IN THE SUPREME COURT OF INDIA

(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL NO. 4056-4064 OF 1999

IN THE MATTER OF :

Mineral Area Development Authority …. Appellant

Versus

M/s Steel Authority of India & Others. … Respondents

VOLUME-I (A)

WRITTEN SUBMISSIONS OF STATES / AUTHORITIES

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CIVIL APPEAL NO.4056-4064 of 1999

IN THE MATTER OF :

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CIVIL APPEAL NO.4722-4724 of 1999

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WRITTEN SUBMISSION ON BEHALF OF THE APPELLANT / MINERAL AREA DEVELOPMENT AUTHORITY BY RAKESH DWIVEDI, SENIOR ADVOCATE DATED 26.02.2024.

PART- I

FACTUAL BACKGROUND

1. Civil Appeal No. 4056-64 of 1999, arises out of common Judgment dated 22.03.1999 passed in 5 writ petitions filed by SAIL C.W.J.C. No. 1885/94 ; Industries and Commerce Association CWJC No. 178/1994; Hindustan Malleables and Forging Ltd. CWJC No. 1783/199; Dhanbad Brickfield Owners Association CWJC No. 3113/1993 and

Kumardhabi Metal Casting CWJC No.2915/1994. They are non mining industries and are not covered by the MMRD Act.

2. Civil Appeal No. 4722-24 of 1999 arises out of the same Judgement passed in 3 Writ Petitions filed by TISSCO; CWJC No. 966/95; Central Coalfields Ltd; CWJC No. 783/1994; M/s Bharat Coking Coal Ltd; CWJC No. 3795 of 1993 pertain to companies engaged in mining.

3. After judgment of **India Cement Ltd. Vs. State of T.N. (1990) 1 SCC 12 [Pg 1151-1174 Vol V]** and **Central Coalfields Ltd. Vs. State of Bihar AIR 1991 Patna 27 [Pg 1286-1300 Vol V]**, declaring cess on royalty under then Bengal Cess Act to be ultra vires, the State Legislature on its own amended Section 89 of MADA Act. "Tonnage Cess" and Cess on royalty" were repealed and tax on land was enforced. Present batch of petitions question validity of amended Section 89 of the Bihar [Coal Mining] Area Development Act, 1992. **[Pg 2700-2703 @ Vol IV]**

4. **Old Section 89 : Levy and assessment of Cess –** *(1) Subject to the provisions of this Act and the rules framed under it, the Authority shall, by notification published in the official Gazette levy a tonnage cess assessed on the annual dispatches of Coal and Coke from each mine at the rates to be prescribed by the Authority with the prior approval of the State Government.*

Provided that the rate of such Cess shall not exceed six rupees per tonne without the prior approval of Central Government ;

Provided further that the tonnage Cess shall be only be leviable until provision to the contrary is made by the Parliament.

(2). **Royalty Cess-**(i). *An additional cess at the rate of five per cent shall be levied and realized on the amount of royalty to be received by the State Government.*

(ii) Additional cess realized under sub-clause (i) shall be transferred to the Authority for the fulfillment of its object.

5. **New Section 89:** *Levy of tax on use of land for other than agricultural and residential purposes:-*

(1) The Authority shall subject to the provisions of this Act and Rules framed thereunder levy tax, by notification published in the Official Gazette on land being used by any person, group of persons, company, the Central Government of the State Government local or Corporate Body for mining, Commercial or Industrial purposes with the prior approval of the State Government.

Provided that the tax so levied shall not exceed Rupees 1.50 per square meter annually for any such land but such tax shall not be levied on land which is subject to Holding Tax.

(2) The State Government shall out of the tax so levied and collected, determine the amount to be deposited into the consolidated Fund of the State Government from time to time.

6. Notification dated 11.02.1993 was issued under Section 89 of the Act **[Pg 101 Vol IV A]** laying down the rates of the tax. The rates were as follows :

(i) Industrial purpose @ Re1per sq mtr per annum

(ii) Commercial purpose Rs.1.25 per sq mtr per annum

(iii) All other non-agricultural and non-residential purpose other than and 2 @ Rs.1.50 per sq mtr per annum

Questions raised before the High Court : -

7.(a). Whether State has competence to enact The Bihar Coal Mining Area Development Authority(Amendment) Act, 1986 as it covers a field occupied by the MMRD Act, 1957 ?

(b). Whether levy is not on land but on use of land and therefore a use tax which State has no competence to impose ?

Findings of High Court.

Point 1 :

8.(i). The Act is concerned with the development of coal mining area, and Section 89 is part of the overall scheme of the Act. Section 96 deals with the use of its own fund by the Authority (Pr. 9).

(ii). MMRD Act deals with and provides for both mineral development and mineral area development. It also provides for taxation on minerals and mineral rights (Pr.11) Reliance was placed on :

1991 Supp(1) SCC 430 M/s Orissa Cement Ltd. Vs State of Orissa

(Pg. 1329-1402 Vol V)

1995 Supp(2) SCC-686, State of Orissa Vs. Coalfields Ltd.

(Pg. 1546-1566 Vol V)

(iii). It is settled that State Legislature can neither make law regulating and/or providing for development of Coal Mining Area, nor can it enact a provision subjecting coal mining area to tax, royalty, etc. (Pr. 12).

(iv). The Act covers and deals with the same matter which is covered and dealt with by the MMRD Act.

(v). State legislature cannot tax coal mining land. (Pr. 13 & 21).

(vi). Caption of Section 89 states tax is on the use of land. Sub-Section (1) shows that tax is dependent on use of land. If there is no use of land there is no tax. Hence tax is not on the land as a unit. (Pr.16). Hence Entry 49 List II is not available.

Relied on : **(1997) 8 SCC 360, State of Bihar Vs. Indian Aluminium Co. (Pg. 1644-1656 Vol V)**

1990(1) SCC 12 India Cement Ltd. Vs. State of T.N. (Pg. 1151-1174 Vol V)

(vii). Rule 2(h) of the MADA Rules 1994 defines "Assessee" to mean a person who uses land for other than agricultural and residential purposes. The assessee therefore may or may not be the owner of the land. When tax is not on the owner but on the user of land it cannot be said that tax is on land. (Pr. 18/Pg.30).

Relied on : **(1997) 8 SCC-360, State of Bihar Vs. Indian Aluminium (Pg. 1644-1656 Vol V)**

(viii). The taxing event is the use of land. The measure of tax at flat rate and exclusion of land paying holding tax by the proviso to Section 89 would not change the nature of tax which is clear from the caption and sub-section (1). Caption is consistent with the section. (Pr. 20).

(ix). **Goodricke-1995 Supp (1) SCC-707, (Pg. 1512-1545 Vol V)** and **Ajoy Kumar Mukherjee AIR 1965 SC 1561 (Pg. 296-301 Vol V)** have been explained and distinguished in State of Orissa Vs. Mahanadi Coalfields (Pr.22)

QUESTIONS REFERRED TO NINE JUDGE BENCH

9. When the present batch of civil appeals pertaining validity of Section 89 of the Act were being heard, the assesses had relied upon the judgment of this Hon'ble Court in **India Cement Vs State of Tamil Nadu (1990) 1 SCC 12 [Pg. 1151-1174 Vol V]** which

has been explained in **West Bengal Vs Kesoram (2004) 10 SCC 201 [Pg. 2020- 2255 Vol V]**

10. Before referring to the questions framed , it is vital to state here that the tax imposed by the Authority in the present case is not based on royalty at all. As seen above, it levies a flat rate per square meter and royalty does not at all go into the computation of the tax. However, the questions referred by are being dealt with below:

11. A three Judge bench in **M.A.D.A Vs Steel Authority (2011) 4 SCC 450 [Pg 7-10 Vol V**] has referred the following questions :

1. Whether "royalty" determined under Sections 9/15(3) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957, as amended) is in the nature of tax?

2. Can the State Legislature while levying a tax on land under List II Entry 49 of the Seventh Schedule of the Constitution adopt a measure of tax based on the value of the produce of land? If yes, then would the constitutional position be any different insofar as the tax on land is imposed on mining land on account of List II Entry 50 and its interrelation with List I Entry 54?

3. What is the meaning of the expression "Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development" within the meaning of Schedule VII List II Entry 50 of the Constitution of India? Does the Mines and Minerals (Development and Regulation) Act, 1957 contain any provision which operates as a limitation on the field of legislation prescribed in List II Entry 50 of the Seventh Schedule of the Constitution of India? In particular, whether Section 9 of the aforementioned Act denudes or limits the scope of List II Entry 50?

4. What is the true nature of royalty/dead rent payable on minerals produced/mined/extracted from mines?

5. Whether the majority decision in State of W.B. v. Kesoram Industries Ltd.[1] could be read as departing from the law laid down in the seven-Judge Bench decision in India Cement Ltd. v. State of T.N.[2]?

6. Whether "taxes on lands and buildings" in List II Entry 49 of the Seventh Schedule to the Constitution contemplate a tax levied directly on the land as a unit having definite relationship with the land?

7. What is the scope of the expression "taxes on mineral rights" in List II Entry 50 of the Seventh Schedule to the Constitution?

8. Whether the expression "subject to any limitations imposed by Parliament by law relating to mineral development" in List II Entry 50 refers to the subject-matter in List I Entry 54 of the Seventh Schedule to the Constitution?

9. Whether List II Entry 50 read with List I Entry 54 of the Seventh Schedule to the Constitution constitute an exception to the general scheme of entries relating to taxation being distinct from other entries in all the three Lists of the Seventh Schedule to the Constitution as enunciated in M.P.V. Sundararamier & Co. v. State of A.P.[3] [AIR p. 494 : SCR at p. 1481 (bottom)]?

10. Whether in view of the declaration under Section 2 of the Mines and Minerals (Development and Regulation) Act, 1957 made in terms of List I Entry 54 of the Seventh Schedule to the Constitution and the provisions of the said Act, the State Legislature is denuded of its power under List II Entry 23 and/or List II Entry 50?

11. What is the effect of the expression "... subject to any limitations imposed by Parliament by law relating to mineral development" on the taxing power of the

State Legislature in List II Entry 50, particularly in view of its uniqueness in the sense that it is the only entry in all the entries in the three Lists (Lists I, II and III) where the taxing power of the State Legislature has been subjected to "any limitations imposed by Parliament by law relating to mineral development"?.

ISSUES NO. I & 4 : WHETHER ROYALTY DETERMINED UNDER SECTION 9 AND 15(3) OF MMRD ACT, 1957 IS TAX ? WHAT IS THE NATURE OF ROYALTY/ DEAD RENT

12. "Royalty" in its normal or ordinary connotation means consideration price for parting with right to work the mine which is owned by government or private person. Royalty in essence is owner's share in mineral value which is legally due on account of ownership parted under the lease.

13. **Section 9 of MMDR Act, 1957** is reproduced below :

'*Royalties in respect of mining leases.*

9. (1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2A) The holder of a mining lease, whether granted before or after the commencement of Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.

(3) The Central Government may, by notification in the Official Gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years.'

In this context following Rules may also be seen :

(i) Rule 64-B, 64-D of the Mineral Concession Rules, 1960 providing for manner of payment of royalty

(ii) Rule 39 of Minerals (Other than Atomic and Hydrocarbons Energy minerals) Concession Rules, 2016

(iii) Rule 23 of Atomic Minerals Concession Rules, 2016

(iv) Section 18-A of Coal Bearing Areas (Acquisition and Development) Act, 1957.

14. A significant feature of legal provisions requiring payment of royalty is that the obligation to pay is said to be ' in respect of any mineral removed or consumed' by him or his agents , manager, employee, contract or sub-lessee from the leased area. The expression 'in respect of' is also used by the provision prescribing the rate. From a bare reading of Section 9, it is evident that the royalty is charged ' **in respect of any mineral removed or consumed by him… from the leased area..**'. This also shows that Section 9

of the Mines and Mineral (Development and Regulation) Act, 1957 uses royalty in its ordinary sense and it cannot be understood as a tax of any kind.

15. The used of expression 'in respect of' is different from the phraseology deployed by taxing statutes and the taxing entries. Looking at the taxing entries the expression ' in respect of ' is used only with regard to fees , Entry 96 List I, Entry 67 List II and Entry 47 List III. A slightly different expression would be found in Articles 246-248, namely with respect to. This also indicates that royalty is not a tax on mineral or mineral rights, it is merely the owner's share of the mineral value which is extracted and removed from the lease area and is a condition for parting with the ownership right over the mineral.

Meaning of 'royalty' has been explained in the following cases :

(i) **HRS Murthy Vs. Collector of Chitoor (1964) 6 SCR 666 : AIR 1965 SC 177 (Pr 7) (Pg. 302-310 Vol V)**

(Overruled in India Cement on the question of competence of State)

(ii) **D.K. Trivedi & Sons Vs State of Gujarat 1986 Suppl SCC 20 (Pr 38 & 39) (Pg. 995-1053 Vol V)**

(iii) **State of Orissa Vs Titagarh Paper Mills Co Ltd 1985 Suppl SCC 280 (Pr 102 & 103) (Pg. 864-963 Vol V)**

(iv) **Inderjeet Singh Sial Vs Karam Chand Thapar (1995) 6 SCC 166(Pr 2) (Pg. 1503-1511 Vol V)**

(v) **State of H.P. Vs Mahendra Pal (1999) 4 SCC 43 (Pr 12-14) (Common Compilation of Judgments-V Pg. 1876-1894)**

(vi) **State of W.B. Vs. Kesoram Industries Ltd. 2004(10) SCC 201 (Pr 58-71) (Common Compilation of Judgments-V Pg. 2020-2255)**

(vii) **State of H.P. Vs. Gujarat Ambuja Cement (2005) 6 SCC 499 Pr 44-46 (Pg. 290-327 Vol VC)**

(viii) **Indsil Hydro Power & Management Vs. State of Kerala (2021) 10 SCC 165 Pr 50-56 (Pg. 381-425 Vol V C)**

Dictionary meanings of royalty may also be seen

- Law Lexicon Justice C.K. Thakker
- Oxford English Dictionary
- P Ramanatha Aiyar Advanced Law Lexicon
- Stroud's Judicial Dictionary
- Black Law Dictionary
- Words and Phrases

[Pg 4075-4103 Vol IV]

16. In order to examine whether royalty is a tax, meaning of both expressions 'tax' and 'royalty' is to be seen. ' Tax' is a compulsory exaction of money for general public good. Taxes are public burdens imposed by the legislative power upon persons or properties to raise money for public purposes. There is no element of quid pro quo

Jindal Stainless Vs State of Haryana (2017) 12 SCC 1 (Pr 67) (Pg. 2937-3557 Vol V)

Per Banumathi J

Paras 310, 313, 315, 334

Per DY Chandrachud J

Pr 622-623

Comr, Hindu Establishment Vs Shirur Mutt AIR 1954 SC 282 Pr 45 (Pg 32-61 Vol V)

17. The 60 year old concept of ‘compensatory tax’ was done away with by 9 Judge bench of this Hon’ble Cout in Jindal Stainless since it introduced the concept of rendering of service in lieu of tax.

18. On the other hand, royalty is considered to be price or consideration for parting with the right and privilege of the owner, namely, the State Government who owns the minerals. The licensee fees under Excise Act is a similar payment. Even in that case, the State Government parts with privilege and is paid consideration in the form of license fees

19. ‘Tax’ and ‘Royalty’ are used distinctly both in the Constitution and MMDR Act, 1957.

20. The expressions ‘ tax’ and ‘royalty’ are used in Schedule VI of the Constitution referable to Articles 244(2) and 275(1) which deal with provisions as to the administration of tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram. Para 8(2) confers power on Regional Council and District Council to levy and collect taxes on lands and buildings, and tolls on persons within such areas. Para 8(3) provides for power of taxation on five other heads. Para 9 provides for making over of such share of the **royalties** accruing each year from licenses or leases for the purpose of prospecting for, or the extraction of, minerals granted by the Government of the State in respect of any area within autonomous district as may be agreed between the State Government and the District Council.

21. Due to inherent distinction in the nature of tax and royalty, the legislative practice is to not use them interchangeably. Similar is the position in MMRD Act, 1957. Section 9 deals with royalty, Section 13(i) which is the rule making power refers to fixing and collection of fees for reconnaissance permits, prospecting license or mining lease surface rent, security deposit, fines, other fees or charges and the time within which and the

manner in which the dead rent or royalty shall be payable. Similar is the position in Section 15(g). Section 25 which provides for recovery as arrears of land revenue, uses tax and royalty distinctly. Similar is the position in Section 21(5). These aspects were missed by the 7 Judge Bench in India Cement.

22. Section 17 (3) provides that where the Central Government undertakes reconnaissance, prospecting or mining operation in any area, the Central Government shall be liable to pay reconnaissance permit fee or prospecting fees, royalty, surface rent or dead rent , as the case may be at the same rate. Under Section 18 (3) where the Central Government and State Government undertake mining activities in any area in which the minerals vest in a private person, it shall be liable to pay prospecting fee, royalty, surface rent or dead rent.

23. It is clear from the said provisions that royalty is paid in consideration for parting with rights and privilege of mining rights and does not bear any characteristics of tax.

24. In fact, GST is being levied on royalty and the challenge to the same is pending before this Hon'ble Court. A Division Bench of Rajasthan High Court dated 24.10.2017 in **Udaipur Chambers Vs UOI** has held that royalty is consideration to have mining operations in the leased area **[Pg 419-433 Vol VB].** Special Leave Petition against the said judgment is pending **[Pg 434-435 Vol VB].**

25. It needs also to be considered whether the definition of 'taxation' in Article 366(28) of the Constitution can at all be relied upon for holding that royalty provided for in Section 9 of MMDR Act, 1957 is a tax. The definition appears to be expansive and includes ' any tax or impost'. It also says that 'tax' shall be construed accordingly. The High Court judgment **Laxminarayan Mining Co. Vs Taluk Development Board AIR 1972 Mys 299 (Pg 538-549 Vol V)** referred to in India Cement adopts this route.

However, four other High Courts had differed though these judgments were noted in India Cement, there is no discussion with respect to them.

26. The word 'impost' occurs along side the word 'tax', and therefore it can only mean such imposts as are in the nature of tax, like custom duty, excise duty or cess which are in the nature of tax. The word ' impost' needs to be construed contextually, and the context would require the application of doctrine of noscitur a socis. This doctrine has been used by a Constitution Bench in **Godfrey Phillips India Vs State of U.P. (2005) 2 SCC 515 Pr 75-81, (Pg. 2267-2306 Vol V)** the context of interpreting Entry 62 of List II of VIIth Schedule.

27. Even otherwise, Article 366 prescribes definition which are subject to the context as is made clear by the initial expression ' unless the context otherwise requires". Moreover, the definitions are meant to construe expressions used in the Constitution.

28. Article 366(28) would cover only such imposts which are in the nature of compulsory exaction made as incidents of sovereignty and for general public good. It will not include determination of price by legislation which has to be compulsorily paid in return for some grant for ex spectrum, or royalty is to be paid in lieu of grant of rights under lease to excavate, win and carry away minerals.

29. To say that royalty is an impost and therefore tax by virtue of Article 366(28) would mean that Section 9 of MMDR Act, 1957 is a taxing provision. Since royalty is a consideration in lieu of grant of mineral rights the tax would be of the nature contemplated in Entry 50 List II. This taxing power is exclusively within the domain of State Legislature. Such a tax cannot be imposed by Parliament by law. Entry 54 List I being a non-taxing entry, does not include any power to impose any tax. It has been held in a number of judgments beginning with ***MPV Sundrarameir & Co. Vs State of A.P.***

AIR 1958 SC 468 (Pg 93-141 Vol V) that general entries do not give power to tax. This proposition has been reiterated in **Jindal Stainless Vs State of Haryana (2017) 12 SCC 1 (Pg 2937-3557 Vol V)** and a recent judgment in **State of Karnataka Vs State of Meghalaya (2023) 4 SCC 416** ***(Pg 3767-3848 Vol V)*** **.** Therefore, Entry 54 List I does not empower Parliament to impose tax. It is a regulatory entry.

30. The emphasis on the word ' limitation' cannot be stretched to create a competence of taxing power or a shift of taxing power under Entry 50 List II into the domain of Entry 54 List I. It would only mean prescription of provisions which limit the State's taxing power under Entry 50 List II. In short, Parliament by exercising power under Entry 54 List I can impose limitations on State's power to tax mineral rights , but it cannot usurp or arrogate the said taxing power to itself and denude the State of its taxing power.

31. During Constituent Assembly debates, an amendment was moved to shift Entry 50 List II to List I, but this amendment was negatived **[Pg 16 CC Vol IV A].**

32. It may be noted that liability to pay royalty arises only upon a grant of mining lease which transfers the right to carry on mining activities in the leased area to the lessee. Section 4 expressly bars mining except under a lease granted under the Act. The lease is in the nature of contract having statutory force. Such a liability cannot be understood as a 'tax within the meaning of Article 366(28).

CIT Vs McDowell (2009) 10 SCC 755 (Pr 21-22) [Pg 155-289 Vol VC].

33. A somewhat similar view has been taken in the context of grant of exclusive privilege with respect to liquor. A 5JJ of this court has held that a levy charged for parting with privilege is neither a tax or a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with privilege.

State of Punjab Vs Devans Modern Breweries (2004) 11 SCC 26 (Pr 113)

[Pg 419-433 Vol VC].

INDIA CEMENT AND THE OBVIOUS ERROR WITH REGARD TO ROYALTY

34. Observations in **India Cement Ltd. Vs. State of T.N. 1990(1) SCC 12 (Pg 1151-1174 Vol V)** , saying that "Royalty is tax" involved a self-contradiction and has been rightly explained and clarified by Constitution Bench in **State of West Bengal Vs Kesoram Industries Ltd. (2004) 10 SCC 201 12 (Pg 2020-2255 Vol V)**. In fact no such argument was made. In para 21, the argument was that royalty is return received from produce of land @ Pg 1163 CC Vol V.

35. In this case, the company had been granted mining lease for limestone and kankar and it was paying royalty, dead rent and surface rent to the State of Tamil Nadu as per the rate determined. By Section 115 & 116 of Madras Panchayat Act , local cess @ Rs 45 paise on every rupee of land revenue payable to the government was imposed. By an Amendment Act, land revenue was defined to mean public revenue due on land including water cess, royalty, lease amount and other sum payable to the government but not including any other cess or surcharge payable under Section 116. Section 116 also provided that rate of local surcharge shall not exceed Rs 2.50 on every rupee of land revenue. The Single Judge and DB followed the judgment of this Court in **HRS Murthy Vs. Collector of Chittor AIR 1965 SC 177 = (1964) 6 SCR 666 [Pg 302-310 Vol V]** and upheld that validity Section 115 as imposing a tax on land. In para 11 , this court posed the question ' is cess on royalty a demand of land revenue or additional royalty ?'. In para 19 the court stated ' we are concerned with cess on royalty'. In para 20, the court observed that cess was not on land but on royalty which is included in the definition of land revenue, and there was no entry in List II which authorized State to impose tax on royalty.

It also held in para 21 that land revenue connotes ‘ share in the produce of land to which the King or the Government is entitled to receive’ and royalty being the return received from the produce of the land, the cess would be a tax on income arising from land and not a tax directly on land (Pr 21-23). The court noted that the impugned Act does not use dead rent as a basis on which the land is to be valued, and therefore in pith and substance, the cess was a tax on royalty.

