I.A. No. 237166/2023 in Civil Appeal No. 4056-4064/1999.
&
Civil Appeal No. 4722-4724/1999.

Written Submissions of Dr. Abhishek Singhvi, Senior Advocate

NB:

1. These written submissions will be used by Dr. Abhishek Singhvi to principally argue 6 issues, listed below, along with the respective paras and pages as indicated below.
2. These written submissions deal with several other issues apart from the 6 issues, which have been partly or largely covered by counsel preceding Dr. Abhishek Singhvi.
3. It is respectfully submitted that the 6 issues listed below are believed by the Petitioners herein to project either new arguments or new nuances and facets and hence will be focused upon.
4. These submissions are without prejudice, alternative arguments and/or in addition to arguments already made by previous counsel.

SUBMISSIONS IN BRIEF

I. Royalty is a tax and/or qualifies as an impost and compulsory exaction under Art. 366(28). ***Paras B1-32, Pg. 21-32.***

II. Dead rent, a levy not based on output/extraction/production but on acreage is clearly a tax on mineral rights, with the same field entirely occupied by Sec. 9A of the MMDR Act. ***Paras B29-32, Pg. 31-32.***

III. Entry 50, List II itself recognises parliamentary limitation of taxation of mineral rights, which limitation has been fully exercised and manifested by parliamentary legislation traceable to and justifiable under a conjoint reading of Entry 54 of List I read with Entry 97 of List I. ***Paras A8-32, Pg. 5-15.***

IV. Wholly in the alternative, assuming without conceding that the States have competence to tax mineral rights (leviable only on the lease/license/right to do mining and not the mineral itself), the States do not and cannot have any competence to levy a tax on minerals (levied upon extraction, production, dispatch). ***Paras A33-50, Pg. 15-20.***

V. Wholly in the alternative, assuming without conceding, that States have competence to levy tax on mineral rights, they cannot in any case levy fees in respect of mining, i.e., neither on minerals nor on mineral rights, because Entry 23 of List II stands eclipsed by Entry 54 of List I and States' competence under Entry 66 of List II, cannot be exercised once the subject-matter in which the field stands, is eclipsed. ***Paras A44-50, Pg. 18-20.***

VI. A self-contained note demonstrating that there was no typographical error in ***India Cement Ltd. v. State of T.N.***, (1990) 1 SCC 12 and that the reasoning of ***State of W.B. v. Kesoram Industries***, (2004) 10 SCC 201 in holding that there was such an error is patently erroneous, is attached at the end of these submissions. ***Paras C1-12, Pg. 34-44.***

ISSUE A

[RE: Q. NOS. 3, 7, 8, 9, 10, 11]

WHAT IS THE CORRECT INTERPRETATION OF THE INTERPLAY BETWEEN ENTRY 50, LIST II, ENTRY 23, LIST II AND ENTRY 54 OF LIST I?

A1. That in respect of this issue, which involves Questions No. 3, 7, 8, 9, 10, 11, a summary of the submissions are as under:

a. The entire field relating to "*regulation of mines and mineral development*" has been taken over by Parliament by virtue of the Parliamentary declaration under Sec. 2 of the MMDR Act, 1957, which is referable to Entry 54, List I which leads to complete denudation of States' legislative power under Entry 23, List II.

b. Just as with Entry 23, List II, the legislative power of the States under Entry 50 of List II with respect to "*tax on mineral rights*" also stands overridden / limited by virtue of the law framed under Entry 54 of List I.

c. The provisions of the MMDR Act, 1957, which is the Parliamentary law referable to Entry 54 of List I, particularly Sec. 9, Sec. 9A, Sec. 9B, Sec. 9C, Sec. 13(2)(i), Sec. 21(5), and Sec. 25 would make it clear that Parliament has levied both "*tax on minerals*" and "*tax on mineral rights*" under the Central legislation, which leads to a complete limitation / denudation of the States' power to levy tax under Entry 50, List II.

d. The expression "*limitations imposed by Parliament by law relating to mineral development*" relate to both the regulatory and taxing power of the Parliament under Entry 54 read with Entries 96 and 97 of List I.

e. For the foregoing reasons, the relevant entries i.e. Entry 54 of List I (read with Entries 96 and 97 of List I), and Entries 23 and 50 of List II constitute a *sui generis* and complete code insofar as it relates to both "*regulation of mines and mineral development*" and "*taxation of minerals and mineral rights*".

f. The clear and unambiguous feature of this *sui generis* and complete code is that the Centre has completely taken over the field of both "*regulation*

of mines and mineral development" and "*taxation of minerals and mineral rights*" by virtue of the Parliamentary declaration contained in Sec. 2 of the MMDR Act, 1957 and the various taxing provisions in the MMDR Act, 1957 itself. The States' legislative power to both regulate and tax under Entry 23 and Entry 50 of List II stands completely denuded.

