

RAJASTHAN HIGH COURT

State of Rajasthan

Vs.

Bhilwara Spinners Ltd.

Civil Special Appeal No. 548 of 1998
(Rajesh Balia and Sunil Kumar Garg, JJ.)

27.11.2000

JUDGEMENT

Balia, J.

1. The appellant is the State of Rajasthan which challenged the order passed by the learned single Judge on 1-4-1998 in S.B. Civil Writ Petition No. 1480/97 (reported in AIR 1998 Rajasthan 293) filed by respondent No. 1 M/s. Bhilwara Spinning Ltd. (for short, 'BSL') and respondent No.2 Mr. D.L. Birla, President and Shareholder of BSL, by which he allowed the writ petition and set aside the order dated 13th March, 1997 in case No. 65/97 raising a demand on account of deficiency in stamp duty and imposing penalty on the petitioner in relation to the instrument executed on behalf of the State of Rajasthan dated 25th March, 1988 and registered on 28th March, 1988 by the Collector (Stamps), Bhilwara.

2. The instrument, which is focus of attention to this appeal, reads as under :-

"SUPPLEMENTARY LEASE DEED

"This Lease Deed is made on the 25th Day of March, 1988 BETWEEN MESSRS BHILWARA SPINNERS LIMITED , (hereinafter called the 'Lessee') which expression shall unless excluded by or repugnant to the context, include his heirs, successors, executors, administrators and assigns of the FIRST PART and the Governor of State of Rajasthan hereinafter called the 'Lesser'), which expression shall unless excluded by or repugnant to the context include his successors in office and permitted assigns of the SECOND PART.

Whereas the Lesser has granted the permission to transfer the lease hold rights in the land measuring 104 Bighas 08 Biswa (56 Acres approx,) in favor of the Lessee and the Lessee has agreed to accept the lease of a plot of land as

described in the Lease Deed dated 22nd Nov. 1968 which was executed by Erstwhile Messer Rajasthan Spinning and Weaving Mills Ltd., and which was registered at Sub Registrar Office Bhilwara on 25-11-1988.

Whereas in compliance of Notification No. P4/59/U/1/83 dated 14th July, 1993, the Lessee agrees to execute this Supplementary Lease Deed for the land 89 Bigha 03

Biswa (56 Acres Approx.) equivalent to 104 Bigha 08 Biswas situated in Industrial Area, Bhilwara and more particularly described in the Schedule hereto (hereinafter called the Plot) upon the terms and conditions vide Notification dated 14th July, 1983.

NOW THIS INDENTURE WITNESSES AS FOLLOWS :

1. That the Lesser agrees to let the said plot and the Lessee agrees to accept the said plot on lease for a balance period of SEVENTY TWO YEARS on rent. The Lessee shall have an option to renew the said lease for a further period of Ninety-nine years after expiry of the present terms of lease.
2. That the lessee shall be responsible for all the dues payable to the Lesser and to the other institutions.
3. That the Lessee agrees to abide by the directions issued from time to time by the State of Rajasthan.
4. That the lessee agrees not to transfer the part of this plot without the permission of the State Government.
5. That the Lessee shall utilize the said plot of land for the Industries use.
6. That the Lessee shall pay the stipulated rent of Rs. 1680/- (Rupees One Thousand Six Hundred Eighty Only) per year of the said plot to the Lesser.

IN WITNESS thereof the parties hereto have set respective hands on the dates mentioned against their signatures.

Sd/-

//seal//

Signed for and on behalf

of the Governor,

State of Rajasthan.

Witness

1. Sd/-

//seal//

Sd/-Sd/-

//seal// //seal//

Witness Signed by the said Lessee"

3. THE CONTROVERSY - Revenue contends it to be an instrument of conveyance of properties comprised in Bhilwara unit owned by Rajasthan Spinning and Weaving Mill Ltd. (RSWM) which includes plant, machinery buildings and fixtures along with lease hold rights in land on which factory is situated to respondent Bhilwara Spinning Ltd. hence Stamp Duty is payable as a conveyance ad valorem on entire value of the property comprising all the aforesaid assets and not as a document of lease as it reads.

4. The controversy had arisen in the facts and circumstances to be narrated briefly hereinafter and detailed in the order under appeal. The instrument in question described as supplementary lease in respect of 56 acres of land executed between State of Rajasthan as lesser and BSL as lessee for 72 years for consideration of rent of Rs. 1680 per annum. The said 56 acres of land was originally held by Rajasthan Spinning and Weaving Mills Limited (for short, 'RSWM' hereinafter') as agriculture land which was given to the RSWM on 15-7- 51 for the purpose of setting up of an industrial unit for establishing industry, thereon for manufacturing cotton and synthetic yarn. The Khatadari rights in the agriculture land were surrendered and the land was converted into industrial land on or about Nov. 26, 1968. The State Govt. executed a lease deed conveying the lease hold rights of the said property to the RSWM. The said lease was for a period of 99 years with an option of renewal for a further period of 99 years at the instance of the lessee. The said RSWM set up its factory at Bhilwara on the aforesaid plot of land. For its own reasons, the RSWM decided to transfer its unit at Bhilwara to its 100% owned subsidiary company to be incorporated, the RSWM, in the Extra ordinary General Meeting of its Members, held on 24th January, 1983 gave its consent to the Board in terms of Section 293 and other applicable provisions of the Companies Act, 1956 to take effective steps for selling, transferring or leasing out the Bhilwara unit of the company to a separate existing company whose name shall be changed to Bhilwara Spinners Pvt. Ltd. or such other name as may be allowed by the Registrar of Companies and the Central Govt., on the book value on the condition that the vendor (RSWM) shall receive in part consideration 9,90,000 equity shares of Rs. 10 in BSL and the balance consideration payable by BSL in 8 half yearly installments. The resolution further stipulated that the BSL at the time of transfer shall be a 100% subsidiary of the Rajasthan Spinning and Weaving Mills Ltd. The case of the petitioners in this connection has been that the transfer of the plant, building and machinery of the RSWM to its subsidiary company, that is the petitioner BSL, was by

way of sale of shares of the petitioner company in accordance with the provisions of Companies Act, 1956 i.e. the part of the transaction and BSL in connection with the transfer of property from holding company to the subsidiary company which as per resolution referred to above and produced as a part of the Annexure P/24-A was to be 100% subsidiary as on the date of the transfer. The fact about the resolution and the transaction between the two companies is not disputed. In this connection the case of the State is that the same was not in accordance with the provisions of law because as per provisions of Section 17 of the Indian Registration Act as well as Section 56 of the Transfer of Properties Act if immovable property having value of Rs. 100 and more is transferred then the same can be done only through a registered transfer deed. Be that as it may, the RSWM proposed to assign its interest in the land held under 99 years lease from the State of Rajasthan (Annexure P/2) to the BSL. The lease Annexure P/2 contained the condition No. 7 that the lessee shall not sublet, underlet or sell its lease hold rights under the lease deed without the written consent of the lesser, provided however, that the lessee shall have the right to assign or to mortgage its lease hold rights thereby demised in favor of a financial institution or institutions for the purpose of availing of financial assistance etc. As the lease-hold rights have been created in respect of industrial land, the aforesaid condition was in consonance with Rule 9 of the Industrial Area Allotment Rules, 1959 framed under the Rajasthan Land Revenue Act. As the transfer of its Bhilwara unit of the RSWM to its subsidiary company BSL involved also the transfer of lease hold rights in land held by RSW M, on which the unit was established, the RSWM applied for the consent of the State Govt. the allotting authority. By communication dated 14th July, 1983, the State Govt.. conveyed its consent for transfer of the lease-hold rights of the RSWM to BSL for the remainder period envisaging that the supplementary lease shall be executed for the remainder period by the BSL in favor of State. In this connection, clause 3 of sanction letter reads as under :-