36. What the Court did not focus upon in India Cement is that the tax was on land revenue and the said expression merely included royalty as one element of land revenue. The local cess was in the nature of additional charge on land revenue. The contention of the Petitioner in India Cement was founded on extracting that single element of ‘royalty’ and questioning the imposition of cess as being a tax on royalty. Further, like land revenue , even royalty is the State’s share as owner of minerals and in the mineral value extracted and removed from the leased area by the lessee. It would clearly attract entry 45 List II along with Entry 49 List II.

37. India Cement also fell into error in treating Entry 23 List II as specific and Entry 50 List II as general and applying the principle ‘ specific excludes general’. Both entries operate in different fields, one is general entry and Entry 50 List II is a taxing entry whose subject matter cannot be located in Entry 23 List II and Entry 54 List I. (Pr 24 & 33)

38. India Cement also erred in holding that the law made by the Union under Entry 54 List I would pro tanto denude the power of the State Legislature under Entry 50 of List II. It is submitted that the taxing power under Entry 50 List II can only be limited and not denuded. Moreover, the Parliament should expressly provide for the limitation with respect to Entry 50 List II. In the garb of providing limitation, the taxing power cannot be usurped by a law made under Entry 54 List I. This Court erroneously relied upon in

judgment in **Laxminarayan Mining Co. Vs Taluq Board AIR 1992 Mys 299 (Pg 538-549 Vol V)** rendered by the Mysore High Court. This Court was also not right in referring to Section 9 of MMDR Act, 1957 as imposing a clear bar on the power of State Legislature to impose tax on royalty ' so as to in effect amend Second Schedule of the Central Act'.

39. The court contradicts itself in para 30 and 33 of the judgment. In para 30 it says that tax on royalty would not be a tax on mineral rights but in para 33 it states that royalty being relatable to minerals extracted would be relatable to Entry 50 List II. Though having so observed, the court negates the power of State to impose tax on royalty because of Section 9 of MMDR Act, 1957

40. Deviating from the earlier observations that royalty was a return received from the produce of land, the court , by oversight appears to state in the first sentence of para 34 that royalty is a tax. There is no discussion about this view point and the judgments of the 4 High Courts are merely referred and not discussed nor disapproved nor overruled. In fact in the last sentence of the same paragraph , the court observes that royalty on the mineral rights is ' a payment for the user of land'.

41. A reference to the concurring judgment by Justice Oza in India Cement shows that the Ld Judge went by the theory of denudation of Entry 50 List II by MMDR Act, 1957 and it was not material whether royalty was a tax or not. He observes that if royalty is imposed by Parliament, it would be tax not only on land but on land plus labour plus capital. These observations are assumptive. The Ld Judge further observed that land revenue would be within the scope of Entry 49 but royalty was not a tax on land alone and could not be upheld under Entry 49 List II. Significantly , he held that if the word '

royalty' was not there in Section 115/116, then the cess being on surface rent or dead rent would be an imposition on tax on land only and would be covered by Entry 49 List II.

42. In essence there would be little difference between surface rent, dead rent or royalty. In fact, under MMDR Act, dead rent is not payable when royalty is higher than quantum of dead rent is payable in respect of dead rent in respect of the leased area. The dead rent and royalty are paid in the alternate due to the expression which ever is greater (See Section 9A(i) proviso). The rents and royalties are paid by the lessee in lieu of parting with the privilege of the right to excavate land, win and carry away the mineral to the State as owner. It is owner's share in the mineral value and constitute a liability with respect to the mineral rights belonging to the State. The lease involves a transfer of mineral rights from State to the lessee.

43. In the case of Laxminarayan, the High Court of Mysore clearly erred in holding that the power of State Legislature under Entry 50 List II would not be exercisable by the State Legislature, once the Parliament makes a law under Entry 54 List I (Pr6). In this case, what had been imposed by the State Government was a license fee. The position with regard to levy of fee is different from tax as fee would relate to Entry 66 List II and depends upon the availability of the legislative field under Entry 23 List II. However, the Taluq board had contended that the license fee was in truth and substance a tax. The High Court referred to the judgment in **Hingir Rampur,** but in the said case, no tax was involved. It pertained to levy of fee. The Supreme Court in fact did not decide whether levy could be justified under Entry 5o List II. Similar was the position in case of **MA Tulloch**. The High Court expressly referred to Entry 50 List II and to the concept of 'royalty' and held that 'royalty' in Section 9 connotes the levy of a tax. It relied upon AIR 1965 Pat 491. Based on this, it concluded that the State Legislature lost its power

under Entry 50 List II. The Court set aside the notification to the extent it levued tax on mining on manganese or iron ore.

44. India Cement if understood otherwise would mean that the Judges ruled royalty to be tax even though MMDR Act,1957 does not say so and that too without discussing the concept of royalty as understood by courts in, and without considering the structural interrelation of entries and scheme of distribution of powers as explained by Constitution Benches. It also cannot be overlooked that Section 17A(3) of MMRD Act envisages payment of royalty by State to private person where latter's land is reserved by State for itself or its corporation, and such payment cannot be of a tax.

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4th Edn. (Silver Jubilee), Vol 3, Pg. 2467-69,2471,2577-79. **[Pg 34-46 Vol IVC].**

45. In **Orissa Cement Ltd. Vs State of Orissa (1991) Suppl 1 SCC 430 [Pg 1329-1402 Vol V].** , enactment of some States imposing a cess on royalty based on annual value of land defined to include royalty was under challenge. A 3 judge bench noted the dissent of Justice Wanchoo in the case of **Hingir Rampur AIR 1961 SC 459 [Pg 142-174 Vol V].** that ' tax on mineral rights would be confined, for example, to taxes on leases of mineral rights and on premium or royalty for that. Taxes on such premium and royalty would be taxes on mineral rights while taxes on the minerals actually extracted would be duties of excise.' But Orissa Cement did not go into the scope of Entry 50 List II. It held that ' however, the conclusion of India Cement is clear that a tax on royalties cannot be a tax on minerals and we are bound thereby'.

46. Orissa Cement also did not examine the question raised as to whether the observation in Para 34 of India Cement that royalty was tax was self-contradictory and made without discussion and also militated with para 35-40 of D.K. Trivedi Vs State of

Punjab (1986) Suppl SCC 20. It proceeded on the assumption that tax on royalty would be tax on mineral rights under Entry 50 List II and Section 9 of MMRD Act, 1957 would operate as a limitation on State's taxing power. It said India Cement has held that State cannot tax royalty so as, in effect to amend the Second Schedule to the Central Act and if cess is understood as tax falling under Entry 50, it would be ultra vires the provisions of the Central Act (Pr 36-39, 50,53).

Similar view was taken in State **of M.P. VS Mahalakshmi Fabric Mills 1995 (Suppl) 1 SCC 642 Pr 10-12, 14 (Pg 1512-1545 Vol V)**

47. In **Federation of Mining Association Vs State of Raj 1992 (Suppl) 2 SCC 239 [Pg 1403-1410 Vol V]**, tax had been imposed by the State on 'annual value of mineral bearing land based on dead rent or royalty whichever is higher'. This Court followed the judgment in ***Orissa Cement*** and struck down the levy. It emphasized that tax was based on royalty derived from land.

48. In **State of Orissa Vs Mahanadi Coalfields 1995 (Suppl) 2 SCC 686 [Pg 1546-1566 Vol V]** , a 3 Judge bench of this Court dealt with the Orissa Rural employment, education and production Act, 1992 which purported to impose a cess in the nature of tax on mineral bearing land and coal bearing land alone. The rate prescribed was a certain percentage of the annual value. For coal bearing land the rate was fixed by schedule. This Court followed the judgment in India Cement and struck down the levy. It was held that the Act does not cover ' all types of land' and therefore tax was really on mineral bearing land. This Court also held that Entry 49 List II was a general entry and Entry 50 List II was a specie taken out of the said general entry and was subject to limitation imposed by Parliament by law. In it view the Act actually fell under Entry 50 List II and by virtue Section 9 and 9-A, the State would be denuded of its power to levy the impugned tax. It is

submitted that this judgment is patently erroneous as entry 49 List II and entry 50 List II are completely different in nature. Entry 50 List II is not a tax on land in which mining is carried on. It is a tax on mineral rights.

ISSUES NO. 2 & 6 : SCOPE OF ENTRY 49 LIST II AND ; WHETHER STATE WHILE LEVYING A TAX UNDER ENTRY 49 LIST II CAN ADOPT A MEASURE BASED ON PRODUCE , IF YES THEN WHETHER TAX CAN BE IMPOSED ON MINING LAND ON ACCOUNT OF ENTRY 50 LIST II AND ITS INTERELATIONSHIP WITH ENTRY 54 LIST I

49. Entry 49 List II read with Article 245/246 confers power on the State to impose 'taxes on land and buildings. The corresponding entry in Government of India Act, 1935 i.e. Entry 42 was as below :

> **'42. Taxes on lands and buildings, hearths and window'.**
>
> 'Hearths and window' came to be omitted in the draft by the Drafting Committee (draft entry 53 List II)

50. There are certain propositions which have been settled qua Entry 49 List II. They are as below :

(i) The expression 'land' in Entry 49 has to widely construed. It will include all kinds of lands irrespective of the use it is put to

(ii) Land includes not only surface but everything under and over it.

(iii) The use to which land is put does not affect the competence of the State to tax it

(iv) Measure of the tax can be based on the income / produce / annual value and that will not alter the nature and character of the tax.

51. In **Byramjee Jeejeebhoy Vs. Province of Bombay AIR 1940 Bom 65(FB) [Pg 9-30 Vol VA]**, Section 22 of the Bombay Finance Act which imposed tax on urban immovable property based on the annual letting value was challenged on the ground that the tax was on income and not on land and buildings and the Province of Bombay lacked legislative competence. This argument was negatived and the Act was upheld and it was held that merely because the basis of the levy was the same as income tax would not alter the nature of the tax. Kania J in his concurring judgment held that measure of tax and nature of tax are distinct.

52. In **Ralla Ram Vs Province of Punjab 1949 FCR 207 [Pg 11-31 Vol V]** a similar challenge was raised to provisions of Punjab Urban Immovable Property Act, 1940. The court rejected the contention that since the measure of tax was on the annual value it was tax on income. It held that merely because the basis of the tax was annual value it will not be tax on income (Pg 221-223). The court held that ' if a tax is to be levied on property, it will not be irrational to co-relate it to the value of the property and to make some kind of annual value the basis of the tax without intending to tax income.' (@ Pg 224-225). Judgment of the Full Bench of the Bombay High Court in **Byramjee** was relied upon.

53. In **Raja Jaganath Baksh Singh Vs State of U.P AIR 1962 SC 1563 = (1963) 1 SCR 220 [Pg 195-208 Vol V],** a 5 JJ bench of this Hon'ble Court was dealing with the validity of U.P. Large Land Holding Tax Act, 1957. Section 3 imposed a tax based on annual value on the land. An argument was made that the State lacked legislative competence to impose tax on agricultural land since 'lands' in entry 49 List II does not include agricultural land. This argument was rejected in para 10-12. It was held that entries have to be read liberally and the word 'lands' is wide enough to include all lands, whether agricultural or not, and it would be plainly unreasonable to assume that it would

include non-agricultural land but does not include non-agricultural land. The court held that the tax in substance is tax on land holding though measure of tax is annual value (Pr 12).

54. In **HRS Murthy Vs Collector Chittoor AIR 1965 SC 177 [Pg 302-310 Vol V],** a 5 JJ of this Hon'ble Court was dealing with a challenge to levy of land cess under Madras District Boards Act, 1920. The land cess levied under Section 78 (Pr 3) was based on annual rent value which was computed under Section 79 and royalty was a component u/S Section 79(1). The Court dealt with the meaning of royalty under Section 79(1) in para 7. After having discussed the judgments in **Hingir Rampur** and **M.A. Tulloch** it held that , there was no similarity between the Orissa Acts and the enactment in question. The Act in questions had nothing to do with regulation and development of mines and minerals (Pr 9). Thought it did not elaborate much on Entry 50 List II but in this context it held that the Parliament had no power to tax mineral rights and the power was with the State and the sole limitation is that it does not interfere with the law of the Parliament as regards mineral development and no such law had been adverted to. The court held that the land cess was a tax on land under Entry 49 List II (Pr 10 & 11).

This judgment was however overruled in India Cement and the subsequent judgments have simply followed the judgment in India Cement.

55. In **Ajoy Kumar Banerjee Vs Local Board of Barpeta AIR 1965 SC 1561 = (1965) 3 SCR 47 [Pg 296-301 Vol V],** a 5JJ was dealing with a challenge to Section 62 of Assam Local Self Government Act, 1953 levied by local boards for use of any land for the purpose of holding markets on the ground that the tax was actually imposed on markets and therefore State lacks legislative competence. Article 14 was also invoked.

The Court held as below (Pr 4 & 6) :

(i) that entry 49 List II has be liberally construed

(ii) Tax can be based on annual value

(iii) Use to which the land is put can be taken into account in imposing tax.

56. In **SC Nawn Vs Wealth Tax Officer AIR 1969 SC 59 [Pg 384-389 Vol V],** a 5JJ of this Court, Wealth Tax Act, 1957 was challenged on the ground that the Parliament lacked competence since expression ' net wealth' includes non-agricultural lands and buildings of an asseesee and power to tax lands and buildings is reserved to the State under Entry 49 List II. The Court rejected the submission and drew out the distinction between taxes under Entry 86 List I and Entry 49 List II (Pr 3 & 5) . It held that the tax which is imposed under Entry 86 is not directly on lands and buildings and is imposed on the capital value of the assets. The tax is not imposed on the components of the assets. While Entry 49 List II contemplates tax on lands and buildings or both as units. It is normally not concerned with division of interest or ownership. Adoption of annual value of the lands as a measure will not make the entries overlap.

57. In **Assistant Commissioner of Urban Land Tax Vs Buckingham Carnatic (1969) 2 SCC 55 [Pg 390-405 Vol V],** , a 5 JJ of this Hon'ble Court was dealing with the validity of Madras Urban Land Tax Act, 1966. The Act was challenged on the ground that the Act was relatable to Entry 86 List I i.e. taxes on capital value of the assets. The Court held that entries in VIIth Schedule have to be read liberally and there is no conflict between Entry 86/87 List I and Entry 49 List II. Entry 49 List II contemplates a levy of tax on lands and buildings both as unit. It is not concerned with the division of interest ownership in the unit of land and building. Tax on lands and buildings is directly imposed on lands and buildings and bears a definite relation to it. Tax on capital value of assets bears no definable relation to lands and buildings which may form a component of the

total assets. It held that the tax under Entry 49 List II may be based on annual value or capital value of land and buildings but that will not make the distinct fields overlap (Pr 4/5). The Court relying on Jagannath Baksh and SC Nawn held that the entry cannot be given a restricted meaning(Pr 7).

58. In **Prithvi Cotton Mills Vs Broach (1969) 2 SCC 283 [Pg 406-411 Vol V],** also tax on land based on capital value was upheld (Pr 5)

59. The law with respect to Entry 49 List II was reiterated in **Second Gift Tax Officer Vs. Mangalore DH Nazreth (1970) 1 SCC 749 5JJ Pr 10 [Pg 446-450 Vol V],**

(involved a challenge to Gift Tax under Entry 97 List I)

60. In **Union of India Vs H.S. Dhillon (1971) 2 SCC 779 [Pg 457-537 Vol V],** a 7JJ reiterated the principle laid down in the earlier judgments (para 74,75 & 78)

Mitter J : Paras 179,188,189,192 & 210.

61. In **Anant Mills Co. Ltd Vs. State of Gujarat (1975) 4 SCC 175 4JJ [Pg 568-600 Vol V],** , the court was dealing with the constitutional validity of Bombay Provincial Municipal Corporation Act, 1949 as amended by Gujarat Act No. 8 of 1968. An argument was made that under Entry 49 List II cannot tax an area occupied by the underground supply lines. The Court held that the word " land" includes not only the face of the earth, but everything under or over it'. (Pr 44-47).

62 In **Govt of A.P. Vs. HMT Ltd. (1975) 2 SCC 274 9 (3JJ) [Pg 601-610 Vol V],** , an argument was made that the State lacked competence to levy tax on land occupied by factories since Entry 36 List III deals with factories. The court rejected the submission and held that the State has power to tax irrespective of the use to which the land is put. (Pr 15-17)

63. **D.G. Ghose Vs State of Kerala (1980) 2 SCC 10 , 5JJ [Pg 68-94 Vol VA],** constitutional validity of Kerala Building Tax Act was challenged. It was argued that the tax in question was a tax on capital goods referable to Entry 86 List I and not under Entry 49 List II. The Court upheld the law under Entry 49 List II. It also held that it was open to State to decide how best to levy it. If the tax was to be annual , it can take annual value as basis (Pr 8-12, 28-31, 35)

64. In **Western Coalfields Vs SADA Korba (1982) 1 SCC 125 [Pg 772-789 Vol V],** a 2 JJ bench of this Hon'ble Court was dealing with a challenge to levy of property tax by Special Area Development Authority. The argument was that the lands and buildings on which the property tax was imposed is covered by coal mines and the field was occupied by MMRD Act, 1957, Coal Mines (Nationalisation) Act, 1973 and the impugned levy is manifestly an impediment in the power and function of the Union to regulate and develop the mines (Pr 25). The Court repelled the challenge and held that the levy was referable to Entry 49 List II and the Act related to Entry 5 List II. The Court also held that the declaration in Section 2 of MMRD Act, 1957 does not result in invalidation of every State Legislation relating to mines and minerals. (Pr 26-29,31)

65. In **Goodricke Group Vs State of W.B, 1995 Suppl 1 SCC 707 3JJ [Pg 1512-1545 Vol V],** , education cess and rural employment cess based on yield/ produce was upheld as tax on land and buildings. This judgment was approved in Kesoram

See also Lt Col Sawai Singh Vs State of Rajasthan 3 JJ [Pg 1601-1610 Compilation V], Pr 7

66. In **Ahmedabad Municipal Corpn Vs. GTIL (2017) 3 SCC 545 [Pg 2916-2936 Vol V]** , tax on mobile towers has been upheld under Entry 49 List II.

67. In **Municipal Corpn Vs Property Owners Association (2023) 3 SCC 258 [Pg 3710-3766 Vol V]**tax under Enry 49 List II which was based on annual value has been upheld.

68. Entry 49 List II prescribes the field of "tax on land and buildings". It contains no limitations and clashes with no taxing entry in List I. Therefore it has to be construed widely.

1990(1) SCC 109,(7 JJ), Synthetics & Chemicals Ltd. Vs. State of U.P.(Pr. 57) (Pg. 1175-1232 Vol V)

69. Entry 49 List II is not "subject to" any Entry in List I or III. Wherever framers wanted to limit they have used such expressions. See entries 1,2,3,12, 13, 17, 22, 23, 24, 26, 27, 33 of List II (general entries) and entries 50,51,54,57 and 63 of List II (taxing entries) . Hence also Entry 49 List II should not be made subject to Entry 54 List 1 or MMDR Act 1957.

70. Only Entry 23 List II, and in a different way Entry 50 List II, are limited by Entry 54 List I. Therefore, Entry 49 List II cannot be subjected to Entry 54 List I. The principles of Calcutta Gas Co. case are also attracted.

1962 Supp (3) SCR-1 Calcutta Gas Co. Vs. State of W.B. (Pg. 209-221 Vol V)

71. The judgments referred above in context of Entry 49 List II were referred to with approval in India Cement Ltd. [(1990) 1 SCC 12 Para 22 & 23

72. "Tax on land" in Entry 49 List II involves a tax on land as a unit. In the present case Here the legislature has chosen that land which is "being used" for mining, commerce and industry. There is no intention to tax land which is "being used" otherwise or which is not being used at all. The Respondents placed much emphases on expression "being used" in Section 89 to submit that that tax levied was either a use tax imposable

only by Parliament or that the tax was not directly on land. It is settled that legislature need not tax all in order to tax something. It has wide latitude in selecting objects, manner and rate of tax.

(i) **1981(4) SCC-675, R.K.Garg (5 J.J) (Pr. 8 & 16). (Pg. 730-771 Vol V)**

(ii) **AIR 1964 SC-925 Khyerbari Tea Co.(5 JJ) (Pr.44) (Pg. 242-277 Vol V)**

(iii)**1997(5) SCC-536,(9JJ) Mafatlal Industries Ltd. (Pr. 343) (Pg. 1657-1864 Vol V)**

(iv)**1970(1) SCC-189, Twyford Tea Co. (5 JJ) Pr. 38) (Pg. 426-445 Vol V)**

(v). **1989 (3) SCC-634, Federation of Hotel & Restaurant Assn. (5 J.J) (Pr. 46-48) (Pg. 1073-1116 Vol V)**

73. The expression 'tax on land as a unit' in the judgments has been used with a view to distinguish 'tax on land and building' from composite taxes which involve imposition of tax cumulatively on all the assets as under Entry 86 List I of VIIth Schedule.

74. Here the measure of tax is "per acre" which also indicates that tax is on land as a unit. Measure of tax in the present case is consistent with the nature of tax being tax on land.

75. The exemption to land paying holding tax, which is a tax on land, also indicates that legislature intends to impose only one tax on land. It is an alternative to Holding tax, which is imposed under Section 82(1)(b) of Bihar Orissa Municipality Act, 1922. Section 3(9) defines "Holding".

76. Similar expression of "use" occurring in tax impositions by States were held by this Court as not indicative of use tax.

(i) AIR 1965 SC-1561=1965(3) SCR-47,49-51, Ajoy Kumar Mukherjee(Pg. 296-301 Vol V)

(ii)AIR 1968 SC-599=1968(1) SCR-705,716-717, Andhra Sugars Ltd. Vs. State of A.P. (Pg. 370-383 Vol V)

"Required for use in Sugar Factory"

(iii)1993 Supp(4) SCC-536, Hotel Balaji & Ors. Vs. State of A.P. (Pr. 36-37,64,65,69,70,90-92,100)(Pg. 1411-1464 Vol V)

(iv)1995 Supp(1) SCC-707,Gooricke Group Ltd. Vs. State of W.B.(Pr. 8,14-20,24,26,27,30,31) (1512-1545 Vol V)

77. The purpose of deploying the expression "being used" is to see that tax is imposed on land which are productive and are yielding return. **In K.T. Moopil Nair Vs State of Kerala AIR 1961 SC 552 (Pg 175-194 Vol V)** tax at a flat rate of Rs. 2/Acre was imposed without regard to quality of land or its productive capacity. Answering the issue of classification Under Article 14 it was observed "ordinarily a tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be taxed. In other words, the tax has reference to the income actually made, or which could have been made…". The tax was struck down on the ground that there is no attempt at classification and this creates inequality. (Pg 91-91) [In Mopil Nair the majority assumed that State legislature is legislatively competent to impose the tax. But the dissenting Judge expressly ruled that a tax could be imposed on forest land under entry 49 List II.

78. Judgment in **State of Bihar Vs Indian Aluminium [Pg 1644-1656 Vol V].**, is distinguishable . In this case Bihar Forest Restoration and Improvement of Degraded Forest Land Taxation Act, 1992 was challenged. This Act imposed a tax for mechanical and biological reclamation of forest land. This court held that in substance the tax was levied on the absence of land and squarely on the activity of mining or removal of earth. It was not a tax directly on land (Para 15-20). Significantly the court observed "the forest

land which is being used is not subjected to tax" (Para 15(d) and again "the existing land or trees are not taxed….." [Para 16(g)]. Further, distinguishing the case of Goodricke it was observed "there education cess and rural employment cess were levied on certain land and building in the State of West Bengal. The estates were carved out as a separate category and a different rate was prescribed thereof". They said that the fundamental difference in Goodricke was that 'the tax, in other words, was on the existing tea estate…. Thus Indian Aluminium has no bearing to the present case as MADA Act does not impose any tax on the absence of land or on the activity of mining or removal of earth. The tax is imposed on lands which are in existence. In (Pr.18) of Indian Aluminium it is said that one of the facets of tax on land is that primary responsibility of payment is on the owner of land but in the taxation act liability was on the person who uses it or occupies it.