g. This *sui generis* and complete code does indeed constitute an exception to the general principle of categorising of entries as general or taxing entries in the Lists of Schedule VII as enunciated in ***MPV Sundaramaier v. State of A.P. & Ors.***, (1958) SCCOnLine SC 22 [***5JJ***, para 51 **@ Pg. 93 at 128 Vol. V**].

h. The expression "*tax on mineral rights*" is different from "*tax on minerals*" as explained in ***Hingir-Rampur Coal v. State of Orissa***, AIR 1961 SC 459 [***5JJ***, para 53 **@ Pg. 142 at 172 Vol. V**].

i. Lastly, without prejudice, and in the alternative, assuming without conceding that the States can tax "*mineral rights*", in any event, the States would not have the competence to levy "fees" on minerals / mineral rights for the simple reason that the once the main subject matter of "mines and mineral development" referable to Entry 23, List II is excluded from the States' domain by virtue of the declaration by the Parliament under Entry 54, List I, then the corresponding power of the States to levy fees under Entry 66, List II vanishes.

A2. The submissions under each of the aforesaid heads are as under:

a. The entire field relating to "regulation of mines and mineral development" has been taken over by parliament by virtue of parliamentary declaration under S. 2 of the MMDR Act, 1957, which is referable to Entry 54, list I which leads to complete denudation of States' legislative power under Entry 23, list II

A3. A reading of the Statements and Objects of the MMDR Act, 1957 leaves no manner of doubt that the Act was introduced in exercise of the Union's powers under Entry 54 of List I [**@ Pg. 910 at 914, Vol. IV**]:

> "An Act to provide for the [development and regulation of mines and minerals] under the control of the Union…
> Statement of Objects and Reasons.—The differentiation made between petroleum and other minerals in Items 53 **and 54 of the Union List** has rendered separate enactments for the two necessary. The present Bill deals only with minerals other than petroleum…."
>
> [Emphasis added]

A4. Even otherwise, it is commonly acknowledged in a catena of decisions that the MMDR Act, 1957 has been enacted under Entry 54 of List I.

A5. In Sec. 2 of the MMDR Act, 1957, the Parliament has declared that [**@ Pg. 910 at 920, Vol. V**]:

> "…. it is expedient in the public interest that the Central Government should take under its control the regulation of mines and the development of minerals to the extent hereinafter provided"

A6. It has been consistently held, beginning from the decision of the constitution bench in ***State of Orissa v. M.A. Tulloch*** AIR 1964 SC 1284 [***5JJ***, para 5, 14 **@Pg. 278 at 281, 289, Vol. V**] that the effect of such a declaration is complete deprivation or denudation of the States' legislative power under Entry 23, List II:

> "5. […] It does not need much argument to realise that to the extent to which the Union Government had taken under "its control" "the regulation and development of minerals" so much was withdrawn from the ambit of the power of the State Legislature under Entry 23 and legislation of the State which had rested on the existence of power under that entry would to the extent of that "control" be superseded or be rendered ineffective, **for here we have a case not of mere repugnancy between the provisions of the two enactments but of a denudation or deprivation of State legislative power by the declaration which Parliament is empowered to make and has made**.
>
> ***
>
> 14. […] Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. **The test of two legislations containing contradictory provisions is not, however, the only**

> **criterion of repugnancy, for if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation**. In the present case, having regard to the terms of Sec. 18(1) it appears clear to us that the intention of Parliament was to cover the entire field and thus to leave no scope for the argument that until rules were framed, there was no inconsistency and no supersession of the State Act."
>
> [Emphasis added]

A7. This principle has been followed consistently and is no more *res integra*. By virtue of the declaration by the Parliament under Sec. 2 of the MMDR Act, 1957, the entire field of "*regulation of mines and mineral development*" and taxes on minerals and mineral rights, has since been an occupied field, and the States stand fully denuded and deprived of their legislative power in this respect. *See* ***Baijnath Kedia v. State of Bihar,*** (1969) 3 SCC 838 [***5JJ***, para. 13, 14, 21 **@Pg. 412 at 422-423, Vol. V**]; ***Bharat Coking Coal Ltd. v. State of Bihar***, (1990) 4 SCC 557 [***2JJ***, para. 15-17 **@Pg. 1242 at 1256-1258, Vol. V**], ***P. Kannadasan v. State of T.N.,*** (1996) 5 SCC 670 [***2JJ***, para. 15, 34, 35 **@ Pg. 114 at 129, 141, Vol. V(C)**], and ***Sandur Manganese,*** (2010) 13 SCC 1 [***2JJ***, para. 79, 80 **@Pg. 2586 at 2621, Vol. V**]**.**

b. Just as with Entry 23, List II, the legislative power of the States under Entry 50 of List II with ***respect to "tax on mineral rights" also stands overridden / limited by virtue of the law framed under Entry 54 of List I***

A8. The declaration found in Sec. 2 of the MMDR Act, referable to Entry 54, List I is also, *ipso facto*, sufficient to denude the States of any power to tax mineral rights under Entry 50 of List II, as Entry 50 itself makes the States' legislative power subject to "*limitations imposed by Parliament by law relating to mineral development*".