5. After grant of this sanction, Collector Bhilwara for and on behalf of the Governor, State of Rajasthan, executed the instrument in question described as supplementary lease deed on 25th day of March, 1988 accepting the BSL as the lessee of the plot in question for 72 years of the period of lease which was the remaining period of lease granted in favor of the RSWM, for which the lessee was to pay stipulated rent of Rs. 1680/- per year. This instrument was also signed on behalf of the lessee BSL. However, the RSWM, the original lessee, is not a party to this instrument in any manner. Annexure P/14, the supplementary lease deed only enumerates the facts that

have happened prior to execution of supplementary lease deed namely that the lesser is granted the permission to transfer the lease-hold rights in the land measuring 104 bighas 8 biswas (58 acres approximately) in favor of the lessee and the lessee (BSL) agreed to accept the lease of the plot of land as described in the lease deed dated 22nd Nov. 1968 which was executed by erstwhile M/s. Rajasthan Spinning and Weaving Mills Ltd. and which was registered at Sub-Registrar's at Bhilwara on 25-11-1968 and whereas in compliance of Notification No. P4/59/U/1/83 dated 14th July, 1983 (the letter of sanction Ex. P/3 granting permission to the RSWM to transfer its lease-hold rights), the lessee agreed to execute the supplementary lease deed for the land in question. The stamp duty as payable under Article 25-A of the Schedule appended to the Stamp Act, 1899 as amended for the State of Rajasthan was paid. This instrument was registered by the Sub Registrar, Bhilwara on 28th March, 1988. Soon after the aforesaid instrument was registered on 28-3-1983 as supplementary document, on 29 - 3-1988, th Sub Registrar made a reference to the Collector of Stamps that since it was not correction of a clerical error, it was not supplementary instrument under Article 25-A of the Rajasthan Stamp Law Adoption Act, 1952 but is a fresh lease deed and ought to have been stamped as a fresh lease deed. It also stated that it amounted to material alteration in the existing lease, therefore, fresh stamp duty was payable. The estimated stamp duty was stated to be Rs. 79 lakhs on the basis of market value of the property. It also stated that since it is a fresh lease deed it ought to have been executed in terms of the Rajasthan Industrial allotment Rules 1959 by charging premium and development charges and that ought to have been included in consideration. It estimated the value of the premium at about Rs. 79 lakhs, development charges at Rs. 2100 and therefore the stamp duty was calculated at Rs. 13,34,305. It also called for a penalty at 10 times. The District Registrar wrote another letter to Collector (Stamps) on 22-4-88 stating that under the Rajasthan Stamp Law Adoption Act as amended in 1982 the building machinery and furniture etc. which are existing on the land is also conveyed with the lease as per the definition of conveyance and the stamp duty should be payable as a conveyance under Article 23 ad valorem on market value. Referring to the Annual Report of BSL, it valued the entire property at 14, 31, 17, 661 and requested for initiating proceedings under Sections 3, 33, 38, 40, 47-C(1)(2)(3) and 47-A(1) (2)(3) of the Indian Stamps Act. On this reference being made on 22nd April, 1988 to the Collector (Stamps), the Collector (Stamps) (who also happened to be the District Collector, Bhilwara) ordered for registering a case under Sections 3, 33, 38, 40, 47-C(1)(2)(3) and 47(1)(2)(3) against the respondent-petitioner company and to obtain a valuation report from the DRDA, Bhilwara of the property existing at site on

the land in question. A notice was issued to the Managing Director, BSL on 26-4-88 informing that an enquiry in connection with the supplementary lease deed registered on 28-3-88 is undergoing for which the Assistant engineer, DRDA, Bhilwara shall be coming on site where the representative of the company may also remain present and make all the facilities available to the said officer.

However, without waiting for the report from DRDA, the Collector (Stamps) on 28th April, 1988 recorded that since the report about the market value of the property in question from DRDA will take enough time, the notice may be issued to the BSL for levying stamp duty of Rs. 14,31,17,661 by treating the document in question as conveyance on the basis of the valuation shown in the audited accounts of the company and for levy of 10 times penalty. Thus, recording an order, the notice dated 28th April, 1988 was issued by the Collector (Stamps) to the petitioner company.

6. The very same officer, who has granted approval to draft supplementary lease put by the Joint Director of Industries before him as Collector and District Magistrate, Bhilwara, and executed the supplementary lease deed for and on behalf of the Governor of Rajasthan on 25th March, 1988 and the said document having been registered on 28th March, 1988 in his capacity as Collector (Stamps), opined it to be not a supplementary lease deed or a lease deed but a conveyance of the entire unit of the RSWM to BSL and initiated proceedings for charging the stamp duty on that basis and levying of penalty for non-payment of duty. Again in his capacity as Collector and District Magistrate Bhilwara, by his order dated 30th April, 1988 he executed a document cancelling the lease dated 25-3-88 vide Annx. P/11. The said cancellation order recites that 'in accordance with Rule 9 of the Industrial Allotment Rules, 1959 the lease deed should have been executed between Rajasthan Spinning and Weaving Mills Ltd., and Bhilwara Spinners, the lesser being only a formal party the supplementary lease deed dated 25-3-1988 is hereby cancelled'.

7. This order led to filing of Writ Petition No. 1412/88 by the BSL challenging the order of cancellation of the deed dated 25th March, 1988. The stand taken by the State Govt. in the reply to the writ petition No. 1412/88 which replied on behalf of all the respondents including the Collector (Stamps), was :

".....The lease was originally executed in favor of M/s. Rajasthan Spinning and Weaving Mills Limited and the lease hold rights could be transferred only by Rajasthan Spinning and Weaving Mills Limited. The State

Government after having rented the lease hold rights to M/s. Rajasthan Spinning Weaving Mills Ltd. was not competent to execute a supplementary lease in favor of M/s. Bhilwara Spinning Mills Ltd.

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The supplementary lease executed in favor of petitioner does not create any right in favor of the petitioner. The petitioner No. 2 had sought permission from the State Government to transfer his lease hold rights to petitioner No. 1. The State Government granted permission to the petitioner No. 2 to transfer its lease hold rights to the petitioner No. 2. The State Government having granted lease in favor of petitioner No. 1 was not competent to execute a supplementary lease deed in favor of petitioner No. 2 and create fresh rights in favor of petitioner No. 1. Unless and until lease hold rights in favor of the petitioner No. 2 were cancelled and the land in question reverted back to the State Government the lease deed in favor of the petitioner No. 1 could not be executed. Both these situations in the instant case have not arisen, as such after grant of permission to the petitioner No. 2 to transfer the lease hold rights, the petitioner No. 2 could have transferred the lease hold rights to the petitioner No. 1. The State Government was not competent to execute any supplementary lease deed in favor of petitioner No. 1 and create fresh rights in favor of petitioner No. 1. When rights have been created by State Government in favor of petitioner No. 2 it had no right to re-transfer the lease hold rights in favor of the petitioner No. 1 till the lease in favor of the petitioner No. 2 was not cancelled, expired and the property had reverted back to the State Government."

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However it is submitted that no rights have been created in favor of the petitioner No. 1 by the said supplementary lease deed. The supplementary lease deed cannot be considered to be a part and parcel of the earlier lease deed. Once the petitioner No. 2 sought permission under Rule 9 to transfer lease hold rights in favor of the petitioner No. 1 the same has to be governed by Rule 9 and the transfer has to be made by existing lessee in favor of the prospective lessee. Since the present lease deed was not executed by the petitioner No. 2 in favor of the petitioner No. 1 no rights have been created by supplementary lease deed dated February 27/1988.

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If the transfer deed was executed by the petitioner No. 2 in favor of the petitioner No. 1, the petitioners would have been required to pay proper stamp

duty. There was a mistake on the part of the respondents State Government in executing the supplementary lease deed which is of no consequence as it does not create any right in favor of the petitioner No. 1".

8. Thus, the categorical stand taken on behalf of all the respondents which included the State of Rajasthan, the Collector and District Magistrate Bhilwara and the Collector (Stamps), Bhilwara, was that under the instrument in question, subject-matter of the present writ petition, neither any rights were created or transferred in favor of BSL by the State nor the State was competent to do so. The stand taken by the respondents was to the extent that not even the leasehold rights in favor of the BSL could be created by the State for the remaining period of the lease which was subsisting between the State and the RSWM vide Annx. P/2 dated 22-11-68. In spite of these assertions ultimately the order of cancellation of an instrument, which according to respondents was of no consequence, was revoked, which is apparent from the fact that the writ petition No. 1412 of 1988 was got dismissed by the counsel appearing for the State of Rajasthan by making a statement that the impugned order has been revoked.