Para 18 is merely presentation of a fact and that is not a fundamental aspect of tax on land. The observation is contrary to S.C. Nawn and Buckingham which say that the tax on land is irrespective of who owns or uses it.

ISSUE NO. 5 : WHETHER KESORAM COULD BE READ AS DEPARTING FROM INDIA CEMENT

79. India Cement is rendered by a bench of 7 Hon'ble Judges and it pertained to the validity of cess on royalty. As against that, Kesoram dealt with Cess Act, 1880; West Bengal Primary Education Act; W.B. rural employment and production Act, 1976 and U.P. Special Areas Development Authority Act which purported to levy and collect road cess and public work cess; education cess; and rural employment cess respectively and cess on minor minerals. The provisions concerned provided for the assessment of cesses for determination of the quantum of cess with regard to mines and quarries ; coal mines and mines other than coal mines and quarries and in addition to other lands including tea

estates. These Acts were amended by the W.B. Taxation Laws Amendment Act, 1992 w.e.f. 01.04.1992 which sought to levy education cess in respect of land, and in respect of coal bearing land at certain rate in relation to annual value. This was the position in relation to State of West Bengal. With regard to tea matters, the main issue was whether the judgment of this court in **Goodricke** runs counter to the judgment in India cement and stands whittled down by the judgment in **Orissa Cement** and **Mahanadi Coal fields**. There were also challenges to Section 35 of U.P. Special Area Developments Act which imposed cess on mineral.

80. In India Cement, Section 115 of the Madras Panchayat Act was challenged as being beyond legislative competence. It charged local cess @ 45 paise per rupee of land revenue and royalty was included while calculating land revenue. The Explanation to Section 115 defined 'land revenue' to mean and include water cess, royalty , lease amount or other sum payable in respect of land to the government. Further, Section 116 enabled every Panchayat Union Council to levy a local cess surcharge on every person liable to pay land revenue as an addition to the local cess at Rs 2.50 on every rupee on land revenue. The High Court relied upon the judgment of this Court in ***HRS Murthy*** and dismissed the writ appeal. In para 11 of India Cement, the Court observed 'the question, therefore, which arises is, is cess of royalty a demand of land revenue or additional royalty?'. In para 12, it said the question about Constitutional validity of Section 115 (1) is involved 'in so far as it sought to levy as local cess @ 45 nai paise on every rupee of the land revenue payable to the Government, the meaning of land revenue being artificially expanded by the Explanation so as to include royalty payable under the mining lease. This Court further noted that royalty is payable under the lease deed as per Section 9 of the MMRD Act. It proceeded to determine the competence of State Legislature of Entry 49,

50 and 54 of List II. It reiterated that the court was ‘ concerned with cess on royalty’ (Pr 19).

81. The contention noted in para 20 is that the levy was nothing but a tax on royalty and therefore ultra vires. The State’s contention was that cess is in respect of land for every fasli. Rejecting State’s contention , the court said that cess is not on land but on royalty which is included in the definition of land revenue and none of the three lists of VIIth Schedule authorise the State to impose tax on royalty (Pr 20-21). It also said that royalty cannot mean land revenue and is not covered by Entry 45 List II.

82. Importantly, in para 22 while dealing with Entry 46 and 49 List II of VIIth Schedule, this Court said that, royalty was not agricultural income. It said ‘ but in the instant case, royalty being that which is payable on the extraction from the land and cess being an additional charge on that royalty, cannot by the parity of the same reasoning be considered to be a tax on land. There was no entry like entry 46 empowering State to impose tax on royalty. It said that there was clear distinction between tax on land and tax on income arising from land. The court said that royalty was indirectly connected with land and hence cannot be said to be a tax directly on land as a unit (Pr 23). In support of the conclusion, the court adverted to there being no liability to pay cess in absence of mining activity, which showed that tax was relatable to minerals extracted. It concluded that in pith and substance, it is a tax on royalty and not a tax on land.

83. While dealing with entry 50 List II in paras 24-30, this court observed that it deals with taxes on mineral rights and observed that mineral rights being expressly covered under Entry 50 List II cannot be brought under Entry 49 List II as it would render Entry 50 List II redundant. It also said that with reference to entry 50 List II, the State Legislature cannot override provisions of MMRD Act, 1957. Section 2 and Section 9 of

MMDR Act would pro tanto override State legislation. Having earlier held, that royalty is a return received from the produce of land (Pr 21) and that the royalty is payable on a proportion of the minerals extracted (Pr 23) , the court referred to the Mysore High Court judgment in Laxmi Narayan Vs Taluk Dev AIR 1972 Mys 299, where the High Court held that royalty under Section 9 was really a tax. The Court criticised the approach of the Constitution Bench in HRS Murthy, and stated that Section 9 was a clear bar on the State Legislature taxing royalty so as to in effect amend Second Schedule of the Central Act. Hence, tax on royalty cannot be tax on land. The Court also noted the judgments of Punjab, Orissa, Gujarat, Rajasthan High Court which held that royalty is not a tax (Pr 31).

(i) Bherulal Vs State of Rajasthan AIR 1956 Raj 161 (Pg 3-7 Vol VB)

(ii) Dr. Shanti Swaroop Vs. State of Punjab AIR 1969 P& H 79 (Pg 48-92 Vol VB)

(iii)Saurashtra Cement Vs UOI AIR 1979 Guj 180 (Pg 119-132 Vol VB)

(iv)Laxmi Kumar Agarwalla Vs State of Orissa AIR 1983 Orissa 330 (Pg 144-179 Vol VB)

84. In para 33, this court iterated that royalty is relatable only to minerals extracted and would be relatable to Entry 23 and 54 of List II and not entry 49 of List II. But without any further discussion, or any decision of its own with regard to the correctness of the judgments of 4 High Courts noted in para 31 and without examining the correctness of Mysore High Court, this court recorded its opinion that royalty is a tax. In the first sentence it observes that royalty is a tax and as such cess on royalty being a tax on royalty is beyond competence of State Legislature because Section 9 covers the field. However, the last sentence of the same para 34, this court observed that royalty on mineral right is not tax on land but a payment for the user of land.

85. So far as judgment in case Kesoram of Constitution Bench is concerned, the cess had not been imposed on royalty. The measure of cess levied was relatable to the product of the land or annual value. It was specifically provided that the annual value will exclude the amount of tax, cess, fee, duty, royalty… However, since the High Court had ruled on the basis of India Cement and Orissa Cement judgment and in the tea matters the conflict between India Cement and Goodricke, Orissa Cement and Mahandi, therefore the Court examined the correctness of the High Court judgment and the correctness of the contention raised. This Court relied upon several earlier judgments that measure of levy is not suggestive of nature of tax , that the word ' land in entry 49 List II has to be liberally construed and has to include the strata above and below and the State can classify on the basis of the nature of land' and the only requirement was that tax should have a definite relation to the land. This Court said that the field of State legislation of tax ought not to be unduly whittled down. Evaluating India Cement, the Constitution Bench referred to the Mysore High Court judgment and observed that it could not be read so widely as laying down that State's could not levy tax within their legislative competence and that the High Court did not keep in view the distinction that entry 54 List I being a general entry did not contain the power to tax. The court also summoned the original judgment in India cement and held that the first sentence of para 34 was a typographical error and for this it referred to para 22 and 31 of the judgment and also the last sentence of para 34. The court observed that it was necessary to explain para 34 in order to comprehend it correctly and in a sensible manner. It observed that apparent error should be ignored. The Court also referred to dictionary meaning and judgments of this Court and other High Courts to conclude that royalty is consideration for parting with the right and privilege of the owner and it was not a tax (See para 59-71).

86. This Court also relied upon the judgment of this Court in MPV Sundararamier and held that entry 54 List I did not include power to tax.

87. The Constitution Bench also examined the provisions of MMRD Act, and the judgments in Hingir Rampur and M.A. Tulloch and concluded that the MMRD Act regulated only such fees and charges as are meant for regulation and development. Section 13,18 and 25 do not empower imposition of tax. It also held that there is nothing like an implied power to tax (Pr 104-107). It is also not an incidental power. The power to regulate and develop and the power to tax were different. The Court also noted the comment of Shri H.M. Seervai in para 115 where he said that royalty is income and therefore State Legislatures could not impose tax on income and India Cement should have decided only on this ground and nothing else was needed. While Mahanadi was overruled , the judgment in Goodricke was upheld. The conclusions are recorded in para 129 . Specific matters were then discussed and all laws were upheld.

88. It is submitted that there is no conflict between India Cement and Kesoram, except for the observations in para 34 of India Cement where without any discussion about the nature of royalty and correctness of 4 High Court judgments, the court in its opinion recorded that royalty was tax. In view of the conflict with the last sentence of para 34, Kesoram discussed the nature of royalty and clarified thar royalty was not tax and ignored the apparent error in India Cement. The judgment of India Cement should be confined and limited to the holding that the State was not competent to impose a tax on royalty as there was no entry empowering it. Royalty was merely a price/ consideration of owner of land and mineral for parting with its privilege to do the mining and take away the minerals.

89. However, the present case of MADA the tax is directly on land and the measure is at the rate of Rs 1.50 per square meter which has definite relation with land . Royalty is no measure of tax. Tax is not on land.

ISSUES NO. 3,7,8,10 & 11 : SCOPE OF ENTRY 50 LIST II AND LIMITATION IMPOSED BY LATER PART OF THE ENTRY, INTERELATIONSHIP OF ENTRY 50 LIST II AND ENTRY 54 LIST I ENTRY 23 LIST II AND 54 LIST I :

90. The relevant entries are being reproduced below :

Entry 54 List I

' 54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament to be expedient in the public interest'.

Entry 23 List II

'23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union'

Entry 50 List II

'50. Taxes on mineral rights subject to any limitation imposed by Parliament by law relating to mineral development'

91. The corresponding entries in Government of India Act, 1935 are reproduced below :

Entry 36 List I

' 36. Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest'

Entry 23 List II

'23. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control.'

Entry 44 List II

'44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.'

92. Entry 54 List I and Entry 23 List II are general entries relating to regulation and development of mines and minerals. Entry 50 List II is a taxing entry. Entry 23 List II has been made subject to the provisions of List I with respect to regulation and development under the control of the Union and Entry 50 List II has been made subject to any limitation imposed by Parliament by law relating to mineral development. The vital distinction between inter-relationship between Entry 54 List I and Entry 23 List II and Entry 54 List I and Entry 50 List II is that while the field available to the States under Entry 23 List II is the residue of what is left after the declaration by the Parliament under Entry 54 List I but so far as Entry 50 List II is concerned such is not the case. The Parliament has no power to levy tax on mineral rights , though it can impose limitation on the States when they exercise their power to levy tax on mineral rights. Though both entry 23 and 50 List II are subject to Entry 54 List I, there is a structural difference in the nature of limitation.

93. When one entry is made subject to another entry all that it means is that the scope of the former will be limited by the latter. It does not follow the power is completely eroded. In so far as 'tax on mineral rights' is concerned , Parliament has no competence. In the present case, the occupied field will have to be ascertained by examination of the Mines

and Minerals (Development and Regulation) Act, 1957 which is a law made by the Parliament referable to Entry 54 List I.

94. Entry 54 List I and Entry 23 List II : It is noteworthy that Entry 54 List I expressly provides that the field of regulation of mines and mineral development would be covered by the said entry '**only to the extent to which'** such regulation and development under the control of the Union in declared by the Parliament to be expedient in the public interest .It is therefore to be examined as to what is the extent covered by MMDR Act, 1957, which admittedly includes a declaration by Parliament as contemplated by Entry 54 List I. To the extent , the field is not occupied, the subject matter remains within the fold of Entry 23 List II. The expression ' to the extent to which' is therefore significant.

95. This Hon'ble Court has in several decisions held that the effect of reading the two entries is that the jurisdiction of the State Legislature under Entry 23 List II is subject to the limitation imposed by the latter part of the said entry. If the Parliament by its law has declared that regulation and development of mines should be in public interest be under the control of Union , to the extent such declaration , the State loses competence. As noted by this Hon'ble Court in **Monnet Ispat Vs Union of India (2012) 11 SC 1**, **(Pg. 2760-2915 Vol V)** that in the course of debate in respect of the corresponding entries in the Government of India Bill, the Solicitor General in the House of Commons stated that the rationale of including only the 'regulation of mines' and 'development of minerals' that too only to the extent it was considered expedient in the public interest by a federal law was to ensure that the provinces were not completely cut out from the law relating to the mine and minerals and if there was inaction at the Centre, then the provinces could make their own laws (Pr 129) . The position therefore is that the legislative competence of the State with regard to this field is eroded only to the extent of MMDR Act, 1957.

(i) **Hingir Rampur Vs State of Orissa AIR 1961 SC 459 (Pr 24 & 25) (Pg. 142-174 Vol V)**

(ii) **State of Orissa Vs M/S M.A. Tulloch AIR 1964 SC 1284 (Pr 5,7,8,12 and 18) (Pg. 278-295 Vol V)**

(iii) **Baijnath Kadio Vs State of Bihar (1969) 3 SCC 838 (Pr 13,14-16 & 21) (Pg. 412-425 Vol V)**

(iv) **Amritlal Nathubhai Shah Vs Union Govt of India (1976) 4 SCC 108 (Pr 3-6) (Pg 59-63 Vol VC)**

(v) **State of Haryana Vs Chanan Mal (1977) 1 SCC 340 (Pr 38) (Pg. 620-640 Vol V)**

(vi) **Western Coalfields Ltd. Vs S.A.D. Authority (1982) 1 SCC 125(Pr 26-31) (Pg. 772-789 Vol V)**

(vii) **Bharat Coking Coal Ltd Vs State of Bihar (1990) 4 SCC 557 (Pr.19) (Pg. 1242-1265 Vol V)**

(viii) **Monnet Ispat & Energy Vs Union of India (2012) 11 SCC 1)Pr 129-131,137-142) (Pg. 2760-2915 Vol V)**

(ix) **Geomysore Services (India) (P) Ltd. Vs Hutti Goldmines Co. Ltd. (2018) 6 SCC 791 (Pr 45 & 52) (Pg. 3558-3579 Vol V)**

96. In Western Coalfields Ltd. Vs S.A.D. Authority (1982) 1 SCC 125 a 2 JJ bench of this Hon'ble Court was dealing with a challenge to levy of property tax by Special Area Development Authority. The argument was that the lands and buildings on which the property tax was imposed is covered by coal mines and the field was occupied by MMRD Act, 1957, Coal Mines (Nationalisation) Act, 1973 and the impugned levy is manifestly an impediment in the power and function of the Union to regulate and develop the mines (Pr

25). The Court repelled the challenge and held that the levy was referable to Entry 49 List II and the Act related to Entry 5 List II. The Court also held that the declaration in Section 2 of MMRD Act, 1957 does not result in invalidation of every State Legislation relating to mines and minerals.

97. Since the idea of denudation of legislative competence of State has an impact on the State's legislative competence, the coverage of the field has to be express and not by implications or mere inference. This is more so when one considers a taxing entry falling expressly within the fold of the Stat's competence. Whether it is denudation or limitation, the Parliament's exercise of power of denudation or limitation must be express and specifically. There is nothing in the MMDR Act, 1957 which would indicate any Parliamentary intent to either entirely cover the filed of Entry 50 List II or even to limit the legislative competence of the State.

98. In this context, it is vital to state here that during the Constituent Assembly debates several members wanted Entry 54 List I (draft Entry 66) to be all exhausting so that States did not enjoy any competence over mines and minerals. An amendment was moved by Shri Brajeshwar Prasad and the aim of the amendment was ' to make redundant entry 28..' However, such amendment was not accepted and later withdrawn. Another attempt was made to transfer entry 23 List II (draft entry 28 List II) to List I , the amendment was also negatived. Similar amendment for Entry 50 List II (draft entry 54) , was also negatived **(Pg 7-16 Vol IVA)**

99. Reference to decision in **Ishwari Khaitan Sugar Mills Vs State of U.P. (1980) 4 SCC 136 [Pg 95-120 Vol VA]** is also supports this view. It was held :

> '***11.*** *Absence of the expression "to the extent hereinafter provided" was pressed into service to point out that while in respect of mines and minerals the Union has*

assumed control to the extent provided in the Mines and Minerals Act, in the case of declared industries the control is absolute, unlimited, unfettered or unabridged and, therefore, everything that would fall within the connotation of the word "control" would be within the competence of the Union and to the same extent and degree the State Legislature would be denuded of its power to legislate in respect of that industry. It was said that in respect of declared industries total control is assumed by the Union and, therefore, Entry 24 List II on its import must be read industry minus the declared industry because Entry 24 List II is subject to Entries 7 and 52 List I. Undoubtedly the Union is authorised to assume control in respect of any industry if Parliament by law considers it expedient in the public interest. The declaration has to be made by Parliament, but the declaration has to be by law and not a declaration simpliciter. The words of limitation on the power to make declaration are "by law". Declaration must be an integral part of law enacted pursuant to declaration. The declaration in this case is made in an Act enacted to provide for the development and regulation of certain industries. Therefore, the control was assumed not in abstract but for a specific and avowed object viz. development and regulation of certain industries. The industries in respect of which control was assumed for the purpose of their development and regulation have been set out in the schedule. This control is to be exercised in the manner provided in the statute viz. the IDR Act. The declaration for assuming control is to be found in the same Act which provides for the limit of control. The deducible inference is that Parliament made the declaration for assuming control in respect of declared industries set out in the Schedule to the Act to the extent mentioned in the Act. It is difficult to accept the submission that Section 2 has to be

read de hors the Act and not forming part of the Act. This would be doing violence to the art of legislative draftsmanship. It is open to Parliament in view of Entry 52 List I, to make a declaration in respect of industry or industries to the effect that the Union will assume its control in public interest. It is not to be some abstract control. The control has to be concrete and specific and the manner of its exercise has to be laid down in view of the well established proposition that executive authority must have the support of law for its action. In a country governed by rule of law, if the Union, an instrumentality for the governance of the country, has to exercise control over industries by virtue of a declaration made by Parliament, it must be exercised by law. Such law must prescribe the extent of control, the manner of its exercise and enforcement and consequence of breach. There is no such concept as abstract control. The control has to be concrete and the mode and method of its exercise must be regulated by law. Now, Parliament made the declaration not in abstract but as part of the IDR Act and the control was in respect of industries specified in the First Schedule appended to the Act itself. Sections 3 to 30 set out various modes and methodology, procedure and power to effectuate the control which the Union acquired by virtue of the declaration contained in Section 2. Industry as a legislative head finds its place in Entry 24 List II. The State Legislature can be denied legislative power under Entry 24 to the extent Parliament makes declaration under Entry 52 and by such declaration, Parliament acquires power to legislate only in respect of those industries in respect of which declaration is made and to the extent as manifested by legislation incorporating the declaration and no more. The Act prescribes the extent of control and specifies it. As the declaration trenches upon the State legislative

power it has to be construed strictly. Therefore, even though the Act enacted under Entry 54 which is to some extent in pari materia with Entry 52 and in a parallel and cognate statute while making the declaration Parliament did use the further expression "to the extent herein provided" while assuming control, the absence of such words in the declaration in Section 2 would not lead to the conclusion that the control assumed was to be something in abstract, total and unfettered and not as per various provisions of the IDR Act. The lacuna, if any, is made good by hedging the power of making declaration to be made by law. Legislative intention has to be gathered from the Act as a whole and not by piece-meal examination of its provisions. It would, therefore, be reasonable to hold that to the extent Union acquired control by virtue of declaration in Section 2 of the IDR Act as amended from time to time, the power of the State Legislature under Entry 24 List II to enact any legislation in respect of declared industry so as to encroach upon the field of control occupied by the IDR Act would be taken away. This is clearly borne out not only by the decision in Baijnath Kadio case[1] where undoubtedly while referring to the control assumed by the Union by a declaration made in Section 2 of the Mines and Minerals Act, it was said that to what extent such a declaration would go is for Parliament to determine and this must be commensurate with public interest, and once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. It is not merely some abstract control but the extent of the control assumed by the Union by the provisions of the IDR Act pursuant to declaration made by Parliament that the State Legislature to that extent, that is, to the extent the

provisions of the IDR Act occupies this field, is denuded of its power to legislate in respect of such declared industry.'

Mines and Minerals (Development and Regulation) Act, 1957 does not cover the field of taxation

100. The differentiation made between petroleum and other minerals in item 53 and 54 of the Union List had rendered separate enactments for the two necessary. Mines and Minerals (Development and Regulation) Act, 1957 dealt only with minerals other than petroleum , before enactment of this Act both were dealt with under the Mines and Minerals (Regulation and Development) Act, 1948. Certain other changes such as prescription of maximum limit qua area, grant of second revenue etc were brought in (See SOR).

101 Section 2 which contains the declaration as envisaged in Entry 54 List I provides that ' it is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to **the extent hereinafter provided.**'. Therefore, the field occupied is to be determined by the provisions contained in the Act.

102. Section 4 contains the general restrictions of undertaking prospecting and mining operations which necessarily has to be under a permit/license/lease under the Act. Section 4A deals with termination of prospecting license or mining leases. Section 5 contains restrictions on the grant of prospecting license and mining lease such as nationality etc. Section 6 contains the restrictions as to the maximum area that can be held under the prospecting license or mining lease. Sections 7 and 8 deals with the periods for which the prospecting license and mining lease may be granted or renewed.

103. Section 9 deals with royalty in respect of mining leases. It provides that the holder of a mining lease shall pay royalty in respect of any mineral removed or consumed by him or his agent, manager, employee, contractor, or sub-lessee from the lease area at the rate specified in the Second Schedule. Section 9A deals with dead rent to be paid to the State Government with respect to area under the mining lease. Section 9B and 9C introduced by Act 10 of 2015 deal with District Mineral Foundation and National Mineral Exploration Trust. Sections 10 & 11 deal with grant of prospecting license or mining lease. Section 12 deals with register of prospecting license or mining lease. Section 12A deals with transfer of mineral concession. Section 13 provides for rule making power of the Central Government. Section 13(i) deals with ' the fixing and collection of fees for[reconnaissance permits prospecting licenses or mining leases], surface rent, security deposit, fines, other fees or charges and the time within which and the manner in which the dead rent or royalty shall be payable;]. Importantly, though it makes reference to various kinds of pecuniary charges, there is no mention of tax. Section 15 confers power on State Government qua minor minerals. Section 15 (g) deals with 'the fixing and collection of rent, royalty, fees, dead rent, fines or other charges and time within which and the manner in which these shall be payable'. Section 17 deals with power of Central Government to undertake prospecting license or mining lease in certain lands and Section 17A deals with power of reservation for purposes of conservation. Section 18 deals with mineral development. Section 21 deals with penalties, 22-22A deal with offences. Section 25 provides that any rent, royalty, tax, fee or other sum due to the Government under this Act or the rules made thereunder or under the terms and conditions of any reconnaissance permit, prospecting license or mining lease may be revered in the same mane rasa n arrear of land revenue.

