 'Person of Indian Origin (PIO)'. Similarly, definition of PIO has also been revised to include 'Overseas Citizen of India' cardholder. Interestingly, the new definition of PIO does not mention about person who at any time held Indian passport. Further, deposits under Foreign Currency Non-Resident (Bank) account Schemes referred to in new Regulation (5)(1)(ii), may also be accepted by a Regional Rural Bank, subject to certain conditions. The said Regulations have been issued by Notification No. FEMA 5(R)/2016-RB, dated 1-4-2016 and they have been clarified by RBI through Circular A.P. (DIR Series) Circular No. 67/2015-16 [(1)/5(R)] dated 5-5-2016.

Guidelines for public issue of units of Infrastructure Investment Trusts:

The SEBI (Infrastructure Investment Trusts) Regulations, 2014 introduced the concept of Infrastructure Investment Trusts ('InvITs'). The purpose of the same was to establish a framework for InvITs and regulate their registration process. Now through Circular No. CIR/IMD/DF/55/2016, dated 11-5-2016, SEBI has laid down the guidelines for the same. As per the guidelines, InvITs are permitted to opt for public issue by adopting the following procedures:

(i) Similar to a practice followed by a company, InvITs are required to appoint merchant bankers and file the offer document.

(ii) During allocation of public issue for InvITs, 75% and 25% of units of InvITs are to be allocated to institutional investors and other investors, respectively. Further, an investment manager, on behalf of an InvIT, may allocate up to 60% of the portion available for allocation to institutional Investors to anchor investors.

(iii) Before the opening of subscription, an amount worth 0.5% of the amount of units offered for subscription to the public or Rs 5 crore, whichever is lower, shall be deposited and maintained with the stock exchange, by the InvIT.

(iv) Further, a public issue shall be kept open for at least 3 working days, but not more than 30 days. However, in case of revision of the price band in a public issue made through the book building process, the bidding

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issue period will be extended for a minimum period of 1 working day.

(v) For opening and closing an issue, advertisements may be issued by InvIT, however, such advertisements shall not contain any matter extraneous to the contents of the offer document.

(vi) Post-issue, the lead merchant banker shall regularly monitor redressal of investor grievances relating to allotment, refund, etc.

(vii) Public issue shall not be made by an InvIT, if the InvIT or parties to the InvIT, or the promoters or directors of parties to the InvIT:

- is/are debarred from accessing securities markets by SEBI, or
- is/are promoter, director, or person in control of any other company or a sponsor, investment manager, or trustee of any other InvIT, which is debarred from accessing securities marlets by SEBI, or
- is/are in the list of willful defaulters published by RBI.

Insolvency and Bankruptcy Code passed by Indian Parliament: The Indian Parliament has passed the major economic reform Bill moved by the Government i.e. the Insolvency and Bankruptcy Code, 2016 ('Code'). The law aims to consolidate the laws relating to insolvency of companies and limited liability entities (including limited liability partnerships and other entities with limited liability), unlimited liability partnerships and individuals, which is regulated through a number of legislations, into a single legislation. It may be noted that the basic premise on which the Code has been formulated is that when an entity defaults on its debt, control of such entity shifts from the shareholders/promoters to a Committee of Creditors, who have 180 days to evaluate proposals from various interested parties or third parties, as to whether the company should be resuscitated or be taken into liquidation. According to Ministry of Finance Press Release dated 11 May, 2016 issued in this regard, the Code envisages four different and novel modes of institutional infrastructure:

i 'Insolvency Professionals' would ensure efficient working of the any bankruptcy process which has been initiated. 'Insolvency Professional Agencies' shall regulate and govern the operations and functioning of the Insolvency Professionals.

ii 'Information Utilities' would be responsible for keeping an inventory on lenders and terms of lending in their electronic databases.

iii Adjudication would be done mainly by the National Company Law Tribunal, for insolvency of companies or firms, and by the Debt Recovery Tribunal for insolvency of individuals.

iv 'The Insolvency and Bankruptcy Board of India' shall regulate the functioning of the Insolvency Professional, Insolvency Professional Agencies and Information Utilities.

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Ratio Decidendi

'Due diligence' means doing everything reasonable, not everything possible: The Securities Appellate Tribunal has held that even though a merchant banker has to employ its own independent due diligence, in practice, it operates with a limitation that its due diligence is based on the material brought before it by the Issuer Company. It was held that the banker cannot be expected to perform this duty in a vacuum when information is not made available to it by the Issuer Company. The SAT, in this regard, observed that a merchant banker cannot be expected to start a due diligence exercise with a presumption that a company whose Initial Public Offer is to be issued through the merchant banker would have committed fraud or mischief. However, it also observed that even if not mandatory, the merchant banker is bound to inspect the bank accounts of the Issuer Company till the conclusion of the IPO, as it would enable the merchant banker to locate diversion of funds, if any, and reveal the true financial position of the Issuer Company.