9. Meanwhile, the present petitioner had approached the Board of Revenue, challenging the reference dated 22nd April, 1988 and notice issued on 28-4-88. By its order dated 20th May, 1988 (Annx. P/12), the Board of Revenue, stayed the implementation of the aforesaid two orders. The revision filed before the Board of Revenue, arising out of the proceedings No. 2 of 1988 on the record of the Collector (Stamps), was dismissed by the Board of Revenue on 26-8-96 as pre-mature, holding that the company shall raise all the objections before the Collector (Stamps). Thereafter, on 6th March, 1997 by Annx. P/15, the Collector (Stamps) issued a notice in the proceedings marked as 65/97 calling upon the petitioner to show cause why stamp duty on the instrument in question be not imposed as conveyance amounting to Rs. 2,43,21,965 and penalty in respect thereof. The petitioner was required to appear on 7th March, 1997. The Collector (Stamps) was apprised by letter dated 6th March, 1997 itself that 7th March, 1997 is a Gazetted holiday and it appears that the date 7th March, 1997 has been fixed inadvertently. The petitioner also demanded a requested to fix the date of hearing giving a reasonable period. Apart from the written request by registered A.D., an express telegram was also sent. Responding thereto hearing was refixed on 10th March, 1997 for which notice was issued on 7th March, 1997 which indisputably was a gazette holiday. The petitioner company also submitted a preliminary objection raising the question about propriety of the proceedings taken in

a hot haste without giving the requisite copies and chance to the petitioner to enable it to produce evidence and examine witnesses and also raised objections as to the jurisdiction invoked under Sections 47-C and 47-A of the Indian Stamps Act. It was also pointed out that against the rejection of revision, the petitioner has also filed a review petition before the Board of Revenue which is pending as well as petition for making a reference to the High Court under Section 57 of the Indian Stamps Act. The petitioner has also produced the various applications made by it before the Collector (Stamps) protesting against the denial of reasonable opportunity and non-recording of the proceedings that transpired during the day which are Annx. P/19 submitted at 3.30 on 10-3-97. Annx. 20 dated 11th March, 1997, Annx. 21 dated 11th March 1997 at 4.45 p.m., Annx. 22 dated 11-3-97 at 5.10 p.m., Annx. P/23 dated 12th March, 1997 protesting against the closure of evidence and demanding sufficient time to call for Power of Attorney residing at Delhi and to examine him. Annx. P/24 dated 12-3-97 was submitted at 2.30 p.m. demanding cross-examination of the Sub- Registrar on the affidavit which was on record but was not presented during the presence of the representative of the petitioner company or its counsel. The application dated 13th March, 1997 filed at 4 p.m. requesting to adjourn the matter pointing out that in view of the manner in which the proceedings are being fashioned, a writ petition has been filed in the High Court of judicature for Rajasthan at Jodhpur on that date so as to enable the petitioner to await its outcome and another application for seeking time to enable the chairman of the company to appear before the Collector (Stamps) and examine himself who was to return from abroad on 15-3-97. Yet another application dated 13th March, 1997 was made alleging that the proceedings are being conducted in breach of principles of natural justice by entertaining evidence on record in the absence of the parties. The proceedings ultimately led to making of an order by the Collector (Stamps) on 13th March, 1997 itself levying difference of stamp duty of Rs. 2,43,20,885 and registration fee of Rs. 871 on the instrument in question and penalty Rs. 2,43,641 totaling to Rs. 4,86,42,641.

10. Aggrieved with the aforesaid order, the petitioner had filed the writ petition No. 1480 of 1997 on 1st April, 1997 *inter alia* on the ground that the proceedings conducted by Collector (Stamps) were in violation of principles of natural justice and were in *mala fide* exercise of the power, that the Collector (Stamps) had no jurisdiction to invoke Section 47-A inasmuch as Section 47-A applies only in the case of instruments relating to immovable property chargeable with ad valorem duty on the market value of the property as stated in the instrument. The instrument in question is

a supplementary lease deed where by the land in question has been leased in favor of the petitioner company on which stamp duty is not paid ad valorem on market value of the property but only on the basis of annual rent reserved, that the State Govt. being the owner of the land alone and not of the building and machinery thereon, no question of transferring or conveying of the buildings, plant or machinery in favor of the petitioner under the instrument would arise for determining stamp duty payable on the instrument in question. It was also urged that no question of conveyance within the meaning of Section 2(10) of the Indian Stamps Act arise in the present case under the instrument in question so as to invite attraction of Article 23.

11. The respondents, apart from raising preliminary objection for not entertaining the writ petition on the ground of availability of alternative remedy under Rule 73 of the Stamps Act to file revision before the Board of Revenue, contended on the merit that notwithstanding the nomenclature and apparent purport of the document, the authorities under the Stamps Act are entitled to go behind the instrument to find out the true nature of the transaction and levy stamp duty which is payable on execution of a conveyance deed to give effect to such transaction by construing the instrument in question as evidence of conveyance of the immovable property comprised in the industrial unit owned by the RSWM at Bhilwara to BSL, the petitioner, and as the Duty on conveyance is payable ad valorem on the market value, the question of determination of the market value depends on consideration of evidence and conclusion of fact, the matter should have been left to be decided by the authorities under the statute.

12. The learned single Judge, considering the various aspects and facets of the case was not inclined to accept the preliminary objection and non-suit the petitioner on the ground of availability of alternative remedy. The learned Judge considered that the alternative remedy under the rules could be availed only on deposit of 50% of the demand raised, which condition in the present facts and circumstances was too onerous, to be treated as equally adequate and efficacious alternative remedy, hence the Court would be justified in entertaining the writ petition notwithstanding the availability of enunciated in *Himmatlal Harilal Mehta v. State of M.P.*¹ *M.G. Abrol, Addl. Collector of Cutsoms, Bombay v. M/s. Shantilal Chhotelal and Co.*,² *M/s. Filterco v. Commissioner of Sales Tax, M.P.*,³ and *Srikant Kashinath Jituri v. Corporation of the City of Belgaum*,⁴ that when the condition precedent for filing an appeal is deposit of substantial portion of demand raised and about which no

discretion vests in the authority for waiving the condition even in appropriate cases, nor the deposit of demand is confined to the admitted sum of liability, the remedy of appeal or revision cannot be said to be an alternative efficacious remedy. The learned single Judge also considered the issue in the light of the decision of the Supreme Court in *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhvani*,⁵ Referring to well known exception to the ordinary rule to avail the alternative remedy. The two well known exceptions are that (1) where there is a complete lack of jurisdiction in the officer or authority to take action impugned, or (2) where the order prejudicial to the petitioner has been passed in violation of principles of natural justice. The two exceptions to the normal rule as to the effect of the existence of an adequate alternative remedy are by no means exhaustive, and even beyond them a discretion vests in the High Court to entertain the petition and grant the petitioner relief in appropriate cases notwithstanding the availability of an alternative remedy. This must necessarily depend on a variety of facts that govern the proper exercise of the discretion by the Court in the matter which is pre-eminently one of discretion, it is not possible nor desirable to lay down inflexible rules which must apply in every case which comes before the Court. The Court also took into consideration the fact that the petition was admitted on 11-4- 97, the respondent had put appearance and filed detailed return and the matter was pending for considerable period. The learned Judge also took into consideration the important questions of law required to be determined in the case, which ultimately deserve to be decided by the High Court. The petition was admitted after hearing present appellant who had entered caveat. The learned Judge did not find it proper to dismiss the writ petition on the preliminary objection.

13. On merit, the learned Judge found that where the law implies a surrender from the unequivocal conduct of both the parties which is inconsistent with the continuance of the existing lease, such a surrender is valid under Section 111(f) of the Transfer of Property Act, there would be a implied surrender when the lesser executes a new lease of some property at the request of the first lessee. In the present case, a supplementary lease deed was executed on 25-3-88 on the request of the original lessee RSWM in favor of the petitioner by the Govt. of Rajasthan after granting necessary permission vide its order dated 14-7-83. The facts and circumstances clearly indicate that there was implied surrender by the RSWM in favor of BSL and thereafter the lesser had entered into a new lease agreement with BSL. The document dated 23-5-88 does not in any way indicate that the transfer of lease is by way of an assignment by the

RSWM in favor of BSL so as to attract the provisions of Article 63 of Schedule I of the Rajasthan Stamp Laws Adoption Act, 1952 to levy a duty as conveyance on consideration equal to the amount of market value of the property. Thus finding that the transaction in question for the purpose of stamp duty clearly covered under Section 35(a)(iii) of the Stamp Act as adopted and the Duty livable is the same as on conveyance on the basis of the amount of value of average annual rent, the Collector (Stamps) was clearly wrong when he assessed the stamp duty by treating the supplementary lease deed executed by State of Rajasthan and BSL as conveyance of Bhilwara unit of RSWM to BSL and although the plant, machinery and building are not mentioned in the lease deed dated 25-3-88, they were treated subject-matter of the instrument on which the petitioner is liable to pay stamp duty for transfer of the plant, building and machinery. The order passed by the Collector (Stamps) was accordingly set aside and the petition was allowed.

14. In the appeal, the appellant in the first instance contended that the learned Judge ought to have dismissed the petition on the ground of availability of alternative remedy of filing revision under Rule 73 of the Rajasthan Stamps Rules, 1973. However, in the facts and circumstances narrated above, for the reasons already noticed, we are of the opinion that the discretion exercised by the learned single Judge in entertaining the petition in spite of availability of alternative remedy on the ground of onerous nature of availability of the remedy, and keeping in view the facts and circumstances of the present case, in the manner in which the proceedings have taken place and the complexity of issues which is invoked, was justified and does not call for interference in the appeal on that ground.