104. It is submitted that though ' tax' is used in Section 25, there is no provision of imposition of tax in MMDR Act, 1957 and rightly so since Parliament does not have the power to tax mineral rights and such power cannot be traced to Entry 54 List I. In short, used of expression 'tax' which is merely a recovery provision or penal provision in Section 21(5) will not clothe the Parliament of competence which is otherwise not conferred by the Constitution. A power of taxation will not be inferred from Section 25 or Section 21(5) . Form K is that statutory form of the lease , Part VII provides for payment of rents, and royalties, taxes etc. It is general obligation to pay all public demands. It is reproduced below :

> '1. *The lessee/ lessees shall pay the rent, water rate and royalties reserved by this lease at such times and in manner provided in Parts V and VI of these presents and shall also pay and discharge all* ***taxes*** *, rates, assessments and impositions whatsoever being in the nature of public demands which shall from time to time be charged, assessed by the authority of the Central and State Governments upon or in respect of the premises and works of the lessee/lessees in common* with other premises and works of a like nature except land revenue'.

105. Clause 2 of Part IX of the same form deals with penalty in case of default in payment of rent, water rate or royalty as required by Section and there is no mention of 'tax'.

106. Reference to 'tax' in Section 21(5) and Section 25 and Form K under the MC Rules, 1960 can only refer to a tax which falls within the competence of Parliament.

107. The effort of the Respondents to draw sustenance from Section 25 of the MRMD Act, 1957 is misconceived. Section 25 is a recovery provision and not a provision

imposing any tax. In fact, Section 25 uses various expressions and royalty, rent, and fee are separately mentioned along with other sums due. It rather indicates that they are not same. Importantly, there is no provision imposing tax.

108. The Parliament has no legislative competence to impose any tax which is expressly provided for in List II of the VIIth Schedule and placed within the competence of State Legislature. Neither under Entry 54 List I or any other entry would enable the Parliament to impose such a tax. Even Article 248 of the Constitution does not enable the Parliament in this respect.

109. The field would remain unoccupied until the Parliament proceeds to specifically and concretely prescribes the limitation. In the context of the Concurrent list and repugnancy under Article 254 this court held that unless the field is occupied as a matter of fact, the legislative competence of the State would not cease. The field should be occupied as a matter of fact.

(i) Tika Ram Ji Vs State of U.P. AIR 1956 SC 676 (Pr 30,32) (Pg. 8-47 Vol VB)

(ii) Punjab Dairy Development Vs Cepham Milk Specialties (2004) 8 SCC 621 (Pr) 12 (Pg. 303-311 Vol VB)

(iii) State of Mahrashtra Vs Bharat lal Shantilal (2008) 13 SCC 5 (Pr 48) (Pg. 333-357 Vol VB)

(iv) Innoventive Industries Vs ICICI Bank (2018) 1 SCC 407 (Pr 51.5) (Pg. 358-418 Vol VB)

110. As far as the State Act in question is concerned , the Parliament has not laid down any limitations with respect to tax on mineral rights provided for in entry 50 List II under

the MMDR Act, 1957. Moreover, the tax imposed by the State is with reference to Entry 49 List II and not Entry 50 List II and entry 49 List II is not subject to any entry in List I and it does not contemplate of laying down any general principles.

Entry 54 List I and Entry 50 List II

111. Entry 50 List II, which is a taxing entry has been made subject to any limitations imposed by Parliament by law relating to mineral development i.e. a law with respect to a general entry namely Enty 54 List I. Although there are several general or non-tax entries in List II which are made subject to general entries in List I but so far as taxing entries are concerned only Entry 50 and 57 List II have been made subject to limitation made under a general entry.

Entry 57 List II

‘ 57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III’

Entry 35 List III

‘35. Mechanically propelled vehicle including the principles on which taxes on such vehicles are to be levied’

112. An examination of judgments dealing with Entry 57 List II read with Entry 35 List III is also essential due to similarity in the nature of limitation, though the nature of the limitation is not identical.

113. In State of **Assam Vs Labanya Probha Devi AIR 1967 SC 1575 (Pr 11) (Vol VA Pg. 63-67 Vol VA)** , this Hon’ble Court while dealing with a challenge to Assam Motor Vehicle Taxation Act, held that that the two entries deal with two different matters though allied one. One deals with taxes and the other deals with principles on which such taxes

are to be levied. The Court upheld the law amending the schedule by which the rates of taxes were increased.

> ***'11.*** *The short question, therefore, is whether any of the provisions of the amending Acts is repugnant to any of the provisions of the existing law with respect to any of the matters enumerated in the Concurrent List. Under the existing law i.e. Act 9 of 1936, no motor vehicles could be used in the Assam Province unless the owner thereof had paid in respect of it a tax at the appropriate rate specified in the Schedule to the Act and, save as therein specified, such tax should thereafter be payable annually notwithstanding that the motor vehicle might from time to time cease to be used (see Section 4). As aforesaid, the Schedule annexed to the principal Act was amended from time to time by different amending Acts and the rate was increased. Under the 1963 amending Act, apart from other provisions which do not relate to any principles of taxation, a new Schedule has been substituted. Neither the amending Act nor the Schedule laid down any principles of taxation in respect of motor vehicles. So too, the amending Act of 1966 substituted the Schedule of the Act by another Schedule. A perusal of the aforesaid Schedule only discloses that different rates were fixed; that is to say, the amended Schedule does not lay down any principles on which taxes on motor vehicles are to be levied within the meaning of Entry 35 of the Concurrent List; it is solely concerned with taxes on vehicles within the meaning of Entry 57 of List II. The two entries deal with two different matters though allied ones — one deals with taxes on vehicles and the other with the principles on which such taxes are to be levied. When two entries in the Constitution, whether in the same List or different*

Lists, deal with two subjects, if possible, an attempt shall be made to harmonize them rather than to bring them into conflict. Taxes on vehicles in their ordinary meaning connote the liability to pay taxes at the rates at which the taxes are to be levied. On the other hand, the expression "principles of taxation" denotes rules of guidance in the matter of taxation. We, therefore, hold that the amending Acts do not come into conflict with the existing law in respect of any principles of taxation, but only deal with a subject-matter which is exclusively within the legislative competence of the State Legislature. In this view, there is no scope for the application of Article 254 of the Constitution.

114. Similar, view was held in **B.A. Jayaram v. Union of India, (1984) 1 SCC 168 (**Pr 10) **(Pg. 239-250 Vol VA):**

'10. *It is true that the object of enacting Section 63(7) by the Parliament was to promote all-India and inter-State tourist traffic.* 178 *But 'taxes on vehicles... suitable for use on roads' is a State legislative subject and it is for the State Legislature to impose a levy and to exempt from the levy. True again, Entry 57 of the State List is subject to Entry 35 of the Concurrent List and, as explained by us at the outset, it is therefore open to the Parliament to lay down the principles on which taxes may be levied on mechanically propelled vehicles. But the Parliament while enacting Section 63(7) of the Motor Vehicles Act refrained from indicating any such principles, either expressly or by necessary implication. The State's power to tax and to exempt was left uninhibited. It may be that a State legislation, plenary or subordinate, which exempts "non-home-State tourist vehicles" from tax would be advancing the object of Section 63(7) of the Motor Vehicles Act and accelerating inter-State trade, commerce and intercourse. But merely by*

Parliament legislating Section 63(7), the State Legislatures are not obliged to fall in line and to so arrange their tax laws as to advance the object of Section 63(7), be it ever so desirable. The State is obliged neither to grant an exemption nor to perpetuate an exemption once granted.'

115. This was reiterated in **Sharma Transport v. Govt. of A.P., (2002) 2 SCC 188(Pg. 394-416 Vol VA)**

'***11.*** *Power to levy taxes on vehicles, whether mechanically propelled or not vests solely in the State Legislature, though it may be open to Parliament to lay down the principles on which the taxes may be levied on mechanically propelled vehicles in the background of Entry 35 of List III. To put it differently, Parliament may lay down the guidelines for the levy of taxes on such vehicles, but the right to levy such taxes vests solely in the State Legislature. No principles admittedly have been formulated by Parliament. In that sense, the Government of India's communication dated 30-8-1993 does not in any sense violate the power of the State Legislature or its delegatee to levy or exempt taxes from time to time*.'

116. Again Article 286(3) empowers Parliament to impose restrictions and conditions on states power to impose a tax on sale or purchase of goods declared by Parliament to be of special importance to inter-state trade or commerce. This would not empower Parliament to impose sales tax which is covered by Entry 54 List II. Article 286 (3) now stands omitted by Constitution (101st) Amendment Act, 2016 w.e.f. 16.09.2016.

See **Rajasthan Rollers Flour Mills Association Vs State of Rajasthan 1994 Suppl(1) SCC 413 Pr 14 & 21 [Pg 97-113 Vol VC]**

See DD Basu (Pg 47-50 Vol IVC)

117. In HRS Murthy Vs Collector , Chittor , AIR 1965 SC 177, a 5 JJ of this Hon'ble Court was dealing with a challenge to levy of land cess under Madras District Boards Act, 1920. The land cess levied under Section 78 (Pr 3) was based on annual rent value which was computed under Section 79 and royalty was a component u/S Section 79(1). The Court dealt with the meaning of royalty under Section 79(1) in para 7. After having discussed the judgments in Hingir Rampur and M.A. Tulloch it held that , there was no similarity between the Orissa Acts and the enactment in question. The Act in questions had nothing to do with regulation and development of mines and minerals (Pr 9). In context of Entry 50 List II, it held that the Parliament had no power to tax mineral rights and the power was with the State and the sole limitation is that it does not interfere with the law of the Parliament as regards mineral development and no such law had been adverted to. The court held that the land cess was a tax on land under Entry 49 List II (Pr 10 & 11).

This judgment was however overruled in India Cement and the subsequent judgments have simply followed the judgment in India Cement.

WHETHER ENTRY 50 LIST II READ WITH ENTRY 54 LIST I IS AN EXCEPTION TO THE PRINCIPLE LAID DOWN IN MPV SUNDARARAMEIR ISSUE NO. 9

118. The short answer to this question is no. As stated earlier, Entry 50 List II is a taxing entry and Entry 54 List I is a general entry. Parliament cannot impose tax on mineral rights under Entry 54 List I, that power is the State but Parliament can impose limitations on exercise of this power. However, this does not detract from the settled constitutional position that general entries and tax entries are distinct.

119. Power to impose limitations, restrictions, conditions and to lay down principles which are envisaged by Article 286(3) , Entry 50 and 57 List II are not intended to enable Parliament to appropriate power to impose tax. The expressions deployed in these provisions only enable regulation with respect to State's legislative power to impose tax.

120. Entry 50 List II and entry 57 List II are not unique or exceptional. Entry 54 List II was earlier subject to provisions of Entry 92A List I. After Amendment by Constitution 101st Amendment Act, 2016, it excludes sale in the course of inter state trade or commerce. It would also be subject to Article 286(1) and (2). The Constitution does not contemplate any overlapping of taxing power, what it envisages in certain cases is regulation by laying down of restrictions, limitations and principles for regulating taxing power of the State in the larger National interest.

PART-II

1. Certain settled constitutional principles in the field of taxation settled by this Hon'ble Court are being set out.

A. TAXATION IS AN INCIDENT OF SOVEREIGNTY

2. While examining the width of the power of State to tax, it is important to bear in mind that very existence of State depends on its power of taxation. Taxation is an inherent attribute of sovereignty. This Hon'ble Court in Jagannath Baksh Singh Vs State of U.P. AIR 1962 SC 1563 relying on M'Culloch Vs Maryland 17 US 316 (1819) held that ' …the power of taxation is, no doubt, the sovereign right of the State..'.

3. This principle has been reiterated by several judgments of this Hon'ble Court and a 9 Judge Bench in Jindal Stainless Steel Vs State of Haryana has after taking note of the previous judgments and passages of **Cooley on Taxation,Vol I** has reiterated the same.

(i) (2017) 12 SCC 1 Jindal Stainless Vs State of Haryana (Pr 17-20 , 112.2,113) (Pg. 2937-3557 Vol V)

> ***17.*** *Power to levy taxes has been universally acknowledged as an essential attribute of sovereignty. Cooley in his book on Taxation, Vol. 1 (4th Edn.) in Chapter 2 recognises the power of taxation to be inherent in a sovereign State. The power, says the author, is inherent in the people and is meant to recover a contribution of money or other property in accordance with some reasonable rule or apportionment for the purpose of defraying public expenses. The following passage from the book is apposite:*
>
> > *"57. Power to tax as an inherent attribute of sovereignty.—The power of taxation is an essential and inherent attribute of sovereignty, belonging as a*

matter of right to every independent Government. It is possessed by the Government without being expressly conferred by the people. The power is inherent in the people because the sustenance of the Government requires contributions from them. In fact the power of taxation may be defined as "the power inherent in the sovereign State to recover a contribution of money or other property, in accordance with some reasonable rule or apportionment, from the property or occupations within its jurisdiction for the purpose of defraying the public expenses". Constitutional provisions relating to the power of taxation do not operate as grants of the power of taxation to the Government but instead merely constitute limitations upon a power which would otherwise be practically without limit. This inherent power to tax extends to everything over which the sovereign power extends, but not to anything beyond its sovereign power. Even the federal Government's power of taxation does not include things beyond its sovereign power. But where exclusive jurisdiction over land is granted to another State or country, the land remains subject to the taxing power of the State within whose boundaries it is located."

18. *To the same effect is the decision of this Court in Jagannath Baksh Singh v. State of U.P. [Jagannath Baksh Singh v. State of U.P., AIR 1962 SC 1563 : (1963) 1 SCR 220] where this Court observed : (AIR p. 1570, para 15)*

"15. ... The power of taxation is, no doubt, the sovereign right of the State; as was observed by Chief Justice Marshall inM'Culloch v. Maryland [M'Culloch v. Maryland, 4 L Ed 579 : 17 US 316 (1819)] : (L Ed p. 607)

'... the power of taxing the people and their property is essential to the very existence of Government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it.'

In that sense, it is not the function of the court to enquire whether the power of taxation has been reasonably exercised either in respect of the amount taxed or in respect of the property which is made the object of the tax. Article 265 of the Constitution provides that no tax shall be levied or collected, except by authority of law; and so, for deciding whether a tax has been validly levied or not, it would be necessary first to enquire whether the legislature which passes the Act was competent to pass it or not."

(emphasis supplied)

19. *Reference may also be made to Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. [Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., (2000) 5 SCC 694] where this Court held : (SCC p. 702, para 8)*

"8. The principle of priority of government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well-recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the

wisdom of conceding to the State, the right to claim priority in respect of its tax dues (see Builders Supply Corpn. [Builders Supply Corpn. v. Union of India, AIR 1965 SC 1061 : (1965) 56 ITR 91]).”

(emphasis supplied)

20. *In CIT v. McDowell and Co. Ltd. [CIT v. McDowell and Co. Ltd., (2009) 10 SCC 755] where this Court reiterated the legal position in the following words : (SCC p. 763, paras 21-22)*

“21. “Tax”, “duty”, “cess” or “fee” constituting a class denotes to various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Within the expression of each specie each expression denotes different kind of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestation only under any law authorising levy and collection of tax as envisaged under Article 265 which uses only the expression that no “tax” shall be levied and collected except authorised by law. It in its elementary meaning conveys that to support a tax legislative action is essential, it cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State.

22. Under Article 366(28) “Taxation” has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. “Impost” means compulsory levy. The well-known and well-settled characteristic of “tax” in its wider sense includes all imposts. Imposts in the context have following characteristics:

(i) The power to tax is an incident of sovereignty.

(ii) "Law" in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.

(iii) The term "tax" under Article 265 read with Article 366(28) includes imposts of every kind viz. tax, duty, cess or fees.

(iv) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a "tax" in its technical sense as an impost, general, local or special."

(emphasis supplied)

112.2. *Secondly, because levy of taxes is both an attribute of sovereignty and an unavoidable necessity. No responsible Government can do without levying and collecting taxes for it is only through taxes that Governments are run and objectives of general public good achieved. The conceptual or juristic basis underlying the need for taxation has not, therefore, been disputed by the learned counsel for the dealers and, in our opinion, rightly so. That taxation is essential for fulfilling the needs of the Government is even otherwise well settled. A reference to A Treatise on the Constitutional Limitations (8th Edn. 1927 — Vol. 2, p. 986) by Thomas M. Cooley brings home the point with commendable clarity. Dealing with power of taxation, Cooley says:*

"Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constitution among

the powers to be exercised by it or not. No constitutional government can exist without it, and no arbitrary Government without regular and steady taxation could be anything but an oppressive and vexatious despotism, since the only alternative to taxation would be a forced extortion for the needs of Government from such persons or objects as the men in power might select as victims."

(emphasis supplied)

113. *Reference may also be made to the following passage appearing in M'Culloch v. Maryland [M'Culloch v. Maryland, 4 L Ed 579 : 17 US 316 (1819)] , where Marshall, C.J. recognised the power of taxation and pointed out that the only security against the abuse of such power lies in the structure of the Government itself. The Court said : (L Ed pp. 427-28, paras 43-44)*

"43. ... It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

44. The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the

influence of the constituents over their representative, to guard them against its abuse."

(emphasis supplied)

Per Shivkirti Singh J (Pr. 193,237.1 and 237.2)

Part VI. Introduction to taxation and its importance

193. *The States in the modern era are not strictly confined to political activities and law-making functions. They function in a welfare society. Such working of States was visualised by our Framers also, who were aware of responsibilities a State must shoulder and discharge. This is the very reason for existence of directive principles of State policy and which sets normative and positive standards for the Government. When the State is burdened with such normative goals as its primary responsibility, such activities are inevitably dependent on availability of monitory resources. The definition of sovereignty has acquired a new flavour in the recent past, "Sovereignty is responsibility". In a democratic system the elected Governments are always responsible for its people. If there is any high taxation which is affecting their life, this puts pressure on the Governments to reduce taxes and elected Governments are answerable to public every five years. No Government can raise tax which would cause public inconvenience. In this context, sovereignty is no more an endless power, rather it is a responsibility. A responsible Government in a democracy should always strive to keep taxes as low as possible, so that no heavy burden is placed on the individuals. Although States are empowered to tax under the Constitution, it does not necessarily mean that they should tax at exorbitant rates. Tax is a way of apportioning the cost of Government among those who in some measure are*

privileged to enjoy the benefits and must therefore bear its burdens. Fundamentally the exercise of sovereignty also includes lawful taxation as its incident. The assessees/dealers on the other hand stated that all powers exercised by the State such as police powers, power of eminent domain and power to tax are also incidents of sovereignty. [Jagannath Baksh Singh v. State of U.P., (1963) 1 SCR 220 : AIR 1962 SC 1563; Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., (2000) 5 SCC 694; CIT v. McDowell and Co. Ltd., (2009) 10 SCC 755.] There is nothing which mandates this Court to deny latitude in use of taxing powers in comparison to other similar powers. Although all powers exercised by State are incidents of sovereignty, there is need to treat taxation on a different pedestal to sustain the Government at the current level and to achieve the constitutional goals set by our Framers.

237.1. *First, taxation is an incident of sovereignty, which cannot be curtailed by any implied limitations. [Umeg Singh v. State of Bombay, AIR 1955 SC 540 : (1955) 2 SCR 164]*

237.2. *Secondly, it is part of any sovereign Government to ensure a welfare State. To achieve the same, tax is the only course available to the Government to generate revenue for purposes of welfare activities. Courts, therefore, cannot abridge the taxing power of the sovereign State.*

Per Bhanumathi J (Pr. 309,310-313,319)

Power to tax is an incident of State sovereignty

309. *Entries relating to taxation and levy of duty under the State List, Seventh Schedule are Entries 46-62 and under the Concurrent List, Seventh Schedule are Entries 35, 43 and 44. The power to tax is a sovereign right of the State and is*

essential to the very existence of a Government. Any fetters on the power of the State to generate revenue through taxes have a direct impact on the autonomy and governance of the State.

310. *The term "tax" is ordinarily used to express the exercise of the sovereign power to raise revenue for the expenses of the Government. Judge Cooley in his memorable work on the Law of Taxation stated that taxation is a mode of raising revenue for a public purpose; and the power of taxation is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent Government. He defined the power of taxation as the power inherent in the sovereign State to recover a contribution of money or other property in accordance with some reasonable rule of apportionment from the property or occupation within its jurisdiction for the purpose of defraying the public expenses:*

> *"... It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.*
>
> *The power of taxation is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent Government. It is possessed by the Government without being expressly conferred by the people. The power is inherent in the people because the sustenance of the Government requires contributions from them. In fact the power of taxation may be defined as "the power inherent in the sovereign State to recover a contribution of money or other property, in accordance with some*

reasonable rule of apportionment, from the property or occupation within its jurisdiction for the purpose of defraying the public expenses."

(emphasis supplied)

[Cooley, Taxation (4th Edn.) pp. 72, 149, 150; Referred to in the article "Power to Tax" by Herman M. Knoeller reported in Market Law Review, Vol. 22 Issue 3-4-1938.]

313. *Subject to the Constitution and its inherent restrictions, the power of taxation is regarded as political and supreme. Power to levy tax is indispensable for the existence of any civilised Government as it is a necessity for its support and maintenance. Without taxes, for lack of source of revenue, the Government would become paralysed. How much revenue is to be drawn and from which source is a matter of fiscal policy and wholly depends on the needs of a State. In order to support the existence of the State and its welfare activities, as mandated by the directive principles of the State policy, the State is empowered to raise revenue through, (i) taxes and duties; (ii) loans raised by the issue of treasury bills, loans or ways and means of advances; (iii) fees for licences; (iv) fees for services rendered; and (v) fines or other pecuniary penalties (Articles 199, 207 and 266). On behalf of the State, it was submitted that there are fiscal limitations against taking loans in view of debt servicing; even otherwise tax is preferable as it is a mode of redistributing wealth in the form of public welfare.*

319. *Tax has always been treated as a distinct entity and is kept on a pedestal separate from all the other legislative fields of the Seventh Schedule. It is worth repeating that the power of taxation is an inherent attribute of sovereignty emanating from necessity. As noted earlier, the exaction is not merely fundamental*

for existence of the State but also to support the welfare activities, therefore, it forms a precondition for exercise of other legislative power. The special status conferred on taxing statutes is evident from the following special provisions : Article 265 provides that no shall be levied or collected except by the authority of law; therefore there can be no levy or collection by exercise of executive power. Tax legislations are given the status of Money Bills under Articles 110 and 199 of the Constitution and, therefore, have a different laying procedure. They can originate only in the Lower Houses of Parliament and the State Legislature as per Articles 109 and 198. Being a Money Bill, all the revenue is sent to the Consolidated Fund and can only be taken out through Appropriation Bills (Articles 114 and 204).