The SAT, while making the above directions, had also made observations on the validity of a comfort letter which is issued by statutory auditors assessing the financial soundness of a company. The SAT held that it is not an ordinary certificate which can be procured by the Issuer Company for general purposes in a routine manner from any auditor, but from statutory auditors, who are governed by SEBI. It was also stated that a comfort letter is a statutorily recognized step in furtherance of due diligence undertaken by the merchant banker and hence, its value cannot be undermined. [*Almondz Global Securities Ltd.* v. *SEBI*- Appeal No. 275, 276 and 301 of 2014, decided on 13-5-2016, SAT]

Arbitration - Objection to arbitration award to be governed by foreign law, if arbitration governed by same: Observing that Part I of the Arbitration and Conciliation Act, 1996 is excluded from operation in case of a foreign award where the arbitration is not held in India and is governed by foreign law, the Supreme Court of India has held that a court in India will not have jurisdiction to entertain objections in respect of a foreign award under Section 34 of the Act, in cases of foreign seat of arbitration and application of foreign law. The Apex Court in this regard observed that when an agreement evinces an intention that foreign law will apply to the resolution of any dispute, it means that foreign law will apply to the conduct of the arbitration and any objection to the conduct of the arbitration or the award will also be governed by such foreign law. It further observed that in fact, it would not even be necessary to specify which law would apply as the mere choosing of the juridical seat of arbitration attracts the law applicable to such location. [*Eitzen Bulk AS* v. *Ashapura Minechem Ltd.* – Civil Appeal Nos. 5131-5133 and 5134-5136 of 2016, decided on 13-5-2016, Supreme Court]

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Action under Negotiable Instruments Act when not affected by winding up process: The Division Bench of the Bombay High Court has held that expression 'suit or other proceedings' in Section 446(1) under Chapter II of Part VII of Companies Act, 1956, does not include criminal complaints filed under Section 138 of the Negotiable Instruments Act, 1881. Submission that in view of Section 446(1), the complaint under the Negotiable Instruments Act cannot be proceeded with till such time the Petitioner secures leave from the High Court as Respondent-Company was ordered to be wound-up by the High Court, was hence rejected by the Court. The Court in this regard noted that no civil liability or any liability against the assets of the drawer of the cheque is contemplated under Section 138 of the Negotiable Instrument Act. Section 446(1) provided that in case where winding up order has been made or where the Official Liquidator has been appointed, no suit or other proceedings shall commence. It was also provided that suits pending on date of winding-up order shall proceed only on leave of the Tribunal.

Relying on various precedents the Court was of the view that provisions of Section 446(1) of the Companies Act are to be invoked judiciously only when it has got any concern with either the winding-up proceedings or with the assets of the Company. It was held that the expression 'suit or other proceedings', as used in Section 446(1), has to be construed accordingly and not to be interpreted liberally and widely so as to include each and every proceeding initiated against the Company. [*Indorama Synthetics (I) Limited* v. *State of Maharashtra* - Criminal Writ Petition No.1280/2010, decided on 6-5-2016, Bombay High Court]

Competition law - Dominant position must be 'used' in an anti-competitive manner to prove 'abuse': It was alleged that Rural Electrification Corporation Limited and its subsidiary RECPDCL have distorted competition in the market for consultancy services in relation to electrification projects in contravention of the provisions of Sections 4(2)(c) and 4(2)(e) of the Competition Act, 2002. The DG, post investigation, concluded that the opposite party has leveraged its dominant position through REC to favor its subsidiary RECPDCL in violation of Section 4(2)(e) and denied market access to other consultancy service providers which are the competitors of RECPDCL, in violation of Section 4(2)(c). The CCI, however observed that *'to establish abuse, every contravention as contemplated under Section 4 of the Act requires 'use' of the dominant position in an anti-competitive manner.'* It was held that to establish a case for leveraging under the Act, there should be a conduct on the part of the dominant group to demonstrate the use of dominant position to enter into or protect another relevant market.

It held that there was no evidence of explicit 'conduct' to show that the decision of the State Discoms in the second relevant market was influenced by the opposite party by using its dominant position in the first relevant market.

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Thus, in the absence of a conduct on the part of opposite party, the reduction in the market share for some of the players cannot be relied upon to infer anti-competitive conduct on the part of OP Group. While stating so, CCI held that there was no case of contravention of Section 4. However, CCI observed that RECPDCL, by virtue of being perceived as an extension of REC (being REC's subsidiary), enjoyed net competitive advantages *vis-à-vis* its competitors because of the bias in favour of public providers. It held that *'though such structure-induced distortions do not violate the letter of the competition law, they are not in accordance with the spirit of competitive neutrality.'* The CCI therefore ordered REC to put in place adequate safeguards to remove conflicts of interest caused by its association with RECPDCL. [*XYZ* v. *REC Power Distribution Company Ltd.*, Case No. 33 of 2014, decided on 5-5-2016, Competition Commission of India (CCI)]

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