A9. The fact that the taxing power of the States was also covered with the enactment of the MMDR Act, 1957 was held in ***Orissa Cement v. State of Orissa***, 1991

Supp (1) SCC 430. [***3JJ***, para. 53 **@Pg. 1329 at 1384, Vol. V**] and also ***State of Orissa v. Mahanadi Coalfields Ltd.***, 1995 Supp (2) SCC 686 [***3JJ***, para. 20 **@Pg. 1546 at 1562, Vol. V**].

A10. It is submitted that paras 407, 408, and 410 of ***State of W.B. v. Kesoram Industries***, (2004) 10 SCC 201, i.e., Sinha J.'s dissent [**@ Pg. 2020 at 2210-2211, Vol. V**], correctly sets out the law on this aspect. It is submitted that once the declaration contemplated under Entry 54 of List I and Entry 23 of List II is found in Sec. 2 of the MMDR Act, 1957 it is irrelevant for the purposes of Entry 50 of List II as to whether a tax has actually been imposed under any specific provisions of the MMDR Act, 1957. In other words, a declaration as contemplated under Entries 54 of List I and 23 of List II would, by itself, suffice to denude the States of the power to tax mineral rights under Entry 50 of List II.

A11. That in fact, the competence of the Parliament to impose tax (by virtue of Sec. 9 of the MMDR Act, 1957) was tested in ***State of M.P. v. Mahalaxmi Fabric Mills Ltd.***, 1995 Supp (1) SCC 642 [***3JJ***, para. 8-14 **@Pg. 1567 at 1578-1582, Vol. V**]. This Hon'ble Court, relying on the finding of the constitution bench in ***Baijnath Kedia*** [***5JJ***, para. 13, 14, 21 **@Pg. 412 at 422-423, Vol. V**], held that the Parliament was competent to enact the MMDR Act, 1957, including Sec. 9, under Entry 54, List I and alternatively under Entry 97, List I:

> "14. In view of the decision of Constitution Bench it is no longer open to the writ petitioners to submit that Entry 50 of -List II can still be available to State legislature. It is easy to visualise that **once Parliament has occupied the field in connection with regulation of mines and minerals development in the country and when Parliament declares that it is expedient in the public interest so to do, Entry 23 of the State list regarding regulation of mines and minerals development would be of no avail to the State legislature as Entry 23 of List II is subject to the provision of List 1, nor will Entry 50 of the State list be of any assistance to the State authorities**. In short, both the entries will be out of way in enacting appropriate legislation imposing the rates of royalty to be paid by those who extract minerals in the country. **Once these Entries are out of picture, it is Entry 54 in the Union list which will operate and the imposition of tax on minerals extracted would be squarely got covered by Entry 54 of the Union list.** To recapitulate, as the

> entire Act has been upheld by this Court in its earlier decisions to which we have made reference in the light of Entry 54 of the Union list, **Section 9 being part and parcel thereof cannot be out of the sweep of Entry 54. However, even assuming that there should be a specific taxing entry regarding taxing of royalty on mineral rights which can sustain such legislation under the said entry, being a topic of legislative power, we find that there is no such specific entry in Union list nor in State list or concurrent list which can be of any assistance in this connection. Entry 50 in the State list is out of picture as we have seen earlier**. In these circumstances the State legislature cannot rely on any entry in the State list or concurrent list for imposing such a tax once a valid legislation by Parliament under Entry 54 of the Union list is holding the field. **In the alternative imposition of such hybrid tax on mines + capital + labour would be covered by residuary Entry 97 of the Union list which empowers Parliament to enact laws on topics not covered by other specific entries in List II or List III**. This conclusion squarely flows from the observations made by Oza J., in his concurring judgment in India Cement case. It must, therefore, be held that Section 9 of the Act is within the legislative competence of Parliament both under Entry 54 of the Union list as well as Entry 97 thereof. The first ground of attack on Section 9 by Shri Sanghi is thus devoid of substance and is, therefore, rejected."
>
> [Emphasis added]

A12. A plea for re-consideration of ***Mahalaxmi Fabric Mills*** (*supra*) was made in ***Saurashtra Cement & Chemicals Industries Ltd. v. Union of India***, (2001) 1 SCC 91 [***2JJ***, para. 11 **@Pg. 1937 at 1951, Vol. V]**, wherein Pattanaik, J held:

> "11…In Mahalaxmi however, as already stated, the validity of the Central legislation was under challenge, as in the present case and the Court upheld the provisions of the MMDR Act and **Sections 9 and 9(3) thereof, by holding that by Entry 54 of List I, it was within the legislative competence of Parliament to make the law in question** and neither Entry 23 of List II nor Entry 50 of List II would be attracted. **It is no doubt true that in the aforesaid case, the Court had also held that Entry 97 of List I will confer the legislative competence, but not because Parliament has no competence under Entry 54 of List I, but that was an additional prop, and therefore Mr Chidambaram is not right in his submission that the Court took recourse to the residuary power under Entry 97 of List I**. In Synthetics Chemicals, this Court no doubt had observed that the power of regulation and control is separate and distinct from the power of taxation, but while considering Entry 50 and comparing with Entry 54 of List II, this Court had observed that the wide taxing power of

> the State under Entry 50 of List II and its conditional or restricted, for example, over mineral rights, mentioned in Entry 50 of the said list is significantly different…."
>
> [Emphasis added]

A13. Indisputably therefore, Parliament's competence under Entry 54 is not limited only to legislate on "*regulation of mines and mineral development*" but also extends to taxing mineral rights.

A14. That the Parliament is competent to tax minerals and mineral rights is, in fact, affirmed by the fact that after the judgment of ***India Cement*** (*supra*), Parliament enacted the CESS AND OTHER TAXES ON MINERALS (VALIDATION) ACT, 1992 which ensured that the States would not have to refund the cess collected under the various enactments struck down as a result of the judgments in ***India Cement*** (*supra*) and ***Orissa Cement Ltd. v. State of Orissa***, 1991 Supp (1) SCC 430 [***3JJ***, para. 72 **@Pg. 1329 at 1402, Vol. V]**.

A15. The validity of the CESS AND OTHER TAXES ON MINERALS (VALIDATION) ACT, 1992 was tested in ***P. Kannadasan*** [***2JJ***, para. 15, 34, 35 @ **Pg. 114 at 129, 141, Vol. V(C)**], wherein this Hon'ble Court, while upholding Parliament's competence to enact such legislation, also held:

> "35. The fifth contention of the learned counsel for appellants-petitioners is equally misconceived. The Parliament has already denuded the State legislatures of their power to levy tax on minerals inhering in them by making the declaration contained in Section 2 of the MMDR Act. **Sri Sanghi argued that the denudation is not absolute but only to the extent provided in the MMDR Act. Section 9, learned counsel submitted, is one of the facets of the extent of denudation**. Section 9, it is submitted, sets out the rates of royalty levied states that such rates of royalty can be revised only once in three years. If Section 9 is sought to be amended, whether directly or indirectly, the learned counsel says, a fresh declaration in terms of Entry 54 of List-I is called for. **This contention assumes that notwithstanding the declaration. contained in Section 2 of the M.M.R.D. Act, the States still retain the power to levy taxes upon minerals over and above those prescribed by the M.M.R.D. Act and that a fresh declaration is called for whenever such subsisting power of the State is sought to be further encroached upon**. This suppositions however flies in the face of the decisions of this Court in

> *India Cement* and *Orissa Cement*. The said decisions are premised upon the assumption that by virtue of the said declaration, the States are totally denuded of the power to levy any taxes on minerals. It is for this reason that the State enactments were declared incompetent insofar as they purported to levy taxes/cesses on minerals. **The denudation of the States is not partial. It is total. They cannot levy any tax or cess on minerals so long as the declaration in Section stands. Once the denudation is total there is no occasion or necessity for any further declaration of denudation or, for that matters for repeated declarations of denotations. Indeed if Sri Sanghi's arguments were to be accepted a fresh declaration would be required every time the Parliament increases the rate of royalties**. No such requirement can be deduced from the relevant constitutional provisions as interpreted by this Court. This contention also accordingly fails."
>
> [Emphasis added]

A16. Thus, it is abundantly clear that the declaration contained in Sec. 2 of the MMDR Act, 1957, *ipso facto*, ousts the States' legislative competence under Entry 50 of List II.

c. MMDR Act contains provisions overriding Entry 50 of List II

A17. Even assuming without conceding that the declaration contained in Sec. 2 of the MMDR Act, 1957 does not, *ipso facto*, oust the States' legislative competence under Entry 50 of List II, the fact that the MMDR Act, 1957 expressly contemplates the levy of taxes thereunder as evident from Sec. 25 thereof and the fact that it levies a royalty (which is a special kind of tax) under Sec. 9 thereof, and dead rent (a tax on the holding of a mining lease) under Sec. 9A, denudes the States of any legislative competence they may have possessed under Entry 50 of List II.

A18. Thus, even assuming Entry 50 is to be read restrictively so as to require an inquiry as to whether any specific provisions of the MMDR Act, 1957 impose a tax, it is submitted that at least three provisions thereof impose a tax on mining lessees:

i. Sec. 9(1) which imposes royalty i.e. a tax / impost on minerals;

ii. Sec. 9A which imposes dead rent i.e. a tax / impost on mineral rights;

iii. Sec. 9B which imposes a cess to be employed for the upliftment of districts affected by mining to be contributed to a body called the District Mineral Foundation (DMF) and to be employed in terms of the *Pradhan Mantri Khanij Kshetra Kalyan Yojana*, issued under Sec. 20A [**@Pg. 47 Vol. IV(K)]**;

iv. Sec. 9C which imposes a cess to be applied towards mineral exploration in the country under the aegis of the National Mineral Exploration Trust.

v. Sec. 25 concerns recovery of rent, royalty, tax, fee or other sum due to the Government under the Act.