Per Dr D Y Chandrachud J (Pr. 617,622-623)

617. *The power to enact laws is a manifestation of sovereignty. The Constitution while conferring legislative powers upon the Union and the States makes them subject to constitutional limitations. The sovereignty of the legislature is subject to the norms of the written Constitution. The power to tax is subsumed in legislative power. Like all legislative power, fiscal legislation is subject to the mandate of the written Constitution. This is the plain consequence of the opening words of Article 245(1) under which the conferment of legislative powers is made subject to the provisions of the Constitution.*

H.2 Sovereignty and constitutional limitations

622. *The power to tax has been considered to be an essential attribute of Government and a sovereign power vesting in the State. Thomas Cooley in his Treatise on the Constitutional Limitations Which Rest Upon the Legislative*

Power of the States of the American Union [Indian Reprint 2005] provides a jurisprudential foundation to the taxing power in the following observations:

> *"Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised by it or not. No constitutional Government can exist without it, and no arbitrary Government without regular and steady taxation could be anything but an oppressive and vexatious despotism, since the only alternative to taxation would be a forced extortion for the needs of Government from such persons or objects as the men in power might select as victims. In the language of Chief Justice Marshall:'The power of taxing the people and their property is essential to the very existence of Government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it. The only security against the abuse of this power is found in the structure of the Government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their Government a right of taxing themselves and their property; and as the exigencies of the Government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the*

interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse.'" (Id. at p. 2-3)

Under the Indian Constitution the conferment of legislative power to impose, collect and enforce the realisation of taxes is specifically spelt out from and enumerated under the constitutional provisions. Taxing entries in Lists I and II are specifically enumerated and their ambit defined. Article 366(28) of the Constitution defines the expression taxation to include "the imposition of any tax or impost, whether general or local or special" and provides that the expression tax "shall be construed accordingly".

623. *Several decisions of this Court have regarded the taxing power as an essential attribute of the Government and sovereignty:*

623.1. *In Rai Ramkrishna v. State of Bihar [Rai Ramkrishna v. State of Bihar, (1964) 1 SCR 897 : AIR 1963 SC 1667] , it was held that : (AIR p. 1673, para 12)*

"12. ... It is, of course, true that the power of taxing the people and their property is an essential attribute of the Government and Government may legitimately exercise the said power by reference to the objects to which it is applicable to the utmost extent to which the Government thinks it expedient to do so. The objects to be taxed so long as they happen to be within the legislative competence of the legislature can be taxed by the legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation."

(emphasis supplied)

623.2. *In Jagannath Baksh Singh v. State of U.P. [Jagannath Baksh Singh v. State of U.P., AIR 1962 SC 1563 : (1963) 1 SCR 220] , this principle was stated as follows : (AIR p. 1570, para 15)*

> *"15. ... The power of taxation is, no doubt, the sovereign right of the State; as was observed by Chief Justice Marshall in M'Culloch v. Maryland [M'Culloch v. Maryland, 4 L Ed 579 : 17 US 316 (1819)] : (L Ed p. 607, para 43)*
>
> > *'43. ... the power of taxing the people and their property, is essential to the very existence of the Government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it.'"*

623.3. *In Amrit Banaspati Co. Ltd. v. State of Punjab [Amrit Banaspati Co. Ltd. v. State of Punjab, (1992) 2 SCC 411] , this Court held that : (SCC p. 424, para 10)*

> *"10. ... Taxation is a sovereign power exercised by the State to realise revenue to enable it to discharge its obligations."*

623.4. *In Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. [Dena Bank v. Bhikhabhai Prabhudas Parekh & Co., (2000) 5 SCC 694] , this Court held thus : (SCC p. 702, para 8)*

> *"8. ... the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in*

possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues.…"

(ii) State of U.P. v. Systematic Conscom Ltd., (2014) 13 SCC 627 (Pr. 19) (Pg. 859-869 Vol VA)

(ii) Amrit Banaspati Co. Ltd. v. State of Punjab, (1992) 2 SCC 411(Pr. 10) (Pg. 378-393 Vol VA)

(iv) Asstt. Commr. of Urban Lan Tax Vs Buckingham & Carnatic Co. Ltd (1969) 2 SCC 55 (Pr 10) (Pg. 390-405 Vol V)

(v) Rai Ramkrishan Vs State of Bihar AIR 1963 SC 1667 (Pr. 13). (Pg. 31-45 Vol VA)

B. <u>POWER OF UNION AND STATE TO TAX IS MUTUALLY EXCLUSIVE</u>

4. The source of power to enact laws including power to tax of Union and State is traced to Article 245 and 246 and the fields of legislation are provided in List I, II and III of the VIIth Schedule. There are no taxing entries in List III i.e. Concurrent List of the VIIth Schedule and there is no overlapping of taxation power between Union and States. There is a complete separation of taxing powers of the Union and the States under Article 245/246 of the Constitution.

(i) State of Kerala Vs Wiliam Fernandes (2021) 11 SCC 705 (Pr 71- 72 &75) (Pg. 930-1000 Vol VA)

71. *The Constitution of India, Part XI, Chapter I deals with legislative relations, legislative powers of Parliament and State Legislatures are clearly demarcated. Power to tax is an incidence of sovereignty and there is a clear demarcation of taxing field, which has been earmarked to Parliament as well*

as to the State Legislatures. Taxing powers of both the Union and the State Legislatures are mutually exclusive and have been clearly demarcated. This is further clear by the fact that in List III i.e. Concurrent List, no taxing entry is included except the entry of stamp duty and levying of fee in respect of any of the matters in List III but not including fees taken in any court.

72. *The Constitution Bench of this Court in Godfrey Phillips (India) Ltd. v. State of U.P. [Godfrey Phillips (India) Ltd. v. State of U.P., (2005) 2 SCC 515] had elaborately considered the entries in the Seventh Schedule to the Constitution of India. The following was laid down in paras 44 and 45 : (SCC pp. 539-40)*

> *"44. The Indian Constitution is unique in that it contains an exhaustive enumeration and division of legislative powers of taxation between the Centre and the States. This mutual exclusivity is reflected in Article 246(1) and has been noted in H.M. Seervai's Constitutional Law of India, 4th Edn., Vol. 1 at p. 166 in para 1A.25 where, after commenting on the problems created by the overlapping powers of taxation provided for in other countries with federal structures such as the United States, Canada and Australia, the learned author opined:*
>
> *'The lists contained in Schedule VII to the Government of India Act, 1935, provided for distinct and separate fields of taxation, and it is not without significance that the concurrent legislative list contains no entry relating to taxation but provides only for "fees" in respect of matters contained in the list but not including fees taken in any court. List I and*

List II of Schedule VII thus avoid overlapping powers of taxation and proceed on the basis of allocating adequate sources of taxation for the federation and the provinces, with the result that few problems of conflicting or competing taxing powers have arisen under the Government of India Act, 1935. This scheme of the legislative lists as regards taxation has been taken over by the Constitution of India with like beneficial results.'

45. This view has also been reiterated in Hoechst Pharmaceuticals Ltd. v. State of Bihar [Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45 : 1983 SCC (Tax) 248] : (SCC pp. 92-93, paras 75 & 76)

'75. A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation.

76. ... Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise.'

(See also State of W.B. v. Kesoram Industries Ltd. [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201])"

75. *The distribution of power between the Union and the States is done in a mutually exclusive manner as is reflected by precise and clear field of legislation as allocated under different list under the Seventh Schedule. No assumption of any overlapping between a subject allocated to the Union and the State arises. When the field of legislation falls in one or other in the Union or the State Lists, the legislation falling under the State entry has always been upheld. The scheme of distribution of legislative power between the Union and the States in the Constitution of India relies on the distribution of legislative power between the Federal Government and the Provincial Government as contained in the Seventh Schedule of the Government of India Act, 1935. The Government of India Act, 1935 has been referred to as the Constitution Act by the Privy Council…..*

(ii) Jindal Stainless Steel Vs State of Haryana (2017) 12 SCC 1 (Pr 89 & 90) (Pg. 2937-3557 Vol V)

89. *Dealing in particular with the scope and meaning of Article 304(b) of the Constitution on a true and correct interpretation Seervai in his treatise Constitutional Law of India (supra) sounded a note of caution and observed that if Article 304(b) was interpreted in a manner that would include levy of taxes as a restriction within the meaning of that Article, it would totally dislocate the scheme under our Constitution. The celebrated author, in our opinion, was right in saying so for the taxing power of the Union and the States are mutually exclusive. While Parliament cannot legislate on the subjects reserved for the States, the States cannot similarly*

trespass onto the taxing powers of the Union. If the constitutional scheme does not allow Parliament to usurp the taxing powers of the State Legislatures, such process of usurpation cannot also be permitted to take place in the garb of making the Union executive's concurrence an essential pre-requisite for any taxing legislation. The following passage from Seervai's book (Vol. 3, p. 2607) is in this regard instructive:

"24.43. Other considerations which show that "restrictions" do not include a tax.—... Thirdly, the whole scheme of taxation in our Constitution would be completely dislocated if Article 304(b) included a tax. The taxing powers of the Union and the States have been made mutually exclusive so that Parliament cannot deprive the States of their taxing powers as has happened in countries where the powers of taxation are concurrent. It would be surprising if the Union Legislature i.e. Parliament could not take away the taxing powers of the State Legislatures and yet it would be open to the Union Executive under Article 304(b) to deprive the State Legislatures of their taxing powers."

90. *To the same effect are the following observations made by Mathews, J. in G.K. Krishnan case [G.K. Krishnan v. State of T.N., (1975) 1 SCC 375] : (SCC p. 385, para 27)*

> *"27. ... Article 304(a) prohibits only imposition of a discriminatory tax. It is not clear from the article that a tax simpliciter [**Ed.** : The word "simpliciter" has been emphasised in original.] can be treated as a restriction on the freedom of internal trade. Article 304(a) is intended to prevent discrimination against imported goods by*

*imposing on them tax at a higher rate than that borne by goods produced in the State. A discriminatory tax against outside goods is not a tax simpliciter [**Ed.** : The word "simpliciter" has been emphasised in original.] but is a barrier to trade and commerce. Article 304 itself makes a distinction between tax and restriction. That apart, taxing powers of the Union and States are separate and mutually exclusive. It is rather strange that power to tax given to States, say, for instance under Entry 54 of List II to pass a law imposing tax on sale of goods should depend upon the goodwill of the Union Executive."*

(emphasis supplied)

Per Shivkirti Singh J (Pr 194),

194. *A tax is a burden or charge imposed by a competent legislature upon persons or property, to raise money for public purposes. [Cooley on Taxation, Vol. 1, 4th Edn., Ch. 2.] Important elements of a tax may be said to be first, that it is a compulsory exaction; secondly, it is payable to the State or to some public authority on its behalf; and thirdly, that it is an exaction for purposes of public interest. Our Constitution has demarcated the taxing powers between the Centre and States. Taxing power of the Union as well as the States resides in Article 245 read with Article 246 of the Indian Constitution. Article 246 of the Constitution, lays down that Parliament has exclusive power to make laws with respect to any matter enumerated in Union List (List I of Schedule VII). The States have complete power to make laws with respect to any matter enumerated in the State List (List II of Schedule VII) and both Parliament and State Legislature have power to make*

laws with respect to any matter enumerated in the Concurrent List (List III of Schedule VII). As per Article 265, no taxes shall be levied or collected except by the authority of law. It is important to note that taxation entries are to be found only in Lists I and II, indicating that in our constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There are no entries in the Concurrent List which give power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited field, it is liable to be struck down.

Per Bhanumathi (Pr 443-444,447)

443. *Under the Indian Constitution, the distribution of power with regard to tax has been done in a mutually exclusive manner and in great detail with reference to different aspects of property or goods. Considering an issue with regard to excise duty and sales tax payable by a manufacturer upon manufacture and sale in Province of Madras v. Boddu Paidanna and Sons [Province of Madras v. Boddu Paidanna and Sons, AIR 1942 FC 33 : (1942) 4 FCR 90 : 1942 SCC OnLine FC 7] , the Federal Court has held that : (SCC OnLine FC)*

> *"... If the taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be an overlapping in one sense; but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed, or given away. ... It is the fact of manufacture which*

attracts the duty, even though it may be collected later…. In the case of a sales tax, the liability to tax arises on the occasion of a sale, and a sale has no necessary connection with manufacture or production."

... there are two complementary powers, each expressed in precise and definite terms then there is no reason for extending the meaning of the expression "duties of excise" at the expense of the provincial power to levy taxes on sale of goods. (p. 101)

444. *Boddu Paidanna [Province of Madras v. Boddu Paidanna and Sons, AIR 1942 FC 33 : (1942) 4 FCR 90 : 1942 SCC OnLine FC 7] has been affirmed in Governor General in Council v. Province of Madras [Governor General in Council v. Province of Madras, AIR 1945 PC 98 : (1945) 58 LW 228 : 1945 SCC OnLine PC 3] in following words : (SCC OnLine PC)*

"... Here again their Lordships find themselves in complete accord with the reasoning and conclusions of the Federal Court in Boddu Paidanna case [Province of Madras v. Boddu Paidanna and Sons, AIR 1942 FC 33 : (1942) 4 FCR 90 : 1942 SCC OnLine FC 7] . The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time upon the occasion of its sale. But that method of collecting the tax is an accident

of administration, it is not of the essence of the duty of excise which is attracted by the manufacturer itself."

447. *As already noted, under our Constitution, there is no overlapping in the taxing power. The Constitution gives independent powers of taxation to the Union and the States. The taxing power of the Union and of the States are mutually exclusive. This avoids the difficulties which have arisen under other Federal Constitutions as rightly observed in Hoechst Pharmaceuticals Ltd. v. State of Bihar [Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45 : 1983 SCC (Tax) 248] and State of W.B. v. Kesoram Industries Ltd. [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201 : AIR 2005 SC 1646]*

(iii) State of West Bengal Vs. Kesoram Industries Ltd. (2004) 10 SCC 201 (Pr.31 & 129) (Pg. 2020-2255 Vol V)

31. *Article 245 of the Constitution is the fountain source of legislative power. It provides — subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State. The legislative field between Parliament and the legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, called the "Union List". Subject to the said power of Parliament, the legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the "Concurrent List". Subject to the abovesaid two, the legislature of any State has exclusive power to make laws with respect to*

any of the matters enumerated in List II, called the "State List". Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarised and restated by a Bench of three learned Judges of this Court on a review of the available decision in Hoechst Pharmaceuticals Ltd. v. State of Bihar [(1983) 4 SCC 45 : 1983 SCC (Tax) 248] . They are:

In a nutshell

129. *The relevant principles culled out from the preceding discussion are summarised as under:*

(1) In the scheme of the lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.

(2) Power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject-matter of two taxes by reference to the two lists is different. Simply because the methodology or

mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and the measure of a tax.

(3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by the legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax.

(4) Entries 52, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of the Union having enacted laws by reference to Entries 52, 53 and 54 in List I. It is for the Union to legislate and impose limitations on the States' otherwise plenary power to levy taxes on mineral rights or taxes on lands (including mineral-bearing lands) by reference to Entries 50 and 49 in List II, and lay down the limitations on the States' power, if it chooses to do so, and also to define the extent and sweep of such limitations.

(5) The entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non

obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

One — Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping?

Two — In which entry the impugned legislation falls by finding out the pith and substance of the legislation?

and

Three — Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

(6) "Land", the term as occurring in Entry 49 of List II, has a wide connotation. Land remains land though it may be subjected to different user. The nature of user of the land would not enable a piece of land being taken out of the meaning of land itself. Different uses to which the land is subjected or is capable of being subjected provide the basis for classifying land into different identifiable groups for the purpose of taxation. The nature of user of one piece of land would enable that piece of land being classified separately from another piece of land which is being subjected to another kind of user, though the two pieces of land are identically situated except for the difference in nature of user. The tax would remain a tax on land and would not become a tax on the nature of its user.

(7) To be a tax on land, the levy must have some direct and definite relationship with the land. So long as the tax is a tax on land by bearing

such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt any one of the well-known modes of determining the value of the land such as annual or capital value of the land or its productivity. The methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land.

(8) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods. Entry 23 in List II speaks of regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union. Entries 52 and 54 of List I are both qualified by the expression "declared by Parliament by law to be expedient in the public interest". A reading in juxtaposition shows that the declaration by Parliament must be for the "control of industries" in Entry 52 and "for regulation of mines or for mineral development" in

Entry 54. Such control, regulation or development must be "expedient in the public interest". Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming the subject-matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. The legislative power to tax by reference to entries in List II is plenary unless the entry itself makes the field "subject to" any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by the State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied by the State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

(9). The heads of taxation are clearly enumerated in Entries 83 to 92-B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248(2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II. It follows that taxes on lands and buildings in Entry 49 of List II cannot be levied by the Union. Taxes on mineral rights, a subject in Entry 50 of

List II, can also not be levied by the Union though as stated in Entry 50 itself the Union may impose limitations on the power of the State and such limitations, if any, imposed by Parliament by law relating to mineral development to that extent shall circumscribe the States' power to legislate. Power to tax mineral rights is with the States; the power to lay down limitations on exercise of such power, in the interest of regulation, development or control, as the case may be, is with the Union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional.

(iii) Godfrey Philips India Ltd Vs State of U.P. (2005) 2 SCC 515 (Pr 44 & 45) (Pg. 2267-2306 Vol V)

(iv) Hoechst Pharamceuticals Ltd. Vs State of Bihar (1983) 4 SCC 45 (Pr 73-77) (Pg. 790-849 Vol V)

C. <u>GENERAL ENTRIES AND TAXING ENTRIES ARE DEMARCATED</u>

5. In List I Entries 1 to 81 enumerate general subjects, as opposed to that entries 82-92 contain taxation entries. Similarly, entries 1 to 45 in List II enumerate general entries and entries 46 to 63 provide for taxation entries. There is a clear demarcation between tax and non- tax entries and power of taxation cannot be traced to the general entries. This principle is consistent with the principle that power to regulate does not include power to tax.

(i) State of Karnataka Vs State of Meghalaya (2023) 4 SCC 416 Pr 72,77-79,81,83,92, 149.5 &151(Pg. 3767-3848 Vol V)

72. *Under the Seventh Schedule to the Constitution, Lists I and II are divided essentially into two groups : One, relating to the power to legislate on specified subjects and the other, relating to the power to tax. In Hoechst Pharmaceuticals Ltd. v. State of Bihar [Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45 : 1983 SCC (Tax) 248] , it has been categorically held that taxation is considered as a distinct matter for purposes of legislative competence.*

77. *It was observed by this Court that while enacting Entry 42 of List I the Constitution-makers could have included the power to tax on inter-State sales instead of leaving that to be inferred by construction of Entry 42 of List I in light of the Commerce Clause under the American Constitution. While saying so in para 51, it was observed as follows : (M.P.V. Sundararamier case [M.P.V. Sundararamier & Co. v. State of A.P., AIR 1958 SC 468] , AIR pp. 493-94, para 51)*

> *"51. In List I Entries 1 to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law of Parliament. An examination of these two groups of entries shows that while the main subject of legislation figures in the first group, a tax in relation thereto is separately mentioned in the second. Thus, Entry 22 in List I is "Railways", and Entry 89 is "Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights". If Entry 22 is to be construed as*

involving taxes to be imposed, then Entry 89 would be superfluous. Entry 41 mentions "Trade and commerce with foreign countries; import and export across customs frontiers". If these expressions are to be interpreted as including duties to be levied in respect of that trade and commerce, then Entry 83 which is "Duties of customs including export duties" would be wholly redundant. Entries 43 and 44 relate to incorporation, regulation and winding up of corporations. Entry 85 provides separately for corporation tax. Turning to List II, Entries 1 to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes. Entry 18, for example, is "Land" and Entry 45 is "Land revenue". Entry 23 is "Regulation of mines" and Entry 50 is "Taxes on mineral rights". The above analysis—and it is not exhaustive of the entries in the Lists—leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248 clauses (1) and (2) and of Entry 97 in List I of the Constitution. Construing Entry 42 in the light of the above scheme, it is difficult to resist the conclusion that the power of Parliament to legislate on inter-State trade and commerce under Entry 42 does not include a power to impose a tax on sales in the course of such trade and commerce."

78. *On the above analysis, it was categorically inferred in M.P.V. Sundararamier case [M.P.V. Sundararamier & Co. v. State of A.P., AIR 1958 SC*

468] that taxation was not intended to be comprised in the main subject in which it might, on extended construction, be regarded as included but is to be treated as a distinct matter for the purpose of legislative competence. But while saying so, in the said case, reliance was placed on Article 286 of the Constitution and on the point, as to, whether, tax on inter-State sales was included within Entry 42 in List I, it was held in the negative, particularly, having regard to Article 286 of the Constitution. Consequently, it was opined that the State had power under Entry 54 of List II to impose a tax on inter-State sales but it would be subject to restrictions included under Article 286(2) of the Constitution.

79. *The aforesaid conclusion was summed up in para 55 in the following words : (M.P.V. Sundararamier case [M.P.V. Sundararamier & Co. v. State of A.P., AIR 1958 SC 468] , AIR p. 494)*

> *"55. To sum up : (1) Entry 54 is successor to Entry 48 in the Government of India Act, and it would be legitimate to construe it as including tax on inter-State sales, unless there is anything repugnant to it in the Constitution, and there is none such. (2) Under the scheme of the entries in the Lists, taxation is regarded as a distinct matter and is separately set out. (3) Article 286(2) proceeds on the basis that it is the States that have the power to enact laws imposing tax on inter-State sales. It is a fair inference to draw from these considerations that under Entry 54 in List II the States are competent to enact laws imposing tax on inter-State sales."*

Kesoram Industries *[State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201]*

81. *In this case, the controversy centred around Entries 52, 54 and 97 of List I and Entries 23, 49, 50 and 66 of List II and also the extended purport of the residuary power of legislation vested in the Union of India. The judgment dealt with the imposition of levies on coal, tea, brick-earth and minor minerals. While dealing with the aforesaid entries of List I and List II, reliance was placed on Hoechst Pharmaceuticals [Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45 : 1983 SCC (Tax) 248] on the interpretation of various entries in the three Lists. The amplitude of legislative power under a general entry vis-à-vis taxation entry was discussed in para 31 which is reproduced as under : (Kesoram Industries case [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201] , SCC pp. 281-82, para 31)*

> *"31. Article 245 of the Constitution is the fountain source of legislative power. It provides — subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State. The legislative field between Parliament and the legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, called the "Union List". Subject to the said power of Parliament, the legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the "Concurrent List". Subject to the abovesaid two, the legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the "State List". Under*

Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarised and restated by a Bench of three learned Judges of this Court on a review of the available decision in Hoechst Pharmaceuticals Ltd. v. State of Bihar [Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45 : 1983 SCC (Tax) 248] . They are:

(1) The various entries in the three Lists are not "powers" of legislation but "fields" of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of

legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.

(4) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeratio of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other

legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three Lists, List I has priority over Lists III and II and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I."

(emphasis in original)

83. *While examining the scheme underlying the Seventh Schedule to the Constitution, reliance was placed on M.P.V. Sundararamier [M.P.V. Sundararamier & Co. v. State of A.P., AIR 1958 SC 468] and it was observed as under : (Kesoram Industries case [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201] , SCC p. 499, para 74)*

"74. ... Taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is

treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248 clauses (1) and (2) and of Entry 97 in List I of the Constitution. Under the scheme of the entries in the lists, taxation is regarded as a distinct matter and is separately set out. (M.P.V. Sundararamier case [M.P.V. Sundararamier & Co. v. State of A.P., AIR 1958 SC 468] , AIR p. 494, paras 51 & 55)"

(emphasis in original)

92. *The aforesaid discussion could be summed up in a nutshell by culling out the following principles stated in Kesoram Industries [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201] : (SCC pp. 322-25, para 129)*

(1) In the scheme of the Lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.

(2) Power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject-matter of two taxes by reference to the two lists is different. Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two

taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and the measure of a tax.

(3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by the legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax.

(4) The entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

One — Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping?

Two — In which entry the impugned legislation falls by finding out the pith and substance of the legislation?

And

Three — Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

(5) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity.

(6) The heads of taxation are clearly enumerated in Entries 83 to 92-B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248(2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II.

