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# **Analyzing The Recent Amendment In** **Maharashtra Stamp Act Viz-A-Viz** **Insolvency And Bankruptcy Code, 2016**

**Authored By- Simran Patawari**

## **Introduction**

The Maharashtra Stamp Act, 1958 was amended in January 2022 vide the Maharashtra Stamp (Second Amendment and Validation) Act, 2021.<sup>1</sup> The main modification made by the amendment was the retrospective amendment of the definition of "conveyance" to include orders passed by the National Company Law Tribunal under section 31 of the Insolvency and Bankruptcy Code, 2016, regarding the approval of a resolution plan, as well as decisions made by the Board for Industrial and Financial Reconstruction under sections 18 or 19 of the Sick Industrial Companies (Special Provisions) Act, 1985. The stamping schedule has undergone necessary adjustments. It is pertinent to note that before the present amendment stamp duty was levied on the orders of the Hon'ble High Court and the Reserve Bank of India dealing with amalgamation and reconstruction however, the present amendment expands the scope of levying stamp duty by bringing reconstruction of Sick Companies under the ambit of the act. This article is an attempt to peruse the anomaly created by the amendment act and scrutinize whether such an amendment is in alignment with the objective sought to be achieved by the Stamp Act vis-à-vis objective of the Insolvency and Bankruptcy Code, 2016.

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<sup>1</sup> Maharashtra Stamp (Second Amendment and Validation) Act, 2021.

## **Payment Of Stamp Duty Vis-À-Vis Resolution Plan Under Insolvency And Bankruptcy Code, 2016**

The rule-making power enables the state to make rules to carry out the purpose of the act and cannot override the statute. Powers of the registering authority exercising quasi-judicial functions can not be curtailed by the recommendations of the district-level committee.<sup>2</sup> The object of the Stamp Act is to secure revenue for the state.<sup>3</sup> The object is three-folded:<sup>4</sup>

- a) To raise revenue by taxing instruments
- b) To penalize by rendering an unduly stamped document, to be inadmissible in evidence, and
- c) Also, to provide for a penalty against stamp evasion
  - i. By impounding instruments.
  - ii. Imposing penalty under section 35; and
  - iii. By prosecuting the defaulter for evasion.

It is pertinent to note that a different rule is adopted for exemption. The intention to create exemption of persons or property must affirmatively appear and can not be raised by implication. It is construed that an enactment imposing a burden requires a strict construction in favor of the subject, but an exemption must be construed in favor of the state.<sup>5</sup> However, in my opinion, it is important to balance the benefit of the state, the burden on the subject, and the end outcome of such imposition since an imposition should not be more drastic than it ought to be for obtaining the desired result.

The Union and the State each have authority to impose stamp duty under the Indian Constitution. The State Government has the authority to levy stamp duty on documents falling under Article 246 read with Schedule VII, List II, Entry 63, while the Parliament (Central Government) has the authority to levy stamp duty on the instruments listed in Schedule VII, List I, Entry 91. The Union Legislature (Schedule VII Entry 91 of the Union List) has the authority to establish the rates of duties on such commercial papers. The Central Government also has the authority to decrease, remit, or compound such charges on the

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<sup>2</sup> Satyan v. State of Rajasthan AIR 1999 Raj 276(280).

<sup>3</sup> Chiranjilal (Dr) v. Hari Das by LRS (2005) 10 SCC 746, Sri Jeyaram Education Trust v. A.G. Sayed Mphideen, AIR 2010 SC 671.

<sup>4</sup> K Manavala Naikar v. K.R. Gopal Krishnaiah AIR 1969 AP 417.

<sup>5</sup> The Indian Stamp Act, K Krishnamurthy 12<sup>th</sup> edition pg. 13

commercial documents (Section 9 of the Indian Stamp Act). On the other hand, the State Legislature (Schedule VII Entry 63 of the State List) has the authority to establish the rates of charges on non-commercial instruments, and the State Government has the authority to lower or remit such duties on non-commercial papers (Section 9 of the Indian Stamp Act).

Union list Entry 91.	State List Entry 63.	Concurrent List Entry 44.
duty on a bill of exchange, a check, a promissory note, a bill of lading, a letter of credit, a policy of insurance, a transfer of shares, a debenture, a proxy, and a receipt	Stamp duty rates applicable to documents other than those listed in List I's requirements regarding rates.	Other stamp charges or fees, outside rates of stamp duty, that are collected with judicial stamps

Exercising its power under Schedule VII entry 91 the Maharashtra State Legislature, with the amendment act, increased revenue and brought uniformity in charging stamp duty in respect of orders passed by various authorities under various Acts relating to amalgamation, merger, etc., of the companies, the Government considered it expedient to charge stamp duty also on orders of the BIFR and NCLT.