15. On the merit of the case, the thrust of the contention of the learned counsel for the appellant is that notwithstanding the document apparently purports to be a document of creating leasehold rights in favor of BSL by the State, it is in fact a conveyance of Bhilwara unit of RSWM which includes leasehold rights also, along with plant and machinery and constructions thereon. Hence Stamp Duty was payable on the market value of property conveyed, it was contended by the learned counsel for the appellant that Section 27 requires the parties to any document to give full and true consideration and all other facts and circumstances affecting the chargeability of the document with the duty or amount of duty with which it is chargeable and where the parties to instrument have not set forth all relevant facts and circumstances affecting the chargeability of the document with duty or the amount of duty with which it is

chargeable, it is open for the stamp authorities to go behind the instrument to unveil the real transaction beyond the instrument and levy duty thereon. In this connection, it was contended that the plants and machinery which were permanently embedded to the earth with an intention of running an industry and while embedding this machinery the intention of the party was not to remove for the purpose of any sale of the same either as a part of the machinery or as a scrap, such machinery being fixtures would themselves become part of immovable property and will form part of the land, subject-matter of transfer. According to learned counsel merely because RSWM is not a party to instrument it would not make any difference if the instrument in the background in which it is executed results in transferring the interest of the RSWM under the scheme of transferring its unit at Bhilwara to BSL under the resolution dated 24-1-83, and therefore, a duty on the instrument, shall be chargeable as on conveyance of the said property which includes the land building standing therein and machinery embedded therein including development charges leviable which go to constitute the market value of the entire property in question. For this proposition, the learned counsel relies on a decision of Supreme Court in *Duncans Industries Ltd. v. State of U.P.*⁶ that where a factory is transferred as a going concern which the vendor conveys under the deed of conveyance, the value of plant and machinery can be taken into consideration for the purpose of stamp duty payable.

16. Learned counsel also refers to the decision of the Supreme Court in *Thayyil Mammo v. Kottiath Rammuni*,⁷ to contend that mere nomenclature of a document is not the conclusive proof of the nature of the document and if on the correct construction of a document the stamp duty has not been paid in accordance with law, the same can be recovered by invoking the provisions of Sections 47-A and 47-C of the Act as adopted in Rajasthan. In this connection, reliance was also placed on a decision of this Court in *Bajaj Hindustan Ltd. v. State of Rajasthan*⁸ laying down that the valuation for the purpose of stamp duty is to be made on the basis of what was sought to be really conveyed through the instrument presented.

17. Mr. Ray, Senior Advocate, appearing for the respondent company contended that the document in question in any sense cannot be construed as an instrument of conveyance of factory plant and machinery within the meaning of Section 2(10) of the Stamps Act for the purpose of attracting applicability of Article 23. It was urged that the instrument in question being not a document between RSWM and BSL, the nature of transaction between RSWM and BSL cannot be subject-matter of an enquiry while

construing a document executed between the State Govt. and BSL. For the purpose of construing instrument neither the transaction between the persons who are not parties to the instrument nor the properties which are not mentioned in the instrument at all can be included for consideration. The duty payable under the Indian Stamps Act is on the instrument and not on any transaction. If the instrument neither creates nor purports to create right in any particular immovable property, the instrument cannot be chargeable as an instrument conveying any property not mentioned therein from a person not party to such an instrument. A document of conveyance has to be inter vivos between two living persons conveying interest of one to another. Mr. Ray contends that there was existing lease between the State of Rajasthan and RSWM for 99 years which could be brought to an end by the act of the parties. If by the conduct of the parties, the surrender of existing lease takes place then the lesser is free to create fresh lease in favor of the third party. The transaction in such circumstances would again be only between the lesser and the party in whose favor fresh lease or purported to be created is created under the instrument in respect thereof the rights impliedly surrendered by the lessee but it cannot reach the rights which were vesting in the lessee as owner of other properties and do not form part of the surrender. In this connection, it was pointed out that the original lessee has obtained a permission from the appellant to transfer his leasehold rights in favor of BSL vide grant dated 14-7-83, thus, there was no impediment on RSWM to transfer the lease hold rights vesting in it. However, the transfer of leasehold rights by the RSWM would not result in destroying the privacy of contract between the State and RSWM so as to absolve the RSWM of its obligations under the said lease notwithstanding an assignment of lease. The assignee may also be responsible for payment of rents and other obligations to the lesser. Thereafter, once the permission was granted by the State as lesser to the RSWM to transfer its lease-hold rights on same terms of the conditions and it was part of the condition of the sanction that a supplementary lease deed for the remainder period of the lease shall be executed between the lesser and the assignee, the instrument of supplementary lease deed dated 25-3-1988 can only be construed in that light. The transaction between RSWM and BSL do not come into picture at all. Moreover, in furtherance of this background when the previous lessee RSWM walked out of the possession of the leased property viz. the land by putting BSL in possession. In furtherance of the terms contained in sanction letter dated 14-7-83 the lesser and assignee executed the supplementary lease deed on 25-3-88 to create a privity of contract between the lesser and assignee directly which was an act inconsistent with the existing relationship of lesser or lessee between the State of Rajasthan and

RSWM, it amounted to surrender of the leasehold rights by the RSWM under the lease in favor of the State and thereafter by executing supplementary lease deed the State Govt. only acted as it purported to have acted to create a fresh lease in favor of BSL on consideration of annual rent of Rs. 1680 for the period of 72 years mentioned in the instrument. Therefore, the question of conveyance of any property from RSWM to BSL under the instrument simply do not arise. With these premise, the learned counsel contended that the appeal deserves to be dismissed.

18. We have carefully considered the rival contentions and perused the record. At the outset we would invite our attention to definition of conveyance as given in the Indian Stamps Act, 1899 and adopted in the State of Rajasthan, which reads as under :-

"(10) "Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I."

19. An analysis of the aforesaid provision makes it clear; (1) it applies to transfer of properties whether movable or immovable; (2) that such transfer has to be made inter vivos and not by operation of law; (3) it expressly includes conveyance of transfer of property by sale or other transfer of property and excludes such transfer which are specifically provided for by Schedule I.

20. If we have a glance at it, the Schedule I refers to many modes of transfer like transfer by way of exchange, gift, lease, mortgage, release, surrender of lease under different specified articles. All those modes of transfer are therefore excluded from the expression 'conveyance' for the purpose of Act, and an instrument of such other modes of transfer is to be governed by such specific article and not by general category of 'conveyance' under Article 23 read with Section 2(10). The question in the present case posed is whether the instrument is an instrument of property mentioned in the document of 'lease' or assignment of lease or 'conveyance' by way of transfer of property from RSWM to BSL, as referred to above envisaged in Resolution of RSWM dated 24-1- 1983. Suffice it to state that instrument of lease is provided for under Article 35 and an instrument of assignment of lease under Article 66. Both cannot be construed as 'conveyance' for the purpose of the Act of 1899 as adopted by State of Rajasthan. Apart from it, it has to be further noticed here that sub-section (10) of Section 2 refers to 'transfer inter vivos' i.e. to say instrument of conveyance can only

be such instrument which refers to any transfer inter vivos. Thus, it makes clear that in order that an instrument falls within the definition, it is necessary that it must effect a present transfer of property, it purports to convey. It must be an instrument between two living persons purporting to transfer the property which is the subject-matter of instrument from one party to another. It cannot relate to a transfer of property which is not a subject-matter to the instrument. Nor it can relate to transfer of an interest of a person who is not a party to such an instrument. That is to say, an instrument of conveyance liable to duty under Article 23 of the Schedule I of the Act is confined to the transfer of immovable properties between the parties to the instrument and the properties to which it relates. Within that precincts only, an enquiry as to the construction of the instrument for the purposes of stamp duty could be undertaken under the provisions of the Act to the extent permissible. However, it cannot traverse beyond the parties who have executed or on whose behalf the instrument has been executed by authorized agents and property mentioned in the instrument to find out the intention of the person who is not party to the instrument in respect of transfer of the property which is not subject-matter to the instrument.

21. The charge of the stamp duty is only on instrument and not on the transaction. The subject-matter of duty is the instrument through which any property is transferred or rights created, not any other transaction which may exist between the parties but are not subject-matter of instrument, which is to be construed and subjected to levy in respect of property it deals with. Nor duty is livable on any transaction that may exist between one or more parties to instrument and other person or persons not party to the instrument, by holding an enquiry whether such other transaction has been carried out in accordance with law or not.

22. It becomes relevant to consider the meaning of expression instrument for the purposes of the Act which has been defined under Section 2(14).

"(14) "Instrument" includes every document by which any right or liability is, or purported to be created, transferred, limited, extended or extinguished or recorded."