A19. That, in fact, Sec. 9 and 25 of the MMDR Act, 1957 were analysed in ***Orissa Cement*** (*supra*) [***3JJ***, para 53 **@ Pg. 1329 at 1384-1385 at Vol. V**] to hold that:

> "53. […] The object of Section 9 of the Central Act cannot be ignored. […] Sec. 25 implicitly authorises the levy of rent, royalty, taxes and fees under the Act and the Rules."

A20. To similar effect is the judgment in ***State of Orissa v. Mahanadi Coalfields Ltd.***, 1995 Supp (2) SCC 686 [***3JJ***, para. 20 **@Pg. 1546 at 1562, Vol. V]** which states that:

> "20. A perusal of the Mines and Minerals (Regulation and Development) Act, 1957 (Central Act 67 of 1957), Sections 2, 3(a) and 3(d), Sections 9 and 9-A and Second and Third Schedules to the Act, quoted in para 3 (supra) **will clearly point out that taxation on mineral and mineral rights, viz., any tax, royalty, fee or rent, are provided in the said Act**. […] Since exhaustive provisions as also the Parliamentary declaration, contemplated by List I Entry 54, have been made in the Mines and Minerals (Regulation and Development) Act, 1957, regarding all kinds of taxation on minerals and mineral rights — tax, royalty — fee — dead rent etc., **the State Legislature is denuded or deprived of the power to enact any law or to impose any tax or other levy with reference to List II Entry 23 or List II Entry 50**."
>
> [Emphasis added]

A21. Two further noteworthy points regarding the levies imposed under the MMDR Act, 1957 are as follows:

(a) Method of calculation:

i. Royalty – is calculated on an *ad valorem* basis on the basis of the rates specified with respect to each mineral in the Second Schedule

ii. Dead rent – is calculated on a rate per hectare basis as specified in the Third Schedule

iii. DMF – is calculated as a percentage of royalty, as prescribed by the Central Government with respect to various categories of leases, but not exceeding 33% of royalty

iv. NMET – is calculated as a sum equivalent to 2% of royalty

(b) At a practical level, these levies are currently imposed in the following manner on lessees of iron ore:

i. Royalty – 15% of the Average Sale Price (ASP) of Iron ore.

ii. Dead Rent – based on size of lease and rates prescribed per hectare of the leased land.

iii. DMF – 10% of royalty (i.e. 1.5% of ASP) in case of auctioned mines and 33% (i.e. 5%) in case of pre-auction mines.

iv. NMET – 2% of royalty (i.e. 0.3% of ASP).

Total levies *– Approx. 16-21% of Average Sale Price in case of Iron Ore.*

(c) Most significantly, all these levies, except (iv) hereinabove i.e., NMET (which constitutes only 0.3% of the ASP) admittedly go to the State Governments' coffers. Hence, the argument of the States that their collections would be circumscribed by accepting the argument of the assessees is incorrect and fallacious.

(d) A press release dated 03.04.2023 by the Ministry of Mines, Government of India, available on the Press Information Bureau website confirms the above and gives a State-wise break-up of royalty accrual, and DMF accrual [**@Pg. 2, Vol. IV(K)**]:

> "The revenue generated from mining activities viz. royalty, contribution to District Mineral Foundation (DMF), auction premium etc. accrues to the respective State Governments. However, only the contribution to the National Mineral Exploration Trust (NMET) accrues to the Central Government."

[Emphasis added]

Submissions regarding points A.1 (d), (e), (f) and (g)

d. The expression "limitations imposed by Parliament by law relating to mineral development" relate to both the regulatory and taxing power of the Parliament under Entry 54 read with Entry 97 of List I

e. For the foregoing reasons, the relevant entries i.e. Entry 54 of List I (read with Entry 97 of List I), and Entries 23 and 50 of List II constitute a sui generis and complete code insofar as it relates to both "regulation of mines and mineral development" and "taxation of minerals and mineral rights"

f. The clear and unambiguous feature of this sui generis and complete code is that the Centre has completely taken over the field of both "regulation of mines and mineral development" and "taxation of minerals and mineral rights" by virtue of the Parliamentary declaration contained in S. 2 of the MMDR Act, 1957 and the various taxing provisions in the MMDR Act, 1957 itself. The States' legislative power to both regulate and tax under Entry 23 and Entry 50 of List II stands completely denuded

g. This sui generis and complete code constitutes an exception to the general principle of grouping of entries in the Lists of Schedule VII as enunciated in MPV Sundaramaier

A22. For the foregoing reasons, it is submitted that the expression "*limitations imposed by Parliament by law relating to mineral development*" occurring in Entry 50, List II relates to both the regulatory and taxing power of the Parliament under Entry 54 read with Entries 96 and 97 of List I.