At this juncture, it is important to analyze the object of IBC. The object of the To promote entrepreneurship, credit availability, and strike a balance between the interests of all stakeholders, including changing the order of priority for payment of government dues, the code is intended to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms, and individuals in a timely manner for maximisation of value of such persons' assets. It also aims to establish an Insolvency and Bankruptcy Board of India. To achieve the said objective and bring uniformity the proceedings under the SICA stood abated and later SICA, 1985 was repealed. However, it is pertinent to note that the main object of SICA was a revival of Sick companies and a speedy winding up of the companies that can not be revived. As a result, to regain their health and revive them, Numerous benefits and incentives were provided to these units, including bank initiatives such as (i) the addition of working capital facilities to address the working capital shortage these units faced, (ii) interest recovery at discounted rates, (iii) an appropriate moratorium on interest payments, and (iv) the freezing of a portion of the outstanding

balances in the accounts. It can therefore be concluded that the reconstruction of sick companies and the orders by the BIFR and NCLT thereto are for the benefit of the sick companies and result in the overall benefit of the state by increased economic activity, enhanced employment, and a better GDP rate.

This shows some anomaly in the action of the state which seeks to impose a duty on such orders of the BIFR and NCLT since it increases the burden on the subject, especially when on the other hand state is providing incentives for its revival. Therefore, presently there is a need to consider the question of whether the present amendment is proportionally aligned with the object sought to be achieved by the state.

### **Judicial discourse and Analysis**

Following are a few significant problems that are being encountered when determining stamp duty on the order of the competent Court indicated above:

- i. The main instrument of transfer in which the Scheme is approved by various Courts.
- ii. Differential stamp duty payment.
- iii. Bifurcating the consideration issued based on the value of units being transferred.

The present article deals with the first issue. There have been numerous discourses around this issue whether the order of the court is an operation of law or a willing compromise between the parties.

In **Ruby Sales & Services Pvt. Ltd.**<sup>6</sup> the apex court held that Consent Decree – is an Instrument of Conveyance. In **Li Taka Pharmaceuticals Ltd. v. the State of Maharashtra**,<sup>7</sup> the Bombay High Court further clarified the issue of the stamp duty in case of merger and acquisition. The court held that any order passed under section 394 is to be considered as an instrument within section 2(1) of the Bombay stamp act because the entire document that leads to the transfer of assets and liabilities between the transferor and transferee is constructed upon a compromise/ arrangement between the two for merger amalgamation.

The Delhi High Court further fuelled the debate by passing its judgment in the case of **Delhi Towers Ltd v. G.N.C.T. Of Delhi**.<sup>8</sup> In this case, it was seen that the fifteen firms were referred to as Delhi Towers Limited's or the transferee firm's wholly-owned subsidiaries.

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<sup>6</sup> Ruby Sales & Services Pvt. Ltd, (1994) 1 SCC 531

<sup>7</sup> Li Taka Pharmaceuticals Ltd. v. the State of Maharashtra

<sup>8</sup> Delhi Towers Ltd v. G.N.C.T. Of Delhi, 2009 SCC OnLine Del 3959

An agreement between the specified majority of shareholders and creditors of the transferor company and the specified majority of shareholders and creditors of the transferee firm forms the basis of the merger arrangement. The proposed transfer is very much a voluntary act entered into by the contracting parties. This type of transfer of assets and liabilities has all the characteristics of a sale. The Court believed that the term "conveyance" had a broad definition that included the scope of a High court order issued in accordance with Section 394 of the Companies Act. Thus, it must be placed within the purview of paying stamp duty. The Delhi High Court went on to rule that any merger that has been approved can be considered a transfer between two or more companies, and that transfer occurs once an order has been approved for the merger that calls for all relevant rights, titles, and interests in all immovable properties belonging to the transferor to be transferred to the transferee.

In a landmark judgment of **Hindustan Lever & Anr vs State of Maharashtra & Anr**,<sup>9</sup> commonly referred to as the Hindustan Lever Case, the Hon'ble Supreme Court of India made some crucial observations. According to the ruling, the term "Instrument" was defined to refer to any instrument that is used to create, transfer, limit, extend, cancel, or record a right or liability of any kind. However, the phrase will not apply to the things listed in Entry 91 of Schedule 7 of the Indian Constitution. According to the interpretation of the merger plan and the High Court's order made pursuant to Section 394 of the Companies Act, upon the High Court's issuance of such an order, the assets and liabilities of the transferor, as well as all movable, immovable, and tangible property, shall be transferred to the transferee without the requirement of any further deed. As a result, the Court's approval of the merger plan necessitates that it be recognized as an "instrument" for the purposes of Section 2(14) of the Indian Stamp Act of 1899. The Supreme Court further ruled that any plan approved by the court would be considered an "instrument" and that only the state legislature would have the power to impose stamp duty on any approved merger order.