23. The aforesaid definition makes it clear that a document which either creates any right or liability is created, transferred, extended, limited, extinguished or recorded can fall within the category of instrument. Even if no such right or liability is created,

transfer, limited, extended, extinguished or recorded in fact but purports to create transfer or record any right or a liability it may invite attraction of stamp duty. But, obviously, the right or liability referred to under above definition can only relate to the right or liability in respect of which the instrument has been executed. If any transaction has been carried out between two parties without execution of an instrument, the provisions of the Stamp Act cannot be attracted on the assumption that in order to create, transfer, limit, extend, extinguish or record validly what instrument ought to be executed. In the absence of any document creating or purporting to create any right or a liability, or purporting to create such right or liability no provision of Stamp Act can be invoked for the purpose of levying Stamp Duty by assuming existence of any document for the said purpose. Else, it would amount to duty on transaction and not duty on the instrument. The instrument is chargeable even the transaction which it recorded or purports to record cannot be effected. For example if a person having no interest in any property which he could transfer executes a document purporting to transfer such interest in immovable property, the document will attract Stamp Duty. Conversely also, as the duty is on the instrument even though where the parties have acted in furtherance of the agreement between them by conducting their affairs accordingly but have not executed any instrument to that effect, in the absence of any instrument to that effect between the parties, no duty under the Act can become chargeable.

24. In connection with the aforesaid two definitions under the Stamp Act, it would also be relevant to refer to some relevant provisions of the Transfer of Properties Act. As the definition of conveyance under the Stamp Act refers to 'transfer of property inter-vivos' but what is transfer of property inter vivos is not defined under the Stamp Act, to consider general law of transfer of property inter vivos becomes relevant. Section 5 of the Transfer of Properties Act reads as under :-

"5. In the following sections transfer of property means an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself, or to himself and one or more other living persons and "to transfer property" is to perform such act.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies,

association or bodies of individuals.

25. The word "inter vivos" according to Bouvier's Law Dictionary (Volume II) means 'between two living persons'. The illustration used is 'as a gift inter vivos which is made by one person to another person'.

26. In the Blacks Law Dictionary, expression inter vivos has been explained :

'Between the living, from one living person to another. Where property passes by conveyance, the transaction is said to be inter vivos, to distinguish it from a case of succession or devise. So an ordinary gift from one person to another is called a "gift inter vivos", to distinguish it from a gift made in contemplation of death or a testamentary gift'.

27. Thus, the expression inter vivos refers to transfer or conveyance of the property from one living person to another. Thus it is an act between two living persons who are parties to such transaction which takes place between the two. That also is the thrust of Section 5 of the Transfer of Property Act. It significantly is more clear and explicit when it says that "transfer of property" means 'an act by which a living person conveys property to one or more other living persons'. It is also to be noticed that Section 5 of the Transfer of Property Act also uses expression "conveys property" to denote transfer of property. Therefore, the word "conveyance" of immovable property inter vivos read in the aforesaid context clearly indicates that an instrument of conveyance envisaged under the Stamp Act can only refer to such an instrument transferring or purporting to the transfer or conveying property between two living persons who are party to such instrument and not a stranger to instrument.

28. Lord Crains while referring to expression "conveyance" has opined :

"There is no magical meaning in this word. It denotes an instrument which carries from one person to another person an interest in land".

29. From the chain of events noticed above, it is apparent that only the leasehold interest in the land in question is demised by the State of Rajasthan, the owner and lesser by executing a deed in 1968. The lesser in the demised property had no other interest vesting in it at the time of grant of lease in favor of the RSWM nor at any time it has acquired any interest in the industrial unit established over the said plot in terms

of the conditions of allotment by the RSWM. The industrial unit was a property absolutely vesting in the RSWM. No interest in that unit as such vested in the State Govt. which as a person it could convey on its own to anyone. That is not even disputed by the appellant. Hence the instrument in question cannot be construed as an instrument creating any right, which the conveying party to instrument viz. State of Rajasthan itself did not have. What the document purports to convey obviously depend only on what property and interest has been made subject of instrument and not beyond it. It therefore cannot be an instrument of conveyance within the meaning of Section 2(10) read with Section 2(14) of the Stamp Act.

30. RSWM, when it decided to transfer its interest in its Bhilwara unit to another company to be incorporated as its subsidiary company had envisaged a transaction between RSWM and BSL namely between the two companies, one of which was holding company and the other was a subsidiary company. As per provision of Section 5 the two companies are to be deemed to be living persons and transaction of transferring Bhilwara unit from RSWM, one living person to BSL, another living person is a transfer or interest of RSM to BSL inter vivos. The Companies Act envisages that any property in the company can be transferred by a resolution of General Meeting of its members authorizing to transit the property. The transfer of Bhilwara unit as a whole as going concern involved transfer of all interests of the RSWM in the said unit including its leasehold rights in respect of land on which the industrial unit was established. But for the condition under the lease deed dated 22-11-1968 and the Industrial Allotment Rules, 1959 the lessee could have assigned its lease hold rights in terms of Section 108(J) of the Transfer of Property Act which envisages an implied authority in the lessee to transfer the lease absolutely or by way of mortgage or sub lease the whole or any part of his interest in the property and any transferee of such interest may again transfer it. It also envisages that the lessee shall not by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. That is to say that the privity of contract between lesser and the original lessee shall continue notwithstanding subsequent and successive assignments of the leasehold rights of the original lessee. The result of assignment of leasehold right could create privity of estate between the original lesser and the assignee but not privity of contract which continues between the original lesser and the original lessee. In such event original lessee alone continue to be reckoned as lessee and his transferee only gets the status of assignee under an independent contract permissible under law. If the leasehold rights are assigned in favor of the lesser, it results in extinguishment

of lease as the right of the lesser in the lessee merges into one. If on assignment of lease in favor of a third party, the lesser executes a fresh lease in favor of assignee from a lessee to his knowledge, it may bring to an end privity of contract between original lesser and original lessee and the new contract results in fusion of privity of contract once again between the lesser and assignee squeezing out the original lessee from the scene inasmuch as the execution of new lease deed between the lesser and the lessee's assignee result in extinguishment of rights and obligations of the original lessee by implied surrender and grant of fresh lease by the lesser in favor of the assignee. This position has been stated in Woodfall's Law of Landlord and Tenant 26th Edition, Volume I page 914. The principle of surrender by operation of law. The term "surrender by operation of law" or implied surrender (there being no distinction) is the expression used to describe all these cases where the law implies a surrender from unequivocal conduct of a both parties which is inconsistent, with the continuance of the existing tenancy. Thus it is properly applied to cases where the owner of a particular estate has been party to some act having some other object than that of a surrender, but which object cannot be effected whilst the particular estate continues, and the validity of which act he is by law estopped from disputing. Such surrender is the act of the law, and takes place independently of, and even in spite of, the intention of the parties. It is presumed to have preceded the act to which the tenant is party."

31. Section 111 of the Transfer of Property Act which envisages the contingencies in which lease of the immovable property determines, includes 'determination of lease by implied surrender' too is in consonance with above principles. In Mulla's Transfer of Property Act 9th Edition the position has been explained :

"Implied surrender or surrender by operation of law.

(1) by the creation of a new relationship; or

(2) by relinquishing of possession.

x x x x x x

The principle which governs the doctrine of implied surrender of a lease is that when a certain relationship existed between two parties in respect of a subject-matter and a new relationship has come into existence regarding the same subject-matter, the two sets cannot co-exist, being inconsistent and incompatible between each other, i.e. if the latter can come into effect only on termination of the former, then it would be deemed to have been terminated in order to enable the latter to operate.

x x x x x x

There can be an implied surrender if the lesser grants a new lease to a third person with the assent of the lessee of the existing lease who delivers the possession to such person or where the lessee directs his sub-tenant to pay the rent directly to a lesser".

32. The principle has been accepted by the Supreme Court in *PMC Kunhiraman Nair v. C. R. Naganatha Iyer*⁹ (Para 10) :

"Under clause (f) of Section 111 of the Transfer of Property Act, 1908, implied surrender is made for determination of a lease of immovable property. In English Law, delivery of possession by the tenant to a landlord and his acceptance of possession effects a surrender by operation of law.Just as under the English Law, there can be an implied surrender under the law of transfer of property in India, if the lesser grants a new lease to a third person with the assent of the lessee under the existing lease who delivers the possession to such person or where the lessee directs his sub-tenant to pay the rent directly to a lesser."