A23. For these reasons, Entries 50 and 23 of List II, and Entry 54 of List I read together with Entry 97 imply a *sui generis* and complete code on the legislative subject of "*regulation of mines and mineral development*" and taxation of minerals and minerals rights inasmuch as States' power of taxation in Entry 50 as well its general powers in Entry 23 of List II are *both* subject to the Parliament's powers under Entry 54 of List I. In other words, once the field of mining and levies including taxes on mining are taken over by the Centre (which they in fact are, by virtue of the MMDR Act, 1957 as confirmed in ***Orissa Cement*** *(supra)* and

Mahanadi Coalfields *(supra)*), the States stand denuded of their powers under both Entries 23 as well as 50 of List II.

A24. Although generally, under the scheme for distribution of legislative powers under the 7th Schedule, taxing entries are distinct from general entries, the framers of the Constitution have made an exception and implied both general and taxing powers in Entry 54 of List I since Entry 50 of List II (which is a specific taxing entry) contemplates that it can be circumscribed/ restricted by a legislation made under Entry 54 of List I. To this extent, Entries 54, List I and Entries 50, List II, being a *sui generis* and complete code relating to the field of mines and mineral development, constitute an exception to general principle of grouping of general entries apart from taxing entries as enunciated in ***MPV Sundaramaier*** (*supra*).

A25. This Hon'ble Court in ***Bimolangshu Roy v. State of Assam***, (2018) 14 SCC 408, [***2JJ,*** para 34 **@Pg. 3580 at 3600, Vol. V**] has acknowledged that the scheme of the 7th Schedule is such that its interpretation cannot be governed by a straightjacketed formula:

> "34. Our endeavour is only to demonstrate that a great deal of examination of the scheme of the entire Constitution is essential while interpreting the scope of each of the entries contained in the three lists pf the Seventh Schedule and no rule which has a universal application with regard to the interpretation of all entries in the Seventh Schedule can be postulated. The statement of Chief Justice Gwyer that a broad and liberal spirit should inspire those whose duty is to interpret the Constitution and the legislative entries should not be read in a narrow or pedantic sense, **cannot be understood as a sutra valid for all times and in all circumstances**."
>
> [Emphasis added]

A26. Moreover, as was acknowledged during the course of this hearing, List II employs 8 distinct phraseologies[1] where the powers of the States have been

[1] 8 different phraseologies that List II employs: (i) "subject to" (Entries 11, 17, 22, 24 and 60) – clear subordination; (ii) "other than" (Entries 12, 32, 63) – completely taken out of the States power; (iii) "subject to List I and III" (Entry 13); (iv) "subject to List III entries" (Entries 26, 27, 57); (v) "subject to a particular field not a particular Entry" (Entry 23); (vi) "subject to the provision of any law made by Parliament" (Entry 37); (vii) Entry 50's language; (viii) "not included in the course of…" (Entry 54 post GST amendment) – same meaning as "other than" – means complete removal of power.

either subjected to broad or specific restrictions/limitations, or have been altogether precluded. Within these 8 formulations itself, the language adopted with respect to Entry 50 of List II is unlike any of the other 7 formulations. Thus, the peculiar nature of the language employed in the Constitution itself with respect to the interplay of Entries 23 and 50 of List II with Entry 54 of List I suggests that the ordinary rule of general legislative powers being distinct from powers of taxation, cannot be applied in this case.

A27. More specifically, that Entry 50 of List II is an exception to the thumb rule (on the distinction between general and taxing entries) has been recognised in ***Synthetics and Chemicals Ltd v. State of UP*** (1990) 1 SCC 109 [***7JJ,*** para 40 **@Pg. 1175 at 1203, Vol. V**] where it was observed by Sabyasachi Mukherjee, J. as follows:

> "40. … The power to levy taxes is to be read from the entry relating to taxes and not from the general entry. **Exception in entry 50 of list II** where tax on mineral rights is subject to any limitation imposed by Parliament relating to mineral development, **and this power of Parliament is in general entry i.e. entry 54 of list I**. …"
>
> [Emphasis added]

A28. Although it is true that the core issue of Entry 50 did not arise in ***Synthetics*** (*supra*), nevertheless on application of principles of stare decisis, this dictum cannot be ignored. Furthermore, although ***Synthetics*** (*supra*) has also been referred to a larger bench in ***State of U.P. v. Lalta Prasad Vaish***, (2007) 13 SCC 463, the reference is not on the aforementioned point.