(emphasis in original)

149.5. *On a close perusal of the entries in the three Lists of the Seventh Schedule to the Constitution, it is discerned that the Constitution has divided the topics of legislation into the following three broad categories:*

(i) Entries enabling laws to be made;

(ii) Entries enabling taxes to be imposed; and

(iii) Entries enabling fees and stamp duties to be collected.

Thus, the entries on levy of taxes are specifically mentioned. Therefore, per se, there cannot be a conflict of taxation power of the Union and the State. Thus, in substance the taxing power can be derived only from a specific taxing entry in an appropriate List in the Seventh Schedule. Such a power

has to be determined by the nature of the tax and not the measure or machinery set up by the statute.

151. *In view of the detailed discussion made above, we find that the dictum of this Court in M.P.V. Sundararamier [M.P.V. Sundararamier & Co. v. State of A.P., AIR 1958 SC 468] analysing the entries in Lists I and II dealing with various subjects of legislation and entries concerning taxation being separate and distinct must be borne in mind while interpreting the impugned Acts. That is the constitutional scheme. In this regard, we reiterate what has been observed in Hoechst Pharmaceuticals [Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45 : 1983 SCC (Tax) 248] , to the effect that taxation is considered to be a distinct matter for purposes of legislative competence and the power to tax cannot be deduced from the general legislative entry as an ancillary power. This is because, as already stated, the general subjects of legislation are dealt with in one group of entries and the power of taxation in a separate group. Also, a power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse legislation touching only upon incidental and ancillary matters. The power to levy tax cannot be considered to be an incidental and ancillary matter while interpreting an entry in the Lists concerning legislative competence of Parliament or legislature of any State to enact laws on the subjects mentioned in the entry. It is reiterated that taxation is not intended to be comprised in the main subject of an entry in the Lists but being a distinct matter for the purpose of*

legislative competence must be relatable to the specific entry dealing with taxation.

(ii) (2017) 12 SCC 1 Jindal Stainless Steel Vs State of Haryana(Pr 23, 119,120) (Pg. 2937-3557 Vol V)

23. *Interpreting Articles 245 and 246, a three-Judge Bench of this Court in Hoechst Pharmaceuticals Ltd. v. State of Bihar [Hoechst Pharmaceuticals Ltd. v. State of Bihar, (1983) 4 SCC 45 : 1983 SCC (Tax) 248] , held on a review of the available decisions that the Constitution effects a complete separation of taxing powers of the Union and the States under Article 246 and that there is no overlapping anywhere in the exercise of that power. The sources of taxation are clearly delineated, observed the Court. The Court also held that there is a distinction between general subjects of legislation and taxation for the former are dealt within one group while the latter is dealt with in a separate group. The result is that the power to tax cannot be deduced from a general legislative entry. That view was approved by a Constitution Bench of this Court in State of W.B. v. Kesoram Industries Ltd. [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201 : AIR 2005 SC 1646] The propositions stated in the two decisions must therefore be treated to be fairly well settled. Reference may also be made to the decision of this Court in State of Kerala v. Mar Appraem Kuri Co. Ltd. [State of Kerala v. Mar Appraem Kuri Co. Ltd., (2012) 7 SCC 106 : (2012) 4 SCC (Civ) 69] where this Court explained the sweep and purport of Articles 245 and 246 : (SCC p. 128, paras 35-38)*

"35. Article 245 deals with extent of laws [The matter between two asterisks has been emphasised in original.] made [The matter between two asterisks has been emphasised in original.] by Parliament and by the legislatures of States. The verb [The matter between two asterisks has been emphasised in original.] "made" [The matter between two asterisks has been emphasised in original.] , in past tense, finds place in the Head Note to Article 245. The verb [The matter between two asterisks has been emphasised in original.] "make" [The matter between two asterisks has been emphasised in original.] , in the present tense, exists in Article 245(1) whereas the verb "made", in the past tense, finds place in Article 245(2). While the legislative power is derived from Article 245, the entries in the Seventh Schedule of the Constitution only demarcate the legislative fields of the respective legislatures and do not confer legislative power as such. While Parliament has power to [The matter between two asterisks has been emphasised in original.] make [The matter between two asterisks has been emphasised in original.] laws for the whole or any part of the territory of India, the legislature of a State can make laws only for the State or part thereof. Thus, Article 245 inter alia indicates the extent of laws made by Parliament and by the State Legislatures.

36. Article 246 deals with the subject-matter of laws made by Parliament and by the legislatures of States. The verb [The matter between two asterisks has been emphasised in original.] "made" [The matter between two asterisks has been emphasised in original.] once

again finds place in the Head Note to Article 246. This article deals with [The matter between two double asterisks has been emphasised in original as well.] distribution of legislative powers [The matter between two double asterisks has been emphasised in original as well.] as between the Union and the State Legislatures, with reference to the different Lists in the Seventh Schedule. In short, Parliament has full and exclusive powers to legislate with respect to matters in List I and has also power to legislate with respect to matters in List III, whereas the State Legislatures, on the other hand, have exclusive power to legislate with respect to matters in List II, minus matters falling in List I and List III and have concurrent power with respect to matters in List III. (See Subrahmanyan Chettiar v. Muttuswami Goundan [Subrahmanyan Chettiar v. Muttuswami Goundan, 1940 SCC OnLine FC 9 : AIR 1941 FC 47] .)

37. Article 246, thus, provides for distribution, as beween Union and the States, of the legislative powers which are conferred by Article 245. Article 245 begins with the expression "subject to the provisions of this Constitution". Therefore, Article 246 must be read as "subject to other provisions of the Constitution".

38. For the purposes of this decision, the point which needs to be emphasised is that Article 245 deals with conferment of legislative powers whereas Article 246 provides for distribution of the legislative powers. Article 245 deals with extent of laws whereas Article 246 deals with distribution of legislative powers. In these articles, the Constitution

Framers have used the word "make" and not "commencement" which has a specific legal connotation. [See Section 3(13) of the General Clauses Act, 1897.]"

(emphasis supplied)

119. *We say so for two precise reasons. Firstly, because entries relating to trade and commerce by themselves are not sufficient to empower the legislature to levy taxes. The constitutional scheme is such that a taxing entry is distinct from other entries and a levy of tax is possible only if there is an entry which authorises the competent legislature to levy the same. This distinction has for long been maintained by the judicial pronouncements of this Court. We may in this regard refer to M.P.V. Sundararamier case [M.P.V. Sundararamier and Co. v. State of A.P., AIR 1958 SC 468 : (1958) 1 SCR 1422] where this Court has declared : (AIR pp. 493-94, paras 51 & 55)*

"51. In List I, Entries 1 to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law of Parliament. An examination of these two groups of Entries shows that while the main subject of legislation figures in the first group, a tax in relation thereto is separately mentioned in the second. Thus, Entry 22 in List I is "Railways", and Entry 89 is "Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights". If Entry 22 is to be construed as involving taxes to be imposed, then Entry 89 would be superfluous. Entry 41 mentions "Trade and commerce with foreign countries; import and export across customs frontiers". If these

expressions are to be interpreted as including duties to be levied in respect of that trade and commerce, then Entry 83 which is "Duties of customs including export duties" would be wholly redundant. Entries 43 and 44 relate to incorporation, regulation and winding up of corporations. Entry 85 provides separately for corporation tax. Turning to List II, Entries 1 to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes. Entry 18, for example, is "Land" and Entry 45 is "Land revenue". Entry 23 is "Regulation of mines" and Entry 50 is "Taxes on mineral rights". The above analysis—and it is not exhaustive of the Entries in the Lists—leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248, clauses (1) and (2) and of Entry 97 in List I of the Constitution. Construing Entry 42 in the light of the above scheme, it is difficult to resist the conclusion that the power of Parliament to legislate on inter-State trade and commerce under Entry 42 does not include a power to impose a tax on sales in the course of such trade and commerce.

***

55. To sum up : (1) Entry 54 is successor to Entry 48 in the Government of India Act, and it would be legitimate to construe it as including tax on inter-

State sales unless, there is anything repugnant to it in the Constitution, and there is none such. (2) Under the scheme of the Entries in the Lists, taxation is regarded as a distinct matter and is separately set out."

(emphasis supplied)

120. *The above pronouncement in M.P.V. Sundararamier case [M.P.V. Sundararamier and Co. v. State of A.P., AIR 1958 SC 468 : (1958) 1 SCR 1422] is, in our opinion, the correct enunciation of the legal position in the light whereof it is difficult to appreciate how entries relating to trade and commerce could be understood to be including levy of taxes also. That apart, once taxes are held to be outside Part XIII for the reason that we have already set out earlier, there is no way we can bring them back into that Part by a tenuous interpretation or understanding of Article 303. As explained by us earlier, Article 303 is an exception to Article 302, inasmuch as it limits the power conceded to Parliament under Article 302 to impose restrictions on freedom of trade, commerce and intercourse in public interest. The power exercised by Article 302 cannot be so exercised as to give preference to one State over another except under a situation covered by Article 303(2), namely, situation arising from scarcity of goods in any part of the territory of India. We cannot add to this Article any artificially extended meaning, the ingenuity of the Bar in coining any such interpretation notwithstanding.*

Per Shivkirti Singh J (Pr 237.5)

237.5. *Fifthly, the taxing entries are specifically provided for in the Seventh Schedule. It is settled principle under our Constitution that taxing power cannot be derived from a general entry. [M.P.V. Sundararamier and Co. v. State of A.P., AIR*

1958 SC 468 : (1958) 1 SCR 1422] In light of this principle the Constituent Assembly passed the Articles and Entries in the following timeline : on 13-6-1949 present Article 245 which was Article 217 (in the draft Constitution) was passed. On 2-9-1949 Entry 52 of the State List (which was Entry 61 in the draft Constitution) was passed. On 8-9-1949 Part XIII (which was Part X-A in the draft Constitution) was passed. This shows that our Constitution-Framers are presumed to be aware of the interplay of taxing provisions. Therefore, the only explicit limitation imposed on the taxing power of the State is Article 304(a) of the Constitution.

Per Bhanumathi (Pr 319)

319. *Tax has always been treated as a distinct entity and is kept on a pedestal separate from all the other legislative fields of the Seventh Schedule. It is worth repeating that the power of taxation is an inherent attribute of sovereignty emanating from necessity. As noted earlier, the exaction is not merely fundamental for existence of the State but also to support the welfare activities, therefore, it forms a precondition for exercise of other legislative power. The special status conferred on taxing statutes is evident from the following special provisions : Article 265 provides that no tax shall be levied or collected except by the authority of law; therefore there can be no levy or collection by exercise of executive power. Tax legislations are given the status of Money Bills under Articles 110 and 199 of the Constitution and, therefore, have a different laying procedure. They can originate only in the Lower Houses of Parliament and the State Legislature as per Articles 109 and 198. Being a Money Bill, all the revenue is sent to the*

Consolidated Fund and can only be taken out through Appropriation Bills (Articles 114 and 204).

Per Dr D Y Chandrachud J (Pr 621)

621. *The legislative entries in the Lists of the Seventh Schedule to the Constitution delineate general fields of legislation separately from taxing heads. In the Union List taxing entries are contained from Entries 82 to 92-C. The residual entry, Entry 97 deals with matters not enumerated in the State or Concurrent Lists, including any tax not mentioned in either of those Lists. In the State List taxes are comprised in Entries 46 to 62. Fees are dealt with under separate heads : in Entry 96 of List I, Entry 66 of List II and Entry 47 of List III.*

(iii) Hoechst Pharamceuticals Ltd. Vs State of Bihar (1983) 4 SCC 45 (Pr 76) (Pg. 790-849 Vol V)

(iv) M.P.V. Sundrarameir & Co. Vs State of A.P. AIR 1958 SC 468 (Pr 51 & 55) (Pg. 93-141 Vol V)

(* This has been approved and affirmed by 9 Judge Bench in Jindal Stainless Vs State of Haryana in para 119 & 120)

D. <u>WIDE INTERPETATION TO BE GIVEN TO ENTRIES</u>

6. It is also settled that the entries are fields of legislation and should be interpreted liberally and not in a narrow and pedantic manner.

(i) State of Karnataka Vs State of Meghalaya (2023) 4 SCC 416 (Pr 58, 62 & 149.1) (Pg. 3767-3848 Vol V)

149.1. *The entries in the different Lists should be read together without giving a narrow meaning to any of them. The powers of the Union and the State Legislatures are expressed in precise and definite terms. Hence, there can be*

no broader interpretation given to one entry than to the other. Even where an entry is worded in wide terms, it cannot be so interpreted as to negate or override another entry or make another entry meaningless. In case of an apparent conflict between different entries, it is the duty of the Court to reconcile them in the first instance.

(ii) State of Kerala Vs Wiliam Fernandes (2021) 11 SCC 705 (Pr 81) (Pg. 930-1000 Vol VA)

81. *This Court in the above case further held that the language used in the legislative entries in the Constitution must be interpreted in a broad way so as to give the widest amplitude of power to the legislature to legislate and not in a narrow and pedantic sense. The Constitution Bench judgment in D.G. Gose & Co. (Agents) (P) Ltd. v. State of Kerala [D.G. Gose & Co. (Agents) (P) Ltd. v. State of Kerala, (1980) 2 SCC 410] also needs to be noticed. The Kerala Building Tax Act, 1975 imposing tax on building under List II Entry 49 "taxes on lands and buildings" whereas List I Entry 86 "Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies."*

(iii) Ujagar Prints Vs Union of India (1989) 3 SCC 488 (Pr 48) (Pg. 302-344 Vol VA)

(v) Elel Hotels & Investments Ltd. Vs UOI (1989) 3 SCC 698 (Pr 14 & 17) (Pg. 367-377 Vol VA)

(vi) Express Hotels Pvt Ltd. Vs State of Gujarat (1989) 3 SCC 677 (Pr 15) (Pg. 345-366 Vol VA)

E. <u>INTERPRETATION SO AS NOT TO WHITTLE DOWN POWERS OF STATE :</u>

7. Federalism is a basic feature of the Constitution and the States are not mere appendages to the Union. In their sphere, the States have plenary powers and therefore courts should not give an interpretation that undermines the delicate distribution of power between the Union and the States provided in our Constitution.

(i) (2017) 12 SCC 1 Jindal Stainless Steel Vs State of Haryana (Pr 85-88) (Pg. 2937-3557 Vol V)

> ***85.*** *That brings us to the third contextual feature relevant to the interpretation of Part XIII. We have in the earlier part of this judgment referred to the decisions of this Court in Kuldip Nayar case [Kuldip Nayar v. Union of India, (2006) 7 SCC 1] and S.R. Bommai case [S.R. Bommai v. Union of India, (1994) 3 SCC 1] apart from the decisions of this Court in Special Reference No. 1 of 1964 [Powers, Privileges and Immunities of State Legislature, In re, Special Reference No. 1 of 1964, AIR 1965 SC 745 : (1965) 1 SCR 413] to hold that the Indian Constitution if not federal in the strict sense of the term is at least quasi-federal in character. That proposition has not been disputed even by the counsel for the assessees/dealers, and must be held to be fairly well settled. Equally well settled is the proposition that India's federal structure is one of the basic features of the Constitution. Relying upon the settled legal position Mr Mukul Rohatgi, Attorney General, followed by Mr Rakesh Dwivedi, Mr P.P. Rao, Mr A.K. Sinha and Mr Devdatt Kamath strenuously argued, and in our opinion rightly so that the provisions of our Constitution are aimed at*

vesting and maintaining with the States substantial and significant powers in the legislative and executive fields so that States enjoy their share of autonomy and sovereignty in their sphere of governance. This can in turn be done by interpreting the provisions of the Constitution including those found in Part XIII in a manner that preserves and promotes the federal set-up instead of diluting or undermining the same.

86. *In ITC Ltd. v. Agricultural Produce Market Committee [ITC Ltd. v. Agricultural Produce Market Committee, (2002) 9 SCC 232] this Court ruled that the Constitution of India must be interpreted in a manner that does not whittle down the powers of the State Legislature. An interpretation that supports and promotes federalism while upholding the Central supremacy as contemplated by some of the Articles must be preferred. To the same effect is the nine-Judge Bench decision of this Court in S.R. Bommai case [S.R. Bommai v. Union of India, (1994) 3 SCC 1] where this Court cautioned against adoption of an interpretation that has the effect of whittling down the powers reserved to the States. This Court said : (SCC pp. 216-17, para 276)*

> *"276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-à-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the*

States. It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Governments — be it the result of advances in technological/scientific fields or otherwise, and that even in USA the Centre has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the Court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle — the outcome of our own historical process and a recognition of the ground realities. This aspect has been dealt with elaborately by Shri M.C. Setalvad in his Tagore Law Lectures "Union and State Relations under the Indian Constitution" (Eastern Law House, Calcutta, 1974). The nature of the Indian federation with reference to its historical background, the distribution of legislative powers, financial and administrative relations, powers of taxation, provisions relating to trade, commerce and industry, have all been dealt with analytically. It is not possible — nor is it necessary — for the present purposes to refer to them. It is enough to note that our Constitution has certainly a bias towards Centre vis-à-vis the States [Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan [Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, AIR 1962 SC 1406 : (1963) 1 SCR 491]]. It is equally necessary to emphasise that courts should be careful not to upset the

delicately-crafted constitutional scheme by a process of interpretation."

(emphasis supplied)

87. *Reference may also be made to Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] where a Bench of thirteen Judges cautioned that the process of interpretation should not diminish or whittle down the provisions of the original contract upon which the federation was founded nor is it legitimate to impose by a process of judicial construction a new contract upon the federating States. To the same effect is the decision of this Court in International Tourist Corpn. v. State of Haryana [International Tourist Corpn. v. State of Haryana, (1981) 2 SCC 318 : 1981 SCC (Tax) 103] where this Court observed : (SCC pp. 325-26, para 6-A)*

"6-A. There is a patent fallacy in the submission of Shri Sorabjee. Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State Legislature must be clearly established. Entry 97 itself is specific in that a matter can be brought under that Entry only if it is not enumerated in List II or List III and in the case of a tax if it is not mentioned in either of those Lists. In a Federal Constitution like ours where there is a division of legislative subjects but the residuary power is vested in Parliament, such residuary power cannot be so expansively interpreted, as to whittle down the power of the State Legislature. That might affect and jeopardise the

very federal principle. The federal nature of the Constitution demands that an interpretation which would allow the exercise of legislative power by Parliament pursuant to the residuary powers vested in it to trench upon State legislation and which would thereby destroy or belittle State autonomy must be rejected."

(emphasis supplied)

88. *An approach which tends to dilute the federal character of our constitutional scheme must, therefore, be avoided and one that supports and promotes the concept of federalism preferred by the courts while interpreting the provisions of the Constitution.*

Per Dr D Y Chandrachud J (Pr 605, 612- 615)

G. Taxation and federalism

605. *In determining an interpretation that would bring a balance between the diverse strands of Part XIII, it is necessary for the Court equally to bear in mind the needs of the federal structure. The doctrine of the basic structure of the Indian Constitution has evolved to incorporate federalism as one of its integral features.*

612. *The evolution of constitutional doctrine in the five decades that have elapsed since the judgment in State of W.B. [State of W.B. v. Union of India, (1964) 1 SCR 371 : AIR 1963 SC 1241 [hereinafter 'West Bengal'].] indicates a recognition that the Constitution does indeed create a federal structure. Though the federal structure is asymmetric in the powers assigned to the States as compared to those assigned to the Centre this does not render the Constitution unitary. The Constitution is federal and in the*

working of a democratic Constitution, judicial review has stepped in to restore the balance despite the asymmetries of distribution and powers. The provisions of the Constitution which indicate a tilt in favour of the Union do not detract from the principle that in the fields which are assigned to them, the States are intended to be integral elements of a federal structure. They are sovereign within their competence, subject to constitutional limitations. This principle was set forth in the following terms in Special Reference No. 1 of 1964 [Powers, Privileges and Immunities of State Legislature, In re, Special Reference No. 1 of 1964, AIR 1965 SC 745 : (1965) 1 SCR 413] under Article 143 of the Constitution : (AIR p. 762, para 39)

"39. ... The supremacy of the Constitution is fundamental to the existence of a federal State in order to prevent either the legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of power which satisfies the particular requirements of States which are desirous of union, but not prepared to merge their individuality in a unity. This supremacy of the Constitution is protected by the authority of an independent judicial body to act as the interpreter of a scheme of distribution of powers. Nor is any change possible in the Constitution by the ordinary process of federal or State legislation [The Law of the Constitution by A.V. Dicey, p. 77.] ."

613. *The constitutional position is authoritatively set forth in the judgment in S.R. Bommai v. Union of India [S.R. Bommai v. Union of India, (1994) 3 SCC 1] . K. Ramaswami, J. construed federalism to be a basic feature, in the following observations : (SCC p. 205, para 247)*

"247. Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible. ... Neither the relative importance of the legislative entries in Schedule VII Lists I and II of the Constitution, nor the fiscal control by the Union per se are decisive to conclude that the Constitution is unitary. The respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The State qua the Constitution is federal in structure and independent in its exercise of legislative and executive powers. However, being the creature of the Constitution the State has no right to secede or claim sovereignty. Qua the Union, State is quasi-federal. Both are coordinating institutions and ought to exercise their respective powers with adjustment, understanding and accommodation to render socio-economic and political justice to the people, to preserve and elongate the constitutional goals including secularism."

B.P. Jeevan Reddy, J. *accepted the same doctrinal position in the following terms : (SCC pp. 216-17, para 276)*

"276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-à-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the

powers reserved to the States. ... must put the Court on guard against any conscious whittling down of the powers of the States."

P.B. Sawant, J. similarly held that though there are provisions under which the Centre has overriding powers over the States, our Constitution does create a federal structure. The States are sovereign in the fields which are left to them.

***614.** In ITC Ltd. v. Agricultural Produce Market Committee [ITC Ltd. v. Agricultural Produce Market Committee, (2002) 9 SCC 232] , this Court emphasised that in interpreting the text of the Constitution the Court should ensure, where the language permits that the powers of the State Legislatures are not diluted and that the principles of federalism are preserved. (See also in this context Kuldip Nayar v. Union of India [Kuldip Nayar v. Union of India, (2006) 7 SCC 1] .)*

***615.** The federal constitutional doctrine has consequences for interpretation. In interpreting the text of the Constitution, the Court must construe the text in a manner that would preserve the carefully crafted balance between the Union and the States. Where the language of the text permits, the effort of constitutional interpretation should be to ensure that the States are not subordinated to the Union in areas reserved to them. Yet it is equally a matter of constitutional doctrine that here a particular provision [such as the proviso to Article 304(b)] imposes a specific requirement (assent of the President before a Bill is introduced in the State Legislature) which subjects the legislative power of the States to constitutional limitations, it would not be open to the Court to ignore the*

plain meaning and effect of such a provision. The text of the Constitution cannot be subverted on the basis of an abstract notion or hypothesis. While creating a federal structure, the draftsmen of the Constitution were conscious of the need for preserving a political and economic Union. If, as a part of that constitutional scheme, the text of the document has incorporated specific provisions, they must be given their plain meaning and effect. It would not be open to the Court to dilute the meaning of the text on the basis of a priori considerations.