33. The same view has been expressed by this Court in *Noratmal v. Mohan Lal*,¹⁰

34. In the light of aforesaid principle, it is clear that the RSWM had agreed to transfer its Bhilwara unit which included the lease hold right in the land in question along with his other assets which formed part of the Bhilwara unit to its wholly owned subsidiary company BSL. The State Govt. as lesser has granted permission for such transfer of lease-hold rights in favor of BSL for the land in question as required under the lease deed of 1968. In pursuance of the agreement between the RSWM and BSL to convey its interest in Bhilwara unit with stipulation of transfer of its leasehold rights in absolute, BSL has been put in possession of the land in question after fulfilling condition under lease agreement about which there is no dispute. This part of transaction is between the RSWM and BSL. The instrument in question neither creates any such right in BSL by transfer of any right of RSWM by State in fact, nor it purports to create such rights. By the instrument in question dated 25th March, 1988 lesser has accepted the BSL as its lessee for the remainder of the period and it has agreed to accept the rent directly from him. The assent of the original lessee for the creation of new relationship between the lesser and his envisaged assignee is apparent from the fact that it applied for permission of such transfers and the State Govt. has

agreed to grant such permission with the stipulation that a supplementary lease deed shall be executed by BSL in favor of State Govt. acknowledging the State Govt. as its lesser. Thus, the continuance of the existing lease between State of Rajasthan and RSWM become inconsistent with the continuance of new lease between the State of Rajasthan and BSL having come into existence with the assent of the original lessee, the rights of the original lessee stood surrendered. The original lease deed Ex. P/2, in favor of RSWM, permission letter dated 14-7- 1983 culminating into execution of supplementary lease deed dated 25-3-88 in favor of BSL all relates to only one property namely lease hold rights in the plot in question which originally stood created in favor of the RSWM, now stood created between State Govt. and BSL vide Ex. P/4 resulting in surrender of lessee's right of the RSWM extinguishing privity of contract between himself and the State Govt. on coming into existence new privity of agreement between State of Rajasthan and BSL. Therefore, the instrument in question which neither refers to any property other than the leasehold rights in the plot in question neither purports to transfer any property other than property in question the leasehold rights in the plot. It even does not convey any of rights of RSWM to BSL through the instrument, but only the effect of creation of new right between the State of Rajasthan and BSL is that existing privity of contract between State of Rajasthan and RSWM which still holds RSWM bound to State, is extinguished.

35. The instrument in question cannot be instrument of conveyance for transfer of property other than the property of State Govt. from State Govt. to respondent BSL. There was no material or ground for the authorities acting under the Stamp Act to assume it being an instrument of conveyance of property inter vivos from RSWM to BSL on any principle of transfer or property from one living person to another living person as a transaction inter-vivos either in the light of the definition of conveyance under Section 2(10) of the Stamp Act or the transfer of property defined under Transfer of Property Act. In our opinion, the transfer of property inter vivos under Stamp Duty Act cannot be different and distinct from the transfer of property under Section 5 of the Transfer of Property Act. Nexus between the two is clear. Section 2(10) refers the conveyance to mean transfer of property inter vivos by way of sale or other methodology not specifically provided under Schedule I of the Act of 1899, and Transfer of Property Act which deals with the substantive law on transfer of immovable property too envisages transfer of immovable property mean conveying the property from one living person to another living person i.e. transfer inter vivos.

36. The authorities under the Stamp Act apparently were laboring under the obsession of the transaction of transfer of a going unit from RSWM to BSL without referring to any instrument, if any executed between the two living person concerned viz. RSWM and BSL creating or purporting to create rights in the properties constituting Bhilwara unit of RSWM in favor of BSL. The question about levy and collect stamp duty in respect of conveyance of any property from RSWM to BSL, could only refer to an instrument of conveyance executed and existing between the said two companies and not to any other instrument. The ground on which the proceedings have been commenced against BSL in respect of instrument dated 25-3-1988, in our opinion were non existing and no person reasonably instructed in law vested with authority to exercise under the provisions of Stamp Act could have reason to hold that the instrument dated 25-3-1988 was an instrument of conveyance of Bhilwara unit of RSWM which includes the building, plant and machinery and other fixtures other than lease hold rights in the plot in question from RSWM to BSL. The instrument could have only been confined to any right or liability created or purported to have been created between the parties to instrument in respect of the property or property mentioned in the instrument. The authorities could not travel beyond the instrument to include interest of persons not parties to instrument or properties not referred to in the instrument. The exercise of construing the nature of transaction emanating from instrument subjected to Duty could only be confined to creation of rights, liabilities and obligation created or purported to be created between parties to the instrument and to the properties mentioned in the instrument. If it were to be treated as conveyance, it could be only conveyance from State of Rajasthan to the BSL in the property mentioned in the instrument. It may again be pertinent to recall here that with reference to the reasons stated above that the instrument of conveyance in question should either create some rights in fact or purport to create rights which it really does not or could not create. Obviously, the instrument in question does not purport to create any right through transfer or conveyance of immovable property except by creation of lease. It does not purport to transfer the land in question by sale from State of Rajasthan to BSL. In fact, it cannot and does not create any other right between the parties other than the lease in respect of any property other than plot in question inasmuch at no point of time the property in the building, plant and machinery and fixtures on the land in question in which the lease hold rights were held by the RSWM became part of the ownership of the State of Rajasthan by any mode of conveyance or by operation of law so as to become a part of the land which could be conveyed to the BSL by State of Rajasthan.

37. By any stretch of imagination it cannot be suggested, nor it has been suggested, that State Govt. was a party to the instrument as an agent or attorney of RSWM, who intended and did execute the instrument to transfer any property of RSWM to BSL or a party to devise adopted to avoid Stamp Duty for the benefit of transferee. As a matter of law State could not transfer any property of RSWM. As a matter of intention the State did not purport to transfer property of RSWM. Hence the instrument in question neither can be an instrument that created a conveyed property of RSWM to BSL in law, nor it purported to do so. It, therefore, cannot be held an instrument of 'conveyance' on other count.

38. Even assuming that the implied surrender of the lease, the developments made on the land in question became part of the land and reverted to the State, still it being not a transaction from State to the BSL was only a transaction of lease of the land as it stood which was the property of the State Govt. in favor of the lessee BSL and a lease executed on 25-3-1988 which was only liable to duty under Article 35 on the annual rating value. Article 35 reads as under :

"Article 35 : Lease, including and under lease, or sub-lease and any agreement to let or sub - let --

(a) where by such lease, the rent is fixed and no premium is paid or delivered;

(i) x x x xx x x x

(ii)x x x xx x x x

(iii) where the lease purports to be for a term of not less than one year but not more than three years;The same duty as on a Conveyance (No.23) for a consideration equal to the amount or value of the average annual rent reserved.

(iv)x x x xx x x x

(v)x x x xx x x x

(b) where the lease is granted for a fine or premium or for money advanced and where no rent is reserved.The same duty as on a Conveyance (No.23) for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease."

39. The stamp duty is payable for consideration equal to the amount or value of the average annual rent reserved. As neither the original lease was granted for a premium or for money advance nor under the instrument in consideration any premium or

money advance is payable as term of lease, the operation of sub-clause (b) of Article 35 does not arise. There was no room at any point of time to include the value of the estimated premium which the State Govt. ought to have charged under the Industrial Allotment Rules as have been envisaged in show cause notice referred to above. It is significant to note that stamp duty is chargeable on consideration equal to amount of value of fine, premium or advance as set forth in the lease. The stamp duty is payable on an instrument of lease on premium on a consideration charged as set forth in the instrument but not on consideration chargeable under the rules which in fact has not been charged. Obviously, non charging of premium under the Industrial Allotment Rules is another circumstance which goes to show that it was an execution of lease simpliciter for creating privity of contract between the owner State of Rajasthan with BSL, as a lessee. Nothing more nothing less. The State Govt. has not purported to assign or transfer the lease hold rights of RSWM to BSL under the instrument in question, nor it could, nor the documents actually results in assigning of rights of RSWM to BSL by dint of the said instrument so as to construe assigning of lease within Article 63.

40. The apprehension and anxiety behind the action taken by the Stamp Duty authorities concerning the avoidance of payment of stamp duty on the conveyance from RSWM to BSL also appears to be ill founded. It would be apposite to invite attention to the provisions of Transfer of Property Act. Section 5 of the Transfer of Property Act, Para 2 of which clearly envisages that the provisions of Transfer of Property Act shall not affect any law for the time being in force relating to transfer of property to or by companies, associations of bodies of individuals. That is to say, special law for the companies in relation to the transfer of their properties shall prevail over the Transfer of Property Act. Though the question whether the property of the RSWM stood transferred to BSL in accordance with as an inter vivos transfer is not a subject-matter of enquiry. However, it is relevant to consider that provisions of Section 5 of Transfer of Property Act envisages exclusion of applicability of Transfer of Property Act in relation to the transfer of properties of the companies in accordance with the Companies Act, if any special provisions are made there under.

41. Under the provisions of the Companies Act, the special methodology is provided for entering into compromise which includes re-construction by amalgamation of two companies or by having of the assets of the companies under the provisions of Sections 391 to 394 of the Companies Act, 1956. If on result of scheme sanctioned by

the Court reconstruction of existing company, or amalgamation of two companies or a compromise is sanctioned and implemented under which property of one company stands transferred to another company by dint of the orders of the Court, and the property of one company stands transferred to another by operation of law, such transfer shall be governed by the provisions of the Companies Act. Whether the conveyance of the Bhilwara unit of RSWM to BSL has taken place under any special provision of the Companies Act is not the subject matter of enquiry in these proceedings and could not be a subject matter of enquiry under the impugned notice to hold and raise a demand on the premise that the RSWM could not have transferred the property without execution of a registered deed in favor of BSL. We have noticed above that so far as conveyance or transfer of property of RSWM to BSL is concerned, the plea of the company has been that such transfer has taken place in accordance with provisions of Companies Act by issuing shares, whether in fact a valid transfer of Bhilwara Unit of RSWM to BSL has taken place in accordance with law or not or any documentation between the two companies attracting Stamp Duty has taken place or not can only relate while construing instrument, if any, to that effect. But not while construing the instrument in question to which such transaction is foreign. If no valid conveyance of property of RSWM to BSL has taken place, it will have different consequence of its own on the affairs of the companies concerned when the question arises while dealing with question whether such properties validly vested in BSL.