A29. The express ***language*** of the said Entry 50 suggests that the taxing power of the States with respect to mineral rights is circumscribed by a legislation made under Entry 54 of List I. This necessarily implies that Entry 54 of List I carries the legislative power also to tax, which is also the finding of this Hon'ble Court in ***Mahalaxmi Fabric Mills*** [***3JJ***, para. 8-14 **@Pg. 1567 at 1578-1582, Vol. V**] (*supra*) and ***Saurashtra Cement & Chemicals*** [***2JJ***, para. 11 **@Pg. 1937 at 1951, Vol. V]**.

A30. It is settled that taxing entries in the State List cannot tax the subject matter of a general entry which occurs in the Union List. Once the general subject lies within the exclusive domain of the Parliament, States cannot exercise taxing powers with respect to the same.

A31. Without prejudice to the above, it is submitted that the Parliament has plenary powers under Art. 248(2) read with Entry 97 of List I, to levy tax on any subject not mentioned in any of the lists. It is therefore clear, that at the very least, the Parliament would have the exclusive competence to levy a "*tax on minerals*" as the same is not mentioned in any of the lists. To say that Art. 248(2) has no application due to the "mention" or "enumeration" of Entry 50 in List II, would be to completely disregard the peculiar language of the said Entry, which by itself affords resort to the power of taxation, and would have to be traced to Entry 97, List I.

A32. Significantly, Majmudar J. in ***Mahalaxmi Fabric Mills Ltd*** (supra) **[*3JJ,*** para 14, **@Pg. 1567 at 1582, Vol. V]** noted that, the Centre's power to tax mineral rights was to be read within Entry 54, List I as a result of the denudation of the States' powers in their entirety, and alternatively it would be traced to Entry 97, List I:

> "14. […] **In the alternative imposition of such hybrid tax on mines + capital + labour would be covered by residuary Entry 97 of the Union list which empowers the Parliament to enact laws on topics not covered by others specific entries in List II or List III**. This conclusion squarely flows from the observations made by Oza J., in his concurring judgment in India Cement Ors. It must, therefore, be held that Section 9 of the Act is within the legislative competence of the Parliament both under Entry 54 of the Union list as well as Entry 97 thereof The first ground of attack on Section 9 by Shri Sanghi is thus devoid of substance and is, therefore, rejected."
>
> [Emphasis added]

h. The expression "tax on mineral rights" is different from "tax on minerals" as explained in Hingir-Rampur

A33. In this context, it may be submitted that the expression 'taxes on *mineral rights*' appearing in Entry 50 of List II is different from 'tax on minerals' itself. It cannot

be lost sight of that the phraseology adopted in Entry 54, List I, Entry 23, List II and Entry 50, List II, is distinct. The phrase "mineral rights" has only been employed in Entry 50, List II. It would follow that it not thus be ascribed a wide and expansive meaning as to cover all that follows after excavation of minerals. It would rather have to be confined to the right to mine, the right to excavate, extract or win the mineral.

A34. The expression "*tax on mineral rights*" contemplates levy of taxes only on minerals that are still embedded in the earth i.e., on the right of extraction thereof, and nothing more. In other words, it implies a tax on the grant of mineral concession / lease at the highest. It precludes imposition of taxes on *extraction* of minerals.

A35. This difference was enunciated by:

a. Wanchoo, J. in his dissenting opinion in ***Hingir-Rampur,*** AIR 1961 SC 459 [***5JJ***, para. 53, Wanchoo, J. dissent **@Pg. 142 at 172, Vol. V**].

b. Sinha, J. in his dissenting opinion in ***Kesoram*** (*supra*) [***5JJ***, para. 400 **@ Pg. 2020 at 2208, 2209, Vol. V**] where he held that if the intention of the framers was to confer on the State legislatures the absolute power to levy tax whether on mineral rights or minerals, the language of Entry 50 of List II would not have been restricted in the manner it has been. Essentially, the difference between mineral rights and minerals themselves hinges on whether the minerals are still embedded in the earth or have been extracted, as also held by Sinha, J. in ***Kesoram*** (*supra*) [***5JJ***, para. 424, Sinha, J. dissent **@Pg. 2020 at 2215, Vol. V**]:

> "424. "Mineral rights" and "mineral" connote two different things. A mineral may be embedded in earth or is extracted. When it is extracted, it may be a culmination of the right to deal in mineral but the **mineral rights would not include a right to dispatch extracted minerals**."
>
> [Emphasis added]

c. Further, support can also be drawn from the concurring opinion of Oza, J. in ***India Cement*** *(supra)* [***7JJ***, para. 40, **@Pg. 1151 at 1173, Vol. V**] where he held:

> "40. Whether royalty is a tax is not very material for the purpose of determination of this question in this case. It is admitted that royalty is **charged on the basis of per unit of minerals extracted. It is no doubt true that mineral is extracted from the land and is available, but it could only be extracted if there are three things**:
> (1) **Land** from which mineral could be extracted.
> (2) **Capital** for providing machinery, instruments and other requirements.
> (3) **Labour**
> It is therefore clear that unit of charge of royalty is not only land but **land + Labour + Capital**. It is therefore clear that if royalty is a tax or an imposition or a levy, it is not on land alone but it is a levy or a tax on mineral (land), labour and capital employed in extraction of the mineral. It therefore is clear that royalty if is imposed by the Parliament **it could only be a tax not only on land but no these three things stated above**.
>
> [Emphasis added]