Therefore, the present position is clear that such orders fall within the purview of conveyance and are therefore liable to be stamped. However, it is important to analyze that imposing a stamp duty levies a burden on the companies which is why the orders under BIFR and NCLT were initially left out of the purview of the Stamp Act. Bringing such orders under the purview of the Stamp Act will increase the difficulty of the unhealthy company to revive and lead to major losses.

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<sup>9</sup> Hindustan Lever & Anr vs State of Maharashtra & Anr (2004) 9 SCC 438

Therefore, it needs to be considered that the object of increasing revenue needs to be proportionally aligned with the burden placed on the subject, however, the current amendment is extremely disproportionate and in conflict with the object of the IBC.

Secondly, the present amendment is affected retrospectively. It is submitted that the retrospective levy of stamp duty on the said orders is unjust and oppressive since it prejudices the subjects by imposing a duty that was not levied in the past. It seems to go against the principles of equity, fairness, and natural justice.

In the case of *Commr. of Income Tax v. Alom Extrusion Ltd. (2009)*,<sup>10</sup> several taxpayers lost out on the benefit of getting deductions on their taxable income as a result of an amendment to a statute because of the prospective implementation of the act. The Supreme Court ruled that a statute's intended benefits should not be withheld from people because of a legislative mistake. The judiciary has repeatedly approved retrospective changes to tax laws that are solely declaratory or curative in nature. A significant change in the law that retroactively creates a complete new responsibility would be against the letter of the Constitution. This was clarified in the case of *Union of India v. M/S Martin Lottery Agencies Limited (2009)*,<sup>11</sup> where the Supreme Court held that existing rules cannot be changed without a valid basis in the name of clarity. The Constitution's Article 19(1)(g) and Article 14 both state that basic rights are violated when new tax obligations are imposed that are retrospective in character. Inconsistencies must be sorted out in favor of the public, even when declaratory or curative revisions are made.

In the case of *Ansal Housing and Construction Ltd. v. ACIT (2017)*,<sup>12</sup> the High Court of Delhi held that a tax law modification must be made with the intention of removing any challenges faced by taxpayers, not the tax officials. The retrospective amendment's lack of clarity regarding the norms and regulations it imposes could lead to ambiguities in the law, which would make it illegal. In the present case retrospective imposition of stamp duty leads to a burden on the subjects and benefits the state.

In the case of *Commr. of Income Tax v. NGC Networks India Pvt. Limited (2019)*,<sup>13</sup> the High Court of Bombay has relied on the maxim of “*lex non-cogit ad impossibile*” to establish that

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<sup>10</sup> *Commr. of Income Tax v. Alom Extrusion Ltd. (2009)*

<sup>11</sup> *Union of India v. M/S Martin Lottery Agencies Limited (2009)*

<sup>12</sup> *Ansal Housing and Construction Ltd. v. ACIT (2017)*

<sup>13</sup> *Commr. of Income Tax v. NGC Networks India Pvt. Limited (2019)*,

A party could not be asked to foretell the future and comply with a law that would be implemented later and accomplish the impossible task of doing so. This prohibits the abuse of legislative authority and spares taxpayers from having to pay excessive taxes.

Therefore, in my opinion, in addition to the unaligned approach, the amendment also suffers from the vice of arbitrariness. Retrospective applicability of the said amendment increases the burden on the subjects which will indirectly impact the economic output which cannot be compromised with the sole purpose of generating revenue.

### **Conclusion**

The present position of law concerning levying stamp duty on reconstruction schemes has been clarified by numerous cases over time. However, it is important to view levying stamp duty from an angle where it is evident that it leads to hampering the process of revival of sick companies by placing an increased financial burden. It is pertinent to note that the Madras High Court held that “Where a sanctioned scheme provides for the transfer of any property or liability of the sick industrial company in favor of any other company or person or where such scheme provides for the transfer of any property or liability of any other company or person in favor of the sick industrial company, then, by, and to the extent provided in, the scheme on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the property shall be transferred to, and vest in and the liability shall become the liability of such other company or person or, as the case may be, the sick industrial company.”<sup>14</sup> There emerges an anomaly as on one hand such companies are being provided incentives for revival however at the same time the law is amended to impose a fiscal duty on the instruments of restructuring such companies. Also, the retrospective nature of the amendment makes it even direr to consider the legality of the law because it creates an obligation in the past when the statute did not even exist leave alone the fact that it defies the motive of the state to assist in the easy and speedy revival of the unhealthy companies.

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<sup>14</sup> M/S Tt Krishnamachari & Co vs The Joint Sub Registrar-I on 7 July, 2008