42. Moreover, the requirement of registration and payment of stamp duty are two different requirements. It is not necessary whether a document is required to be necessarily registered is also required to be stamped necessarily. Under Stamp Act a remission is operating on transfer of properties from holding company to its subsidiary company. The transfer from RSWM to BSL was transfer to a 100% subsidiary company. Under Section 9 of the Indian Stamp Act Notification No. 1 had been issued on 16th January, 1937 by the Central Board of Revenue granting a general remission on Stamp Duty chargeable on conveyance of any property from holding company of its subsidiary company in the following terms :

- "(i) Where at least 90 per cent, of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or
- (ii) Where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 per cent , of

the issued share capital of the other, or

(iii) Where the transfer takes place between two subsidiary companies in each of which not less than 90 per cent of the share capital is in the beneficial ownership of a common parent company :

Provided that in each case a certificate is obtained by the parties from the officers appointed in this behalf by the Local Government concerned that the conditions above prescribed are fulfilled."

43. That notification was designed to facilitate reconstruction of a Company or amalgamation of two Companies which are more or less under same ownership so that they may be able to rearrange their affairs without being saddled with liability for payment of Stamp Duties. The Rajasthan State has by the Rajasthan Stamp Law (Adaption) Act, 1952 has adapted the Indian Stamps Act subject to provisions made in the Adaptation Act. For coming to conclusion whether Stamp Duty was at all livable on the alleged conveyance of property from RSWM to BSL would have required consideration of question about the consequence of adaptation of Indian Stamp Law by providing that the Indian Stamp Act, 1998 of the Central Legislation as amended from to time, shall apply to the whole of the State of Rajasthan w.e.f 1-4-1958, on the applicability of such notifications under Indian Stamps Act prior to 1-4-1958 and were in force, within the State of Rajasthan as on that date of particularly when no provision to the contrary has been made in the Adaptation Act to affect the operation of notification for relaxation of the provision of the Act, particularly in the cases of general remission like the one under Notification dated 16-1-1937. It would also entail an enquiry into question as to difference "between legislation by incorporation and adaptation of an operative statute for continued operations subject to provisions made to the contrary in Adaptation Act. Prima facie it appears to us that there is a vital difference between legislation by incorporation, and adaptation of existing law to operate in the given territory subject to adaptations made by the legislature adapting the same to operate within the territorial region of its operative field. In the former it is a case of enactment afresh to cover the field so far uncovered by the legislative field open for the legislature, by bodily lifting the provision of another statute by incorporating words by word as a part of enactment being made, resulting in repeal of all previous laws operating in the field. In the case of adaptation, what is enacted is the adaptation of provisions as implemented to continue to operate within the occupied field, except to the extent adaptation made. In other words, adaptation is method of legislation by which law in operation is adapted for continued operation as it is,

subject to the provisions made afresh in the adapting enactment. In such event, it stands to reason that sub-ordinate legislation which is operative law, remains in continued operation, unless independent or contrary provisions are made in adapting statute. However, as the question about the levy of Stamp Duty from RSWM to BSL was not at all subject matter of enquiry, nor was within the scope of enquiry in construing the nature of instrument, we refrain from probing into this question further and do not express any final opinion. This aspect has been noticed only to point out that an enquiry into the question of levy of Stamp Duty on any conveyance from RSWM to BSL would have entirely different scope than the construction of instrument between State of Rajasthan and BSL which enquiry cannot travel beyond the right of the parties to instrument in the property named and dealt with in the instrument and nature of their dealing in the instrument so as to determine the true nature of business transacted between the parties to the instrument in respect of property mentioned therein.

44. That apart whether the deed of conveyance between RSWM and BSL of Bhilwara Unit under the instrument dated 19th Jan., 1985, (produced along with the application dated 23rd March 2000 in this appeal) creates or purports to create any right or liability amounting to conveyance or subject to stamp duty under any provision and whether any proper stamp duty has been paid thereon or not is not the subject of enquiry here but the fact remains that the present petitioner-respondent claims to have acquired interest of the RSWM in its Bhilwara Unit by dint of issuing shares. If the Bhilwara Unit stood validly transferred by the act of transferor company RSWM to transferee company BSL it would not change the character of the present instrument. It is independent of the transaction between RSWM and BSL. The instrument in question relates to creation of lease in favor of BSL by the appellant resulting in fusion of privity of contract and privity of estate between the parties namely State of Rajasthan and BSL. If there is no valid transfer of the Bhilwara Unit from RSWM to BSL, the creation of leasehold right in the land in question would not result in creation of any right in the properties of RSWM to BSL nor the instrument purports to create such rights. Therefore, the instrument cannot be treated to be an instrument creating or purporting to create interest in the property of RSWM in favor of BSL so as to invite consideration of construing the instrument as conveyance from RSWM to BSL. It is not even the case of appellant that instrument is a conveyance from State Govt. to the transferee BSL. It would be suffice to refer to the stand taken by the State of Rajasthan, Collector, Bhilwara and Collector (Stamps) in response to Writ Petition No.

1412 of 1988 quoted in extenso in narration of facts. It is the undisputed case of the present appellant that a supplementary lease deed was not required and in fact did not create any rights in favor of the BSL from the State Govt. inasmuch as the State Govt. could not create any right in the property in question in favor of BSL. Therefore, when admittedly, the one of the executants namely the State Govt. could not create any right in the property of RSWM in favor of BSL, the document can only be read as what it purports to be namely the creation of lease which, it purports to create at least, in favor of BSL for a period of 72 years for which annual rent is reserved as Rs. 1680/-. The stamp duty is chargeable only on that basis.

45. Section 2 (xiv) excludes from the purview of conveyance any transfer of immovable property which is not otherwise specifically provided for by Schedule I. Lease is mode of transfer specifically provided under Article 35 of Schedule I of the Stamp Act and transfer of lease by way of assignment vide Article 63 of the Schedule I of Stamp Act. Thus whether it be a lease or assignment of lease, it cannot be an instrument of conveyance.

46. We are therefore, in agreement with the conclusion reached by the learned single Judge for the reasons aforesaid that the instrument is a lease-deed and chargeable to duty under Article 35(a)(iii) of the Rajasthan Stamps Act and the duty livable is the same as on conveyance on the consideration equal to the amount of the average annual rent reserved.

47. There is yet another aspect of the matter which may be noticed. It has been the case of the appellant that by the methodology adopted by RSWM the property in question has not been transferred and the transfer has been complete only by execution of supplementary lease deed. If that is so, it becomes a case where there are several instruments for completing the transaction. In that event under Section 4 only the principal instrument is to be charged with the duty prescribed under Schedule I for the conveyance of mortgage or settlement and each of the several instruments will be chargeable with the duty of Rupee 1/- (now Rs. 2) only if any duty is prescribed in that provision. Obviously, on the facts narrated above, as per the appellants the instrument between RSWM and BSL, if any, does not complete the transaction; between them and for completion of transaction, supplementary lease deed Ex. 3 was also required to be executed by the State. In that event, the principal instrument of sale or conveyance as a result of agreement between RSWM and BSL would be the

instrument executed between those two companies as parties to transaction. The execution of supplementary lease deed to complete the transfer of leasehold rights in the plot over which the Bhilwara Unit was existing is only a document incidental to complete the formality of transfer of the lease-hold rights in land as component of the property in its entirety, and therefore, only the instrument executed between the principal parties to the transaction namely RSWM and BSL would attract the Duty as conveyance, if the same is liable to stamp duty, which is alleged to be by the respondent as annexure along with the application referred to above in this appeal and the document in question Annexure P/3 can only be considered as an incidental document chargeable with fixed fee of Rupee 1. Further, in such event, it is the option of the parties to the transaction to determine between themselves which of the documents shall for the purpose of Section 4 of the Stamp Duty Act be deemed to be principal document. In the absence of any option exercised by the parties, incidental instrument cannot be deemed to be principal document so as to attract the duty chargeable on the principal document as conveyance.