(ii) (1994) 3 SCC 1 S.R. Bommai Vs. Union of India (Pr 4, 20,96-99,169,247,276)

(iii) (2002) 9 SCC 232 ITC Vs Agricultural Produce Market Committee (Pr 59) (Pg. 417-537 Vol VA)

59. *The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy as contemplated by some of its articles.*

(iv) (2004) 10 SCC 201 State of West Bengal Vs. Kesoram Industries Ltd. (Pr 50 and 139) (Pg. 2020-2255 Vol V)

50. *Yet another angle which the Constitutional Courts would advisedly do better to keep in view while dealing with a tax legislation, in the light of the purported conflict between the powers of the Union and the State to legislate, which was stated forcefully and which was logically based on an analytical examination of the constitutional scheme by Jeevan Reddy, J. in S.R. Bommai v. Union of India [(1994) 3 SCC 1] , may be touched. Our*

Constitution has a federal structure. Several provisions of the Constitution unmistakably show that the Founding Fathers intended to create a strong Centre. The historical background relevant at the time of the framing of the Constitution warranted a strong Centre naturally and necessarily. This bias of the framers towards the Centre is found reflected in the distribution of legislative heads between the Centre and the States. More important heads of legislation are placed in List I. In the Concurrent List the parliamentary enactment is given primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. The residuary power to legislate is with the Centre. By the Forty-second Amendment a few of the entries in List II were omitted or transferred to other lists. Articles 249 to 252 further demonstrate the primacy of Parliament, allowing it liberty to encroach on the field meant exclusively for the State legislation though subject to certain conditions being satisfied. In the matter of finances, the States appear to have been placed in a less favourable position. True, the Centre has been given more powers but the same is accompanied by certain additional responsibilities as well. The Constitution is an organic living document. Its outlook and expression as perceived and expressed by the interpreters of the Constitution must be dynamic and keep pace with the changing times. Though the basics and fundamentals of the Constitution remain unalterable, the interpretation of the flexible provisions of the Constitution can be accompanied by dynamism and lean, in case of conflict, in favour of the weaker or the one who is more needy. Several taxes are collected by the

Centre and allocation of revenue is made to States from time to time. The Centre consuming the lion's share of revenue has attracted a good amount of criticism at the hands of the States and financial experts. The interpretation of entries can afford to strike a balance, or at least try to remove imbalance, so far as it can. Any conscious whittling down of the powers of the State can be guarded against by the courts.

> *"Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle — the outcome of our own historical process and a recognition of the ground realities." (SCC p. 217, para 276)*

Quoting from Setalvad, M.C.: Tagore Law Lectures, "Union and State Relations under the Indian Constitution" (Eastern Law House, Calcutta, 1974), Jeevan Reddy, J. observed: (SCC p. 217, para 276)

> *"It is enough to note that our Constitution has certainly a bias towards Centre vis-à-vis the States…. It is equally necessary to emphasise that courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation."*

139. *It is true that once a Central legislation declares regulation of mines and mineral development by law to be expedient in the public interest, the legislation relating to regulation of mines and development of minerals shall fall within the sweep of Entry 54 of List I. The entry has to be liberally and widely interpreted. Yet it cannot be lost sight of that the entry itself employs an expression "to the extent to which such regulation and development under the control of Union is declared by Parliament by law"*

as qualifying the preceding expression stating the subject "regulation of mines and mineral development". Section 2 of the MMRD Act too qualifies the relevant declaration by suffixing to it the expression "to the extent hereinafter provided". Section 15 of the Act has excepted and preserved the power of State Governments to make rules in respect of minor minerals. The qualifying words used in Entry 54 of List I and in Section 2 of the MMRD Act contain an inbuilt indication that in spite of an inclination on the part of the courts to be liberal in assigning a wide meaning to the scope of the said provisions, the boundaries of limitation are there and the expanse of these provisions cannot be so stretched as to strike at the State legislations which are adequately accommodated within the field of an entry in List II, which too shall have to be meaningfully and liberally construed.

F. <u>JUDICIAL REVIEW QUA LAWS OF TAXATION</u>

9. Apart from that fact that all laws enjoy the presumption of constitutionality, the legislature enjoy wider and greater latitude in the field of taxation keeping in view the inherent fiscal complexities and the diverse elements that go into making of such laws.

(i) (2017) 12 SCC 1 Jindal Stainless Steel Vs State of Haryana (Pr 140 -143) (Pg. 2937-3557 Vol V)

140. *The legal position as to the approach that courts adopt towards fiscal measures while examining their constitutional validity is fairly well settled by a long line of decisions of this Court. The law on the subject is so well settled that it calls for no elaborate discussion of the same. Courts have almost universally accepted the principle that keeping in view the inherent complexities of fiscal*

adjustments and the diverse elements and inputs that go into such exercise a greater latitude is due to the legislature in taxation related legislations. It is unnecessary to refer to all the decisions in which this Court has conceded such play at the joints to the legislature. Reference to some of the decisions of this Court should in our opinion suffice. In Mafatlal Industries Ltd. v. Union of India [Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536] in a separate but concurring opinion Paripoornan, J. held : (SCC pp. 740-41, para 343)

> *"343. ... In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters. (See Collector of Customs v. Nathella Sampathu Chetty [Collector of Customs v. Nathella Sampathu Chetty, AIR 1962 SC 316 : (1962) 1 Cri LJ 364] ; Khyerbari Tea Co. Ltd. v. State of Assam [Khyerbari Tea Co. Ltd. v. State of Assam, AIR 1964 SC 925 : (1964) 5 SCR 975] ; R.K. Garg v. Union of India [R.K. Garg v. Union of India, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] ; Gauri Shanker v. Union of India [Gauri Shanker v. Union of India, (1994) 6 SCC 349] and Union of India v. A. Sanyasi Rao [Union of India v. A. Sanyasi Rao, (1996) 3 SCC 465] , etc.)"*

141. *Reference may also be made to the Constitution Bench decision of this Court in Khandige Sham Bhat v. Agricultural ITO [Khandige Sham Bhat v. Agricultural ITO, AIR 1963 SC 591] , where this Court declared that a law may facially appear to be non-discriminatory and yet its impact on persons and property similarly*

situate may operate unequally in which event, the law would offend the equity clause. This implies that facial equality is not the only test for determining whether the law is constitutionally valid. What is equally important is the impact of the legislation. This Court held : (AIR pp. 594-95, para 7)

> *"7. ... Though a law ex facie appears to treat all that fall within a class alike, if in effect it operates unevenly on persons or property similarly situated, it may be said that the law offends the equality clause. It will then be the duty of the court to scrutinise the effect of the law carefully to ascertain its real impact on the persons or property similarly situated. Conversely, a law may treat persons who appear to be similarly situate differently; but on investigation they may be found not to be similarly situate. To state it differently, it is not the phraseology of a statute that governs the situation but the effect of the law that is decisive. If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstance arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine vide Purshottam Govindji Halai v. B.M. Desai [Purshottam Govindji Halai v. B.M. Desai, AIR 1956 SC 20 : 1956 Cri LJ 129] , and Kunnathat Thatehunni Moopil Nair v. State of Kerala [Kunnathat Thatehunni Moopil Nair v. State of Kerala, AIR 1961 SC 552 : (1961) 3 SCR 77] . But in the application of the principles, the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the legislature in the matter of*

classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways."

142. *In V. Guruviah Naidu and Sons v. State of T.N. [V. Guruviah Naidu and Sons v. State of T.N., (1977) 1 SCC 234 : 1977 SCC (Tax) 172] the Court was examining whether levy of sales tax on hides and skins from within or outside the State was discriminatory and offensive to Article 304(a) of the Constitution. Repelling the contention that it was violative of Article 304(a), this Court held : (SCC pp. 239-40, paras 8-9)*

"8. None of the circumstances which led this Court to strike down the relevant provisions in the abovementioned two cases exists in the present case. In Mehtab case [Firm A.T.B. Mehtab Majid and Co. v. State of Madras, AIR 1963 SC 928 : 1963 Supp (2) SCR 435 : (1963) 14 STC 355] discrimination was found to exist because of the fact that tax was being levied at the same rate in respect of both raw hides and skins as well as dressed hides and skins, even though the price of dressed hides and skins was much higher. The position was worse in Hajee Abdul Shukoor [A. Hajee Abdul Shukoor and Co. v. State of Madras, AIR 1964 SC 1729] because in that case the sales tax was found to have been charged at a higher rate in respect of dressed hides and skins than that on the sale of raw hides and skins in spite of the fact that the price of dressed hides and skins was higher than that of raw hides and skins. The position in the present case is materially different, for here the rate of sales tax for raw

hides and skins is 3 per cent, while that for dressed hides and skins is 11/2 per cent. It is plain that the lower rate of tax in the case of dressed hides and skins has been prescribed with a view to offset the difference between the higher price of dressed hides and skins and the lower price of raw hides and skins. No material has been brought on the record to show that despite the lower rate of sales tax for dressed hides and skins, the imported hides and skins are being subjected to discrimination. The onus to show that there would be discrimination between the hides and skins which were purchased locally in the raw form and thereafter tanned and the hides and skins which were imported from other States was upon the appellant. The appellant, we find, has failed to discharge such onus.

9. Article 304(a) does not prevent levy of tax on goods; what it prohibits is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The object is to prevent discrimination against imported goods by imposing tax on such goods at a rate higher than that borne by local goods since the difference between the two rates would constitute a tariff wall or fiscal barrier and thus impede the free flow of inter-State trade and commerce. The question as to when the levy of tax would constitute discrimination would depend upon a variety of factors including the rate of tax and the item of goods in respect of the sale of which it is levied. The scheme of Items 7(a) and 7(b) of the Second Schedule to the State Act is that in case of raw hides and skins which are purchased locally in the State, the levy of tax would be at the rate of 3 per cent at the point of

last purchase in the State. When those locally purchased raw hides and skins are tanned and are sold locally as dressed hides and skins, no levy would be made on such sales as those hides and skins have already been subjected to local tax at the rate of 3 per cent when they were purchased in raw form. As against that, in the case of hides and skins which have been imported from other States in raw form and are thereafter tanned and then sold inside the State as dressed hides and skins, the levy of the tax is at the rate of 11/2 per cent at the point of first sale in the State of the dressed hides and skins. This levy cannot be considered to be discriminatory as it takes into account the higher price of dressed hides and skins compared to the price of raw hides and skins. It also further takes note of the fact that no tax under the State Act has been paid in respect of those hides and skins. The legislature, it seems, calculated the price of hides and skins in dressed condition to be double the price of such hides and skins in raw state. To obviate and prevent any discrimination or differential treatment in the matter of levy of tax, the legislature therefore prescribed a rate of tax for sale of dressed hides and skins which was half of that levied under Item 7(a) in respect of raw hides and skins."

(emphasis supplied)

143. *In Malwa Bus Service (P) Ltd. v. State of Punjab [Malwa Bus Service (P) Ltd. v. State of Punjab, (1983) 3 SCC 237] this Court held that a difference in the rate of tax by itself cannot be considered to be discriminatory and offensive to the equality clause : (SCC pp. 251-52, para 21)*

"21. The next submission urged on behalf of the petitioners is based on Article 14 of the Constitution. It is contended by the petitioners that the Act by levying Rs 35,000 as the annual tax on a motor vehicle used as a stage carriage but only Rs 1500 per year on a motor vehicle used as a goods carrier suffers from the vice of hostile discrimination and is, therefore, liable to be struck down. There is no dispute that even a fiscal legislation is subject to Article 14 of the Constitution. But it is well settled that a legislature in order to tax some need not tax all. It can adopt a reasonable classification of persons and things in imposing tax liabilities. A law of taxation cannot be termed as being discriminatory because different rates of taxation are prescribed in respect of different items, provided it is possible to hold that the said items belong to distinct and separate groups and that there is a reasonable nexus between the classification and the object to be achieved by the imposition of different rates of taxation. The mere fact that a tax falls more heavily on certain goods or persons may not result in its invalidity. As observed by this Court in Khandige Sham Bhat v. Agricultural ITO [Khandige Sham Bhat v. Agricultural ITO, AIR 1963 SC 591] in respect of taxation laws, the power of legislature to classify goods, things or persons are necessarily wide and flexible so as to enable it to adjust its system of taxation in all proper and reasonable ways. The courts lean more readily in favour of upholding the constitutionality of a taxing law in view of the complexities involved in the social and economic life of the community. It is one of the duties of a modern legislature to utilise the measures of taxation introduced by it for the purpose of achieving maximum social good and one has to trust the wisdom of the

legislature in this regard. Unless the fiscal law in question is manifestly discriminatory the court should refrain from striking it down on the ground of discrimination. These are some of the broad principles laid down by this Court in several of its decisions and it is unnecessary to burden this judgment with citations. Applying these principles it is seen that stage carriages which travel on an average of about 260 km every day on a specified route or routes with an almost assured quantum of traffic which invariably is overcrowded belong to a class distinct and separate from public carriers which carry goods on undefined routes. Moreover the public carriers may not be operating every day in the State. There are also other economic considerations which distinguish stage carriages and public carriers from each other. The amount of wear and tear caused to the roads by any class of motor vehicles may not always be a determining factor in classifying motor vehicles for purposes of taxation. The reasons given by this Court in G.K. Krishnan case [G.K. Krishnan v. State of T.N., (1975) 1 SCC 375] for upholding the classification made between stage carriages and contract carriages both of which are engaged in carrying passengers are not relevant to the case of a classification made between stage carriages which carry passengers and public carriers which transport goods. The petitioners have not placed before the court sufficient material to hold that the impugned levy suffers from the vice of discrimination on the above ground."

(ii) Vivek Narayan Sharma Vs UOI (2023) 3 SCC 1 (Pr 223-228) (Pg. 1001-1183 Vol VA)

223. *We may gainfully refer to the following observations of the seven-Judge Bench in Prag Ice & Oil Mills v. Union of India [Prag Ice & Oil Mills v. Union of India, (1978) 3 SCC 459] : (SCC p. 478, para 24)*

> *"24. We have listened to long arguments directed at showing us that producers and sellers of oil in various parts of the country will suffer so that they would give up producing or dealing in mustard oil. It was urged that this would, quite naturally, have its repercussions on consumers for whom mustard oil will become even more scarce than ever ultimately. We do not think that it is the function of this Court or of any Court to sit in judgment over such matters of economic policy as must necessarily be left to the Government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts."*
>
> *(emphasis supplied)*

224. *In R.K. Garg v. Union of India [R.K. Garg v. Union of India, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] , another Constitution Bench of this Court observed thus : (SCC p. 690, para 8)*

> *"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit*

of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved."

(emphasis supplied)

225. *Again, the Constitution Bench of this Court in Shri Sitaram Sugar Co. Ltd. v. Union of India [Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223] , observed thus : (SCC pp. 255-56, para 57)*

"57. Judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J. in Gupta Sugar Works [Gupta Sugar Works v. State of U.P., 1987 Supp SCC 476] : (SCC p. 479, para 4)

'4. ... the court does not act like a chartered accountant nor acts like an income tax officer. The court is not concerned with any

individual case or any particular problem. The court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination.' "

(emphasis supplied)

226. *Recently, this Court in Small Scale Industrial Manufactures Assn. v. Union of India [Small Scale Industrial Manufactures Assn. v. Union of India, (2021) 8 SCC 511] had an occasion to consider the issue with regard to scope of judicial review of economic and fiscal regulatory measures. This Court observed thus : (SCC p. 570, paras 69-72)*

"69. What is best in the national economy and in what manner and to what extent the financial reliefs/packages be formulated, offered and implemented is ultimately to be decided by the Government and RBI on the aid and advice of the experts. The same is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review. Merely because some class/sector may not be agreeable and/or satisfied with such packages/policy decisions, the courts, in exercise of the power of judicial review, do not ordinarily interfere with the policy decisions, unless such policy could be faulted on the ground of mala fides, arbitrariness, unfairness, etc.

70. There are matters regarding which the Judges and the lawyers of the courts can hardly be expected to have much knowledge by reasons of their training and expertise. Economic and fiscal regulatory

measures are a field where Judges should encroach upon very warily as Judges are not experts in these matters.

71. The correctness of the reasons which prompted the Government in decision taking one course of action instead of another is not a matter of concern in judicial review and the court is not the appropriate forum for such investigation. The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering of the points from different angles. In assessing the propriety of the decision of the Government the court cannot interfere even if a second view is possible from that of the Government.

72. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review. The scope of judicial review of the governmental policy is now well defined. The courts do not and cannot act as an appellate authority examining the correctness, stability and appropriateness of a policy, nor are the courts advisers to the executives on matters of policy which the executives are entitled to formulate."

227. *This Court in Small Scale Industrial Manufactures Assn. [Small Scale Industrial Manufactures Assn. v. Union of India, (2021) 8 SCC 511] observed that the Court would not interfere with any opinion formed by the Government if it is based on the relevant facts and circumstances or based on expert's advice. The Court would be entitled to interfere only when it is found that the action of the executive is arbitrary and violative of any constitutional, statutory or other provisions of law. It has been held that when the Government forms its policy, it is*

based on a number of circumstances and it is also based on expert's opinion, which must not be interfered with, except on the ground of palpable arbitrariness. It is more than settled that the Court gives a large leeway to the executive and the legislature in matters of economic policy. A reference in this respect could be made to the judgments of this Court in P.T.R. Exports (Madras) (P) Ltd. v. Union of India [P.T.R. Exports (Madras) (P) Ltd. v. Union of India, (1996) 5 SCC 268] and Bajaj Hindustan Ltd. v. Sir Shadi Lal Enterprises Ltd. [Bajaj Hindustan Ltd. v. Sir Shadi Lal Enterprises Ltd., (2011) 1 SCC 640]

228. *It is not the function of this Court or of any other Court to sit in judgment over such matters of economic policy and they must necessarily be left to the Government of the day to decide since in such matters with regard to the prediction of ultimate results, even the experts can seriously err and doubtlessly differ. The Courts can certainly not be expected to decide them without even the aid of experts.*

(iii) State of West Bengal Vs. Kesoram Industries Ltd. (2004) 10 SCC 201 (Pr 32) (Pg. 2020-2255 Vol V)

Tax legislation

32. *The abovestated are general principles. Legislations in the field of taxation and economic activities need special consideration and are to be viewed with larger flexibility in approach. Observations of the Constitution Bench in R.K. Garg v. Union of India [(1981) 4 SCC 675 : 1982 SCC (Tax) 30 : AIR 1981 SC 2138] are apposite, wherein this Court has emphasised a greater latitude — like play in the joints — being allowed to the legislature because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula. In this field the court*

should feel more inclined to give judicial deference to legislative judgment. Their Lordships quoted with approval the following statement of Frankfurter, J. in Morey v. Doud [354 US 457 : 1 L Ed 2d 1485 (1957)] :

"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."

Their Lordships further observed that the courts ought to adopt a pragmatic approach in solving problems rather than measuring the propositions by abstract symmetry. The exact wisdom and nice adaptations of remedies may not be possible. Even crudities and inequities have to be accommodated in complicated tax and economic legislations.

R.K. Garg Vs Union Of India (1981) 4 SCC 675 (Pr 7 & 8) (Pg. 730-771 Vol V)

G. <u>MEASURE OF LEVY NOT DETERMINATIVE OF NATURE OF TAX</u>

9. The measure of levy does not determine the nature of the tax. The subject of tax is different from the measure of tax and the Legislature enjoys wide discretion in determining the measure of levy.

(i). State of West Bengal Vs. Kesoram Industries Ltd. (2004) 10 SCC 201 (Pr 35-38)

Taxation — measure of levy not suggestive of nature of tax — illustrative cases

35. *In Ralla Ram [1948 FCR 207 : AIR 1949 FC 81] the Federal Court held that a tax on buildings under Section 3 of the Punjab Urban Immovable Property Tax Act, 1940, measured by a percentage of the annual value of such building, remained a tax on buildings even though the measure of annual value of a building was also adopted as a standard for determining income from property under the Income Tax Act. The same standard was adopted as a measure for the two levies, yet the levies remained separate imposts by virtue of their distinctive nature. The measure adopted, it was held, could not be identified with the nature of the tax levied.*

36. *In Sainik Motors v. State of Rajasthan [AIR 1961 SC 1480 : (1962) 1 SCR 517] a tax on passengers and goods was assessed as a rate on the fares and freights payable by the owners of the motor vehicles. The contention that the levy was a tax upon income and not upon passengers and goods was repelled by this Court. The Court pointed out that though the measure of the tax is furnished by the fares and freights, it does not cease to be a tax on passengers and goods.*

37. *In D.G. Gose & Co. (Agents) (P) Ltd. v. State of Kerala [(1980) 2 SCC 410] the Court examined the different modes available to the legislature for measuring the levy of tax on buildings. The Court upheld the provision made by the legislature linking the levy with the annual value of the building and prescribing a uniform formula for determining its capital value and for calculating the tax.*

38. *In Hingir Rampur Coal Co. Ltd. v. State of Orissa [AIR 1961 SC 459 : (1961) 2 SCR 537] the form in which the levy was imposed was held to be an impermissible test for defining in itself the character of the levy. It was argued that the method of determining the rate of levy was by reference to the minerals*

produced by the mines and, therefore, it was levy in the nature of a duty of excise. This Court held that the method thus adopted may be relevant in considering the character of the impost but its effect must be weighed along with and in the light of the other relevant circumstances. Referring to Bombay Tyre International Ltd. [(1983) 4 SCC 210 : 1983 SCC (Tax) 315 and (1984) 1 SCC 467 : 1984 SCC (Tax) 17 (reasoned order)] the Court further held that it is clear that when enacting a measure to serve as a standard for assessing the levy, the legislature need not contour it along lines which spell out the character of the levy itself. A broader-based standard of reference is permissible to be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy.

(ii). Federation of Hotel & Restaurant Vs UOI (1989) 3 SCC 634 (Pr 43) (Pg. 1073-1116 Vol V)

43. *The subject of a tax is different from the measure of the levy. The measure of the tax is not determinative of its essential character or of the competence of the legislature. In Sainik Motors v. State of Rajasthan [AIR 1961 SC 1480 : (1962) 1 SCR 517] , the provisions of a State law levying a tax on passengers and goods under Entry 56 of List I were assailed on the ground that the State was, in the guise of taxing passengers and goods, in substance and reality taxing the income of the stage carriage operators or, at any rate, was taxing the "fares and freights", both outside of its powers. It was pointed out that the operators were required to pay the tax calculated at a rate related to the value of the fare and freight.*

Repelling the contention, Hidayatullah, J., speaking for the court said: (SCR p. 525)

> *"We do not agree that the Act, in its pith and substance, lays the tax upon income and not upon passengers and goods. Section 3, in terms, speaks of the charge of the tax 'in respect of all passengers carried and goods transported by motor vehicles', and though the measure of the tax is furnished by the amount of fare and freight charged, it does not cease to be a tax on passengers and goods."*

Indeed, reference may be made to the following statement in Encyclopaedia Britannica (Vol. 14 p. 459) on "Luxury Tax":

> *"A different approach to luxury taxation, much less frequently found, seeks to single out the luxury component of spending on a given object rather than taxing specified goods and services as luxuries. One example of this is the Massachusetts 5 per cent tax on restaurant meal of $. 1 or more...."*

(emphasis supplied)

(iii). Hingir Rampur Vs State of Orissa AIR 1961 SC 459 (Pr 22) (Pg. 142-174 Vol V)

H. <u>THE LEGISLATURE ENJOYS WIDE LATTITUDE IN MATTERS OF TAXATION AND DOES NOT HAVE TO TAX ALL IN ORDER TO TAX ONE OR FEW :</u>

(i). **Federation of Hotel & Restaurant Assn. of India v. Union of India, (1989) 3 SCC 634 (Pr 46-53) (Pg. 1073-1116 Vol V)**

46. *It is now well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go*

into the formulation of a fiscal policy legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc., for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity  *within each group, the law would not be discriminatory. Decisions of this Court on the matter have permitted the legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes.*

(ii). **Vivian Joseph Ferreira Vs Municipal Corpn of Greater Bombay (1972) 1 SCC 70 Pr 14 & 15 (Pg. 101-118 Vol VB)**

(iii). Khyerbari Tea Co Vs State of Assam AIR 1964 SC 925 (Pr 44) (Pg. 242-277 Vol V)

(iv). N. Venugopala Ravi Varma Rajah v. Union of India, (1969) 1 SCC 681 (Pr 14 & 15) (Pg.42-49 Vol VC)

Dated : 26.02.2024

Filed by

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IN THE SUPREME COURT OF INDIA

Transfer Petition (Civil) No. 613 of 2009
Hindalco Industries Limited v. State of U.P.
and
Transfer Petition (Civil) No. 626 of 2009
Kanoria Chemicals and Industries Limited v. State of U.P.