48. It has been urged by learned counsel for the State that instrument in question makes a mention of transaction between original lessee RSWM and its assignee BSL, therefore the said transaction is subject-matter of the instrument in question. We are unable to accept. Merely because a reference has been made in the instrument to the original lease, and about the sanction granted in favor of the RSWM and the transaction between RSWM and BSL, it does not amount to be incorporating, the terms and conditions of transaction between RSWM and BSL, as the terms and conditions of an agreement between State of Rajasthan and BSL as part of the instrument in question. To draw any such inference, it must be clearly shown that the parties to the instrument intended to incorporate them in the deed. In this connection, attention may be invited to the decision of the Supreme Court in *Himalaya House Co. Ltd. v. Chief Controlling Revenue Authority*,¹¹ It was a case in which a person obtained a land on lease from the Govt. and constructed a building thereon consisting of several flats, offices and shops. Under various agreements, he appears to have assigned the right of occupation to several persons. The occupants formed a company under the Companies Act. Lessee executed deed whereby he surrendered right in the land in favor of the company for no consideration. The authorities under the Stamp Act sought to levy the stamp duty on the said instrument executed between the person holding leasehold rights from the Govt. and the company in whose favor these leasehold rights were assigned for no consideration as conveyance of the property. The

value of consideration was sought to be taken as the total amount received from the occupants of the flats under agreements executed between the original lessee and the occupants on the like plea as has been raised before us. The Court rejected the contention of the revenue while allowing the appeal by the assignee and held that there was no basis to hold that consideration is the total amount received under the agreements between him and the persons to whom he had assigned certain rights in the flats, offices and shops in the building, those persons had independent right of their own, their rights did not flow from the impugned Assignment Deed. Whether the title obtained by them was perfect or not, there is no denying of the facts that they had acquired valuable rights even before the impounded deed was executed.

49. With the parity of reasoning's, it can be said that the consideration that was passed from BSL to RSWM for conveyance of the property comprised in Bhilwara Unit from RSWM, is, independent of the instrument in question. Whether the title obtained by BSL from the RSWM was perfect or not is also independent of the instrument in question and that cannot affect the Stamp Duty payable on construction of instant document as executed between the State of Rajasthan and the BSL on the premises of their respective position vis a vis the property described in the instrument.

50. The decision relied on by the learned counsel for the appellant namely *Duncans Industries Limited v. State of U.P.*,¹² in our opinion is of little assistance in the present case. It was a case in which, ICI India Ltd. a company registered under the Companies Act had executed an agreement of sale dated 11-11-93 wherein it agreed to transfer on as "as is where is" and as "a going concern" its fertilizer business of manufacturing, marketing, distribution and sale of urea fertilizer in favor of CCFCL renamed as M/s. Duncans Industries Ltd. for Rs. 70 crores which was termed as "slump price" in the agreement. It was in relation to an instrument between the parties to the transaction of conveyance that a question arose whether the immovable property under the conveyance on which stamp duty was payable ad valorem at market value would include plant and machinery and land, building thereon because the agreement was to transfer the immovable property was on 'as is where is' basis. It is apparent that the conveyance of property under the instrument was not in dispute. What was in dispute was which part of the transferred property consisted of immovable property so as to invite attraction of ad valorem stamp duty on its market value. We are not, here concerned with a case where the question of market value of the property described in the instrument itself is to be considered.

51. The other decision relied on by the learned counsel for the appellant is Bajaj Hindustan Ltd., AIR 1997 Rajasthan 262. This decision rather helps the respondents than the appellant. It was a case in which M/s. Bajaj Hindustan Ltd. had transferred its factory to M/s. J.K. Udaipur Udhog Ltd. in the year 1993. The plant and machinery and EDPS of the cement undertaking were not mentioned in any of the documents as property conveyed under the instruments in respect of which market value of the property was enquired by the authority under the Stamp Act. On the aforesaid omission being challenged in the Court, the Division Bench of the High Court found that whereas the main contention sought to be made by the petitioners is that the plant and machinery and electrical and EDP of the cement undertaking were separately transferred by delivery of possession vide receipt dated 1-12-1993, the respondents (Stamp Duty Authorities) in their valuation have purported to value such plant and machinery and electrical and EDP in respect of which no document was presented or lodged by the petitioners before the respondents for registration. The Court said (Para 23 of AIR) :

"The said plant and machinery and electrical and EDP are extraneous to the five documents lodged for registration. The respondents while seeking to include the value of such assets in the value of the properties mentioned in the five documents lodged for registration have gone beyond the documents presented for registration in complete disregard of the charging Section 3 of the Indian Stamp Act as adopted in the State of Rajasthan. List of assets which were transferred separately by delivery of possession on 1-12-1993 was made over to the respondents on or about 4th Oct. 1994. The respondents thus while seeking to value those properties which were extraneous to the five documents lodged for registration are in fact seeking to re-write the documents presented for registration which is not permitted in law."

We are in respectful agreement.

52. The same view was taken in *Mohd. Hussain v. District Registrar*,¹³ wherein it has been held that it is only the instrument that is presented for registration that should be charged with the stamp duty . The authorities cannot look into the various documents that are connected with it with a view to judge the nature of the transaction that is covered by this document read in conjunction with several others.

53. In view of our conclusion on the merit of the issue, we are not examining the other

issues raised before us by the learned counsel for the respondents namely whether power under Section 47-A or 47-C could have at all been invoked in the present case by the Collector (Stamps) when the stamp duty payable on the instrument was not as per market value but was only on the consideration.

54. Even if it be treated as an assignment of lease as on the date the instrument was executed, the stamp duty was payable not on the market value but on the consideration at the rate applicable to the conveyance of such value.

55. Another contention raised by the learned counsel is that the power has been invoked mala fide.

56. Having agreed with the conclusion reached by the learned single Judge about the true nature of the instrument and its chargeability to the stamp duty under Article 35, we are of the opinion that *prima facie* case of malice in law appears to have been made out. The manner in which the proceedings have taken place, the fact that the very same officer has accorded approval for execution of a supplementary lease deed on behalf of the State of Rajasthan which was in consonance with the conditions of permission granted vide Annexure P/3 dated 14-7-1983 and the said document having been registered on 25th March, 1983, the Sub Registrar barely three days thereafter makes a reference to treat it not as a supplementary lease under Article 25-A but a fresh lease yet thereafter another reference is made by the Registrar of the stamp on 28th April, 1988 to the Collector (Stamps), who is the same officer as District Collector who had executed the document in question stating to treat the supplementary lease a documents of conveyance of the property from RSWM to BSL. Taking notice of the said reference on the very date, the Stamp Collector made an order for appointing DRDA for valuing the market value of the property which is apprehended to be a subject-matter of conveyance. Then after directing the DRDA to appoint a person and submit a report of valuation, the said officer without waiting for the report, on the very same day decides to accept the valuation disclosed by the Registrar in his communication dated 28th April, 1988 on the basis of Audited Annual Accounts of the Company 1986 and issues a notice describing the amount of duty and penalty to be levied thereon to show cause against it. Having issued this notice by treating it to be a document of conveyance resulting in creation of right in property subject matter of transaction between RSWM and BSL , in his capacity as District Magistrate, Bhilwara, cancels the said lease by holding that it was not required to be executed at all and when the order of cancellation is challenged, a categorical stand is

taken that the document in question does not purport to transfer any interest in favor of BSL by the State Govt. inasmuch as State Govt. had no interest on that date and persuades this Court to dismiss the writ petition. One fails to comprehend that when all concerned viz. the State of Rajasthan, the District Collector, the Collector (Stamps) unanimously held the view that the the State of Raj. the designated lesser or the transferee under the instrument did not have any interest in property which it could have transferred, and the document was a superfluous act, any belief at all could be held by the Collector, Stamps at any time that it created an interest in property of Bhilwara Unit by way of conveyance and construing the document to be a document of conveyance which it did not ever purport to be. Then the order of cancellation of lease has been revoked only in 1997 and thereafter the manner in which the hearing has been fixed and adjudicated by the then Collector (Stamps) particularly keeping in view that the date of hearing was fixed on a holiday and when pointed out that it was a gazetted holiday, notice fixing next date was still issued on gazetted holiday as if even delay of one day in fixing the date was not palatable. Ignoring the fact that until 1997 the proceedings were stayed under the orders of competent superior Court. He refused to grant opportunity to the company for even producing relevant documents or calling upon its senior executive to be examined as witness and refused to supply document which formed the foundation for initiating the proceedings. The chain of events clearly indicates that the decision to impose the stamp duty and penalty was a pre-determined. We leave it at that.

57. As a result of above discussion, this appeal fails and is hereby dismissed. There shall be no orders as to costs.

Appeal dismissed.

Cases Referred.

1. AIR 1954 SC 403
2. AIR 1966 SC 197
3. (1986) 2 SCC 103
4. (1994) 6 SCC 572
5. AIR 1961 SC 1506
6. AIR 2000 SC 355

7. AIR 1966 SC 337
8. AIR 1997 Raj 262
9. AIR 1993 SC 307
10. AIR 1966 Raj 89
11. AIR 1972 SC 899
12. AIR 2000 SC 355
13. AIR 1964 And Pra 43