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Kanoria Chemicals and Industries Limited v. State of U.P.

Written Submissions of Mr. Vijay Hansaria, Sr. Advocate on behalf of Shaktinagar Special Area Development Authority

I. Legislative Scheme under the Constitution

1. The Constitution of India has adopted a federal structure under which the Union has been conferred **exclusive** power to make laws on the subjects enumerated in List I of the Seventh Schedule, the States have the **exclusive** power to make laws on the subjects enumerated in List II. On the subjects enumerated in List III, both the Union and the State have **concurrent** jurisdiction. Thus, the Union has no power to legislate on subjects enumerated in List II, and the States have no power on the subjects enumerated in List I.
2. The Entries of the 7th Schedule to the Constitution relevant for the present case are the following:

List I

a. Entry 52 : Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.
b. Entry 53 : Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.
c. Entry 54 : Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is

declared by Parliament by law to be expedient in the public interest.

List II

d. Entry 5 : Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

e. Entry 23 : Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

f. Entry 45 : Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

g. Entry 49 : Taxes on lands and buildings.

h. Entry 50 : Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

II. Provisions under challenge

3. That in the present case, the petitioners have challenged the validity of the section 35 of the Uttar Pradesh Special Area Development Authorities Act, 1986[1]

[1] Convenient Compilation Volume IV Page 3864.

(hereinafter referred to as SADA Act) which empowers the Special Area Development Authority (hereinafter referred to as Development Authority) constituted under the said Act and reads thus:

> "S. 35. *Cess on mineral rights.* (1) Subject to any limitations imposed by Parliament by law relating to mineral development, the Authority may impose a **cess on mineral rights** at such rate as may be prescribed.
>
> (2) Any cess imposed under this section shall be subject to confirmation by the State Government and shall be leviable with effect from such date as may be appointed by the State Government in this behalf."

4. In exercise of the said power, the Governor of Uttar Pradesh framed Shaktinagar Special Area Development Authority (Cess on Mineral Rights) Rules, 1997 (hereinafter referred to as Cess Rules), whereby Shaktinagar Special Area Development Authority (hereinafter referred to as Shaktinagar Development Authority) was empowered to impose "a cess on mineral rights" on the 'coal, 'stone', 'coarse sand' and 'sand' "on the basis of per ton or per cubic metre of mineral extracted at the prescribed rates."

5. The State of U.P. enacted SADA Act to provide for establishment of Special Area Development Authorities for the planned development of certain areas of Uttar Pradesh and for the matters ancillary thereto. It may be relevant to note some of the statutory provisions of the Act as hereunder[2]:

    a. Section 2(a) defines 'authority' to mean Special Area Development Authority constituted under section 4.

[2] Convenient Compilation Volume IV Page 3864.

b. Section 2(b) defines ‘amenities’ includes road and streets, water and electricity supply, street lighting, sewage, public works etc.

c. Section 2(d) defines ‘development’ to mean planned development of any area by carrying out building, engineering, **mining** or other operations.

d. Section 3 empowers the State to declare any area to be a ‘Special Development Area’. It is not in dispute that ‘Shaktinagar’ has been declared as a Special Development Area.

e. Section 4 empowers the State to constitute a Special Area Development Authority and the State Government in exercise of the said power has constituted Shaktinagar Development Authority.

f. Under section 6, the functions of SADA includes planned development of the Special Development Area; acquire, hold, develop, manage and dispose of land and property to implement the plan; carry out building, engineering, **mining operations** and other constructions activity; provide utilities and amenities such as, water, electricity, drainage and sewage; and provide municipal management as is done by Nagar Mahapalika.

g. Section 7 empowers SADA providing that SADA shall have powers of Nagar Mahapalika under the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959 for the purpose of Municipal administration and for the purpose of taxation.

h. Chapter III (Sections 8 to 12) contains provision for preparation of master plan for Special Development Area.

i. Chapter IV (Section 13 to 15) contains provisions for development of lands in the Special Development Area. Under section 13(1), no development of

land can be undertaken by any person including Government or public sector undertaking unless "permission for such development have been obtained in writing from such authority" and all such development must be "in accordance with such plans" vide sub section (2) of section 13.

j. Chapter V (Sections 16 and 17) contains provisions for acquisition and disposal of land.

k. Chapter VI (Sections 18 to 22) contains provision for finance, account and audits. Section 18 provides that SADA shall have and maintain its own fund to which all fee, toll, **cess** and charges received by the authority shall be credited along with other funds received or borrowed.

l. Section 32 enables SADA to levy betterment charges upon the owner of the property "in respect of increase in the value of the property resulting from the execution of the development."

m. Section 35 empowers the authority to "impose a **cess on mineral rights**" at the prescribed rates subject to limitations imposed by the Parliament.

n. Section 36 empowers the authority to levy **cess** "on the consumption or sale of electricity" in the Special Development Area.

o. Under section 37, any amount due to SADA may be recovered as arrears of land revenue.

p. Under section 52, provisions of SADA Act have overriding effect over any master plan or development plan prepared under the Uttar Pradesh Urban Planning and Development Act, 1973 or any other State legislations with effect from declaration of an area as Special Development Area.

6. A perusal of the aforesaid provisions of the SADA Act shows that SADA constituted under the Act is required to execute all development authorities for the area and provide all amenities and utilities of the area including roads and streets, water and electricity supply, street lighting, drainage, sewerage, public conveyance etc. The source of funds of the Authority are the fee, toll, cess and charges levied under the Act and the grants received from the State or the Central Government. Any provision in the Act towards the levy of cess and other charges must be widely construed so as to enable SADA to perform the functions entrusted to it under the Act.

III. Constitutional validity of section 35 of SADA Act and the Cess Rules upheld by High Court in *Ram Dhani Singh* and by this Hon'ble Court in *Kesoram Industries* have attained finality

7. That a large number of Writ Petitions challenging the constitutional validity of section 35 of SADA Act and the Cess Rules were dismissed by the Allahabad High Court in the case of *Ram Dhani Singh*[3], inter alia, holding as under:

> **"39.** …..the Special Area Act as has been enacted by the State Legislature **is relatable to Entry No. 5 of List II** of the Seventh Schedule of the Constitution.
>
> **40.** ……Special Area has to be developed in accordance with the provisions of Special Area Act and that **development may include the area from which digging or excavating or quarrying has already taken place**. These will fall within Entry No. 5 of List II and therefore there is nothing wrong and the State Government does not transgress its power in any manner

[3] *Ram Dhani Singh v. Collector*, 2000 SCC OnLine All 214 : AIR 2001 All 5.

whatsoever when it levies the cess on mineral rights by virtue of powers conferred upon it by S. 35 of the Act. It is difficult to see any conflict in the provisions contained in S. 35 and contents of Entry No. 54 of list I.

42. …. The **method of measurement** to the extent of determining the mineral rights should not be confused with that of payability of the royalty on mineral excavated by the lessee. If this distinction is borne in mind, it is clear that the State Government through the Cess Rules has only permitted scientific basis for determining the cess on mining rights of individuals or corporation, which is the lessee under UPMMC Rules and MNRE Act. …. cess on coal should not be confused as additional royalty but the measurement thereof is the method of determining the cess on the mineral rights which is conferred on the lessee or the licensee through the lease or licence executed in his or its favour by the State or Central Government, as the case may be."

8. The aforesaid judgement was carried in appeal before this Hon'ble Court and this Hon'ble Court in *Kesoram Industries*[4] affirmed the High Court judgement and upheld the validity of section 35 of SADA Act and the Cess Rules. This Hon'ble Court considered the contention of the Writ Petitioners extensively and arrived at the following findings :

"137. All the minerals form part of the land. Minerals are conceived by the mother earth by the process of nature and nurtured over innumerable number of years and delivered on their assuming value and utility for the earthlings. Generally and broadly speaking, and that would suffice for our purpose, a

[4] *State of W.B. v. Kesoram Industries Ltd.* (2004) 10 SCC 201, Convenient Compilation Volume V Page 2020.

mine is an excavation in the earth which yields minerals. Mineral is something which grows in a mine and is capable of being won or extracted so as to be subjected to a better or precious use. **Until extracted, the mineral forms part of the crust of the earth**. A mineral right, according to *Black's Law Dictionary* (7th Edn.) is the right to search for, develop and remove materials from the land. It also means the right to receive a royalty based on the production of minerals which right is usually granted by a mineral lease. In both the senses, the right vests in the owner of the land and is capable of being parted with.

138. …….The **subject-matter of levy is not to be confused with the method and manner of assessment** or realisation.

139. It is true that once a Central legislation declares regulation of mines and mineral development by law to be expedient in the public interest, the legislation relating to regulation of mines and development of minerals shall fall within the sweep of Entry 54 of List I. The entry has to be liberally and widely interpreted. Yet it cannot be lost sight of that the entry itself employs an expression "to the extent to which such regulation and development under the control of Union is declared by Parliament by law" as qualifying the preceding expression stating the subject "regulation of mines and mineral development". ….."

140. ….The SADA Act intends to achieve a level of local governance which the usual models of Local Government such as boards and municipalities are not considered capable of achieving and that is why there is a special development area and a Special Area Development Authority. The fund established under the Act meets expenses of administration needed to be incurred by the authority. The funds cannot be utilised for any purpose other

than the administration of the Act. There are pieces of land which though containing a mine yet fall within the territory of special development area. …….**The imposition of cess envisaged through the SADA Act and the Rules was a step towards developing the special area.** …..The impugned cess can, therefore, be **justified as a fee** for rendering such services as would improve the infrastructure and general development of the area, the benefits whereof would be availed even by the stonecrushers. Entry 66 in List II is available to provide protective constitutional coverage to the impugned levy as fee.

143. As a tax the impugned levy of cess is clearly covered by Entry 5 of List II (as the High Court has held, and we add) read with Entries 49 and 50 of List II. There is no challenge to the declaration of the area as a special development area and the constitution of Special Area Development Authority for the administration thereof. In other words, the constitutional validity of the enactment as a whole and the rules framed thereunder is not put in issue. What is under challenge is only the levy of cess. There is nothing wrong in the State legislation levying cess by way of tax so as to generate its funds. Although it is termed as a "cess on mineral right", the impact thereof falls on the land delivering the minerals. Thus, **the levy of cess also falls within the scope of Entry 49 of List II**. ……There are myriad **methods of calculating the value of the land** for the purpose of quantifying the tax, reference whereto has already been made by us in the other part of this judgment. Validity of cess upon the land quantified by reference to the quantity of its produce was held to be a levy on the land and hence constitutional…

> **145**….. Our conclusion, therefore, is that the impugned Act is relatable to Entries 23 and 66 in List II of the Seventh Schedule, and its validity is not impaired or affected by Entries 52 and 54 in List I read with Act 65 of 1951 and Act 53 of 1948 respectively."
>
> **147. Royalty is not a tax**. The impugned cess by no stretch of imagination can be called a tax on tax. The impugned levy also does not have the effect of increasing the royalty. Simply because the royalty is levied by reference to the quantity of the minerals produced and the impugned cess too is quantified by taking into consideration the same quantity of the mineral produced, the latter does not become royalty. The former is the rent of the land on which the mine is situated or the price of the privilege of winning the minerals from the land parted with by the Government in favour of the mining lessee. The cess is a levy on mineral rights with impact on the land and quantified by reference to the quantum of minerals produced. The distinction, though fine, yet exists and is perceptible."

9. It is submitted that the judgement of the Allahabad High Court in *Ram Dhani Singh* and of this Hon'ble Court in *Kesoram Industries* so far as the constitutional validity of section 35 of SADA Act and the Cess have attained finality and its correctness has not been doubted. Further, there is no reference to the validity of these provisions in the reference order of this Hon'ble Court dated 30.03.2011[5].
10. Thus, it is respectfully submitted that the petitioners are not entitled to raise the question of validity of section 35 of SADA Act and Cess Rules in the present

[5] *Mineral Area Development Authority v. Steel Authority of India* (2011) 4 SCC 450, Convenient Compilation Volume V Page 7.

proceedings. It is only a matter of chance that the two Writ Petitions[6] filed by the petitioners were not clubbed together with the batch of 73 cases which were heard and decided by the High Court in *Ram Dhani Singh,* even though they raised identical issues.

IV. SADA Act relatable to Entry 5 List II

11. It is submitted that SADA Act is referable to entry 5 of List II and SADA is a 'local authority' under the said entry. The following judgements of this Hon'ble Court are relied upon in this regard :

    a. *Western Coalfields Ltd. v. Special Area Development Authority, (1982) 1 SCC 125*[7]

> **"27.** Entry 5 of List II relates to "local Government, that is to say, the constitution and powers of municipal corporations and other local authorities for the purpose of local self-Government". It is in pursuance of this power that the State legislature enacted the Act of 1973[8]. The power to impose tax on lands and buildings is derived by the State legislature from Entry 49 of List II: "Taxes on lands and buildings". The power of the municipalities to levy tax on lands and buildings has been conferred by the State legislature on the Special Area Development Authorities. Those Authorities have the power to levy that tax in order effectively to discharge the municipal functions which are passed on to them. Entry 54 of List I does not contemplate the taking over of municipal functions.

[6] Writ Petition No. 791 of 1997 and Writ Petition No. 53 of 2000.
[7] *Western Coalfields Ltd. v. Special Area Development Authority (1982) 1 SCC 125,* Convenient Compilation Volume V Page 772.
[8] Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam (Act 23 of 1973).

b. *K.K. Poonacha v. State of Karnataka*, (2010) 9 SCC 671[9]

> **"49.** The 1976 Act was enacted by the legislature of the State of Karnataka to provide for the establishment of a development authority for the development of the city of Bangalore and the area adjacent thereto and for matters connected therewith. It is not a law enacted for acquisition or requisitioning of property. The terms like "amenity", "civic amenity", "Bangalore Metropolitan Area", "betterment tax", "building", "building operations", "development", "engineering operations", "means of access", "street" defined in Section 2 of the 1976 Act are directly related to the issue of development. Section 14 lays down that the object of the authority constituted under Section 3 shall be to promote and secure the development of the Bangalore Metropolitan Area and for that purpose it shall have the power to acquire, hold, manage and dispose off movable and immovable property, within or outside the area of its jurisdiction, to carry out building, engineering and other operations and generally to do all things necessary or expedient for the purpose of such development and for purposes incidental thereto. Chapter 3 of the 1976 Act contains provisions relating to development schemes. The provisions relating to acquisition of land contained in Chapter 4 (Sections 35 and 36) are only incidental to the main object of the enactment, namely, development of the city of Bangalore and area adjacent thereto."

[9] *K.K. Poonacha v. State of Karnataka* (2010) 9 SCC 671, Convenient Compilation Volume V Page 2531.

V. Meaning of the term 'Royalty'

12. The definition of royalty in various books and judgements may be noted as hereunder:

    a. "'Royalty' is compensation for the use of property, usually copyrighted material or natural resources, expressed as a percentage of receipts from using the property or as an account per unit produced. A payment which is made to an author or composer by an assignee, licensee or copyright holder in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent. Royalty is a share of product or profit reserved by the owner for permitting another to use the property."[10]

    b. "'Royalty' in the sense in which the word is used in connection with mining leases, is a payment to the lessor proportionate to the amount of the demised mineral worked within a specified period. A royalty is a true rent, and as such may be apportioned on a time basis. Usually the royalties are made to merge in the fixed rent by means of a provision that the lessee, without any additional payment, may work, in each period for which a payment of fixed rent is made, so much of the minerals as would, at the royalties reserved, produce a sum equal to the fixed rent."[11]

    c. "'Royalty' is the share of the produce reserved to owner for permitting another to exploit and use property. The word 'royalty' means compensation paid to landlord by occupier of land for species of occupation allowed by contract between them. 'Royalty' is a share of the product or profit (as of a

[10] *Black's Law Dictionary,* 6th Edition (1990-91) Page 1330.
[11] *Halsbury's Laws of England*, 4th Edition Volume 31, Para 336.

mine, forest etc.) reserved by the owner for permitting another to use his property."[12]

d. "The word 'royalties' signifies, in mining leases, that part of the reddendum which is variable, and depends upon the quantity of minerals gotten or the agreed payment to a patentee on every article made according to the patent. Rights or privileges for which remuneration is payable in the form of a royalty."[13]

e. "*Royalty*.—Payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised."[14]

f. "A pro rata payment to a grantor or lessor, on the working of the property leased, or otherwise on the profits of the grant or lease. The word is especially used in reference to mines, patents and copyrights."[15]

g. "Rent is an integral part of the concept of a lease. It is the consideration moving from the lessee to the lessor for demise of the property to him.[16]

h. "Royalty may not be a fee but it is not a tax. It is a payment for the mineral which is removed or consumed by the holder of the mining lease. The minerals themselves, — the property beneath the soil — belong to the Union. When the holder of a mining lease removes these minerals or consumes them, he can do so only on payment of its price or value. Therefore, royalty

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[12] *Words and Phrases*, Permanent Edition Volume 37-A, page 597.
[13] *Stroud's Judicial Dictionary of Words and Phrases*, 6th Edition (2000) Volume 3, page 2341.
[14] *Wharton's Law Lexicon* 14th Edition, page 893.
[15] *Mozley & Whiteley's Law Dictionary* 11th Edition, page 243.
[16] *D.K. Trivedi & Sons* v. *State of Gujarat* 1986 Supp SCC 20, Convenient Compilation Volume V Page 995 *Para 38.*

is a share which the Union claims in the minerals which have been won from the soil by the lessee and which otherwise belong to it. Royalty is a share in such minerals and not a tax in the form of a compulsory exaction."[17]

i. **"**Royalty is paid to the owner of land who may be a private person and may not necessarily be a State. A private person owning the land is entitled to charge royalty but not tax. The lessor receives royalty as his income and for the lessee the royalty paid is an expenditure incurred. Royalty cannot be tax."[18]

13. It is thus submitted that Royalty cannot be regarded as a tax, and it is a compensation for use of the property belonging to the owner of the said property, which may be tangible or intangible. It is submitted that royalty is not paid only in respect of minerals. It is paid to the author, composers of a music, holder of copyright or patent as a share to another person to use a product or property.

VI. Levy of cess not covered by Mines And Minerals (Development And Regulation) Act, 1957

14. The challenge by the writ petitioners is on the ground that the entire field of levy of tax on mineral bearing land is covered by MMDR Act[19] enacted by the Parliament which is referable to entry 23 of List I. It is submitted that MMDR Act is a legislation only to provide for "development and regulation of mines and minerals" and does not deal with taxation. Sections 4 to 9C are under the heading of the Chapter relating to "General restrictions and undertaking prospecting and mining operations." The following are the relevant sections:

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[17] *Saurashtra Cement & Chemical Industries Ltd.* v. *UOI*, 1979 SCC OnLine Guj 23 : AIR 1979 Guj 180 *Para 9.*
[18] *State of W.B. v. Kesoram Industries Ltd.* (2004) 10 SCC 201, Convenient Compilation Volume V Page 2020 *Para 71.*
[19] Convenient Compilation Volume IV Page 891.

a. Section 4 provides that mining operations can only be carried out under a license granted under the Act.
b. Section 4A prescribes the procedure for termination of license and mining leases.
c. Under section 5, license can be granted only to an Indian national or to a company registered under the Companies Act and on fulfilling the prescribed conditions.
d. Section 6 deals with the maximum area for which a prospecting license or mining lease may be granted.
e. Sections 7, 8 and 8A provide for the grant of license/mining lease and the period thereof.
f. Under section 9, every holder of a mining lease is required to pay **royalty** in respect of **minerals removed or consumed by him** at the specified rate.

15. That the long title of the MMDR Act states "An Act to provide for the development and regulation of mines and minerals under the control of the Union." There is a difference between the power of regulation and development which is to be exercised by the Union and the power of imposing and/or levying tax or cess. As per *Black's Law Dictionary*, the power to 'regulate' means "to fix, establish or control; to govern or direct according to rule or bring under control of constituted authority, to limit and prohibit, to arrange in proper order and to control that what already exists". It defines 'regulation' as "the act of regulating; a rule or order prescribed for management or government; an order having force of law issued by the executive authority of Government." The regulation or power to regulate, therefore is a supervisory power of the Union with respect to development of mines and minerals.

16. Section 9A requires the holder of a mining lease to pay dead rent i.e. the minimum amount payable by mining lease irrespective of the quantity of amount removed. The aforesaid provisions clearly show that the royalty payable under the MMDR Act is a payment made by the holder of a lease for the right to extract minerals. It is not a tax but is a payment for a right to enjoy the land and the usufruct of the land.

VII. Interpretation of Taxing Statute : Strict, Clear and Precise

17. That as per G P Singh's Principle of Statutory Interpretation, the taxing entries have to be construed with clarity and precision so as to maintain this exclusivity.[20] A taxing statute is to be strictly construed. "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.[21] In interpreting a section in a taxing statute, *Lord Simons* said "the question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits. Lord Simons calls this "the one and only proper test."[22]

18. That statutes imposing tax have to be clearly defined and nothing can be implied, the limit, if any, to be imposed by the Union upon the States with respect to the said subject, also has to be specific and that the Union shall define extent and scope of such limitation. Any compulsory exaction of money by Government amounts to imposition of tax which is not permissible except by or under the authority of a statutory provision.[23] Power of tax cannot be inferred from a general entry for the

[20] *G P Singh's* Principle of Statutory Interpretation, 14th Edition (2016) Page 874.
[21] *Cape Brandy Syndicate v. IRC,* (1921) 1 KB 64 referred with approval in *Bansal Wire Industries Ltd. v. State of Uttar Pradesh* (2011) 6 SCC 545.
[22] *G P Singh's* Principle of Statutory Interpretation, 14th Edition (2016) Page 882.
[23] *CCE v. Kisan Sahkari Chinni Mills Ltd.,* (2001) 6 SCC 697.

reason that taxes are specifically levied, assessed and collected by the Union or the States by enacting a specific legislation while exercising power under Article 245 and 246 of the Constitution read with the relevant entries in List I, II or III of the Constitution.

VIII. Inadvertent error in paragraph of the *India Cement* judgement

19. It is submitted that the *Kesoram Industries* judgement has rightly held that there was an inadvertent error in paragraph of the *India Cement* judgement which held that royalty is a tax whereas, the correct conclusion of the judgement is that "cess on royalty is a tax"; and the inadvertent error or mistake rightly was corrected in paragraph 66 of the *Kesoram Industries* judgement.

20. It is thus submitted that section 35 of the SADA Act and the Cess Rules framed thereunder are constitutionally valid and the levy is within the legislative competence of the State falling under entry 5, 49, 50 and 66 of List II of the Seventh Schedule to the Constitution.

Drawn and Filed by :

Dated : 23.02.2024

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