A36. It is submitted that the holding of Wanchoo, J. in ***Hingir-Rampur*** (*supra*) [***5JJ***, para. 53, Wanchoo, J. dissent **@Pg. 142 at 172, Vol. V]** and that of the dissent of Sinha, J in ***Kesoram*** *(supra)* [***5JJ***, para. 424, Sinha, J. dissent **@Pg. 2020 at 2215, Vol. V**] represent the correct position of the law.

A37. Further, it is borne out from Oza, J.'s opinion in ***India Cement*** (*supra*) [***7JJ***, **@Pg. 1151 at 1170, Vol. V**], that any levy on extraction of minerals amounts to a tax on land + labour + capital, which makes it a hybrid tax, which cannot be justified either singularly as a tax on land or singularly a tax on "*mineral rights*". Such a hybrid tax can be levied only by Parliament under Entry 97.

A38. In the context of the instant case, the phrase '*taxes on mineral rights*' appearing in Entry 50 of List II, would imply that Entry 50, at the highest, confers legislative competence only to tax the grant of mineral concessions / leases, and not the extraction of minerals.

A39. As a corollary, any measure adopted to impose *"taxes on mineral rights"* must necessarily bear a reasonable and rational nexus with the subject matter of the levy i.e., *"mineral rights"*. Extraction or production of "minerals" cannot be made the measure for a tax on "mineral rights" as that would change the fundamental nature of the tax itself.

A40. A "tax on mineral rights" cannot be based on the quantum of extraction or production of minerals. To do so would equate a "*tax on mineral rights*" with "*tax on minerals*". If at all, such taxation of mineral rights, has to be based on the value of the right granted e.g. a right to extract minerals by way of license, lease etc. and the value of such right, on which alone such levy should operate.

A42. Extrapolating from the proposition established above, it clearly follows that a tax on mineral rights must relate to the grant of the concession/lease (i.e., the right to mine/extract/win the mineral), and cannot relate to a tax on the minerals itself. Therefore, it will be a tax on mineral bearing land itself or a tax on the right, concession, lease, and not a tax on minerals itself.

A43. All of the above is without prejudice to the overarching argument that the legislative power of the States under Entry 50, List II stands fully denuded by virtue of the MMDR Act, 1957, i.e., by both the declaration in Sec. 2 as well as the specific provisions, particularly Sec. 9A.

i. Lastly, without prejudice, and in the alternative, assuming without conceding that the States can tax "mineral rights", in any event, the States would not have the competence to levy "fees" on minerals / mineral rights for the simple reason that the once the main subject matter of "mines and mineral development" referable to Entry 23, List II is excluded from the States' domain by virtue of the Parliamentary declaration under Entry 54, List I, then the corresponding power of the States to levy fees under Entry 66, List II vanishes.

A44. Lastly, it is submitted, without prejudice, that in any event, even if this Hon'ble Court were to hold that the States would have the power to tax "mineral rights", this Hon'ble Court may clarify that the power to levy fees with respect to any

subject to relating to "mines", "minerals" or "mineral rights" does not lie with the States.

A45. That this is for the simple reason that the power of the States to levy fees with respect to any subject matter enumerated in List II flows from Entry 66, List II. Since the entire legislative power of the States with respect to mines and mineral development under Entry 23, List II stands denuded by virtue of the Parliamentary declaration referable to Entry 54, List I, the corresponding power of the States to levy fees under Entry 66, List II also vanishes.

A46. This is fortified by the categorical finding in both ***Hingir Rampur*** (*supra*) and ***MA Tulloch*** (*supra*) that the entire field of mine and minerals is taken over by the Centre and Entry 23 of List II, thus, effectively stands effaced.

A47. In ***Hingir Rampur*** (*supra*), though rendered in the context of a 1952 legislation by the Orissa Legislature, vis-à-vis the MMRD Act, 1948, noted that it was beyond dispute that after the enactment of the MMDR Act, 1957, a State could not levy a fee relatable to Entry 23 of List II [***5JJ***, para. 24 **@ Pg. 142 at 155, Vol. V**]:

> "24. <u>The next question which arises is, even if the cess is a fee and as such may be relatable to Entries 23 and 66 in List II its validity is still open to challenge because the legislative competence of the State Legislature under Entry 23 is subject to the provisions of List I with respect to regulation and development under the control of the Union; and that takes us to Entry 54 in List I.</u> This Entry reads thus: "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". The effect of reading the two Entries together is clear. The jurisdiction of the State Legislature under Entry 23 is subject to the limitation imposed by the latter part of the said Entry. **If Parliament by its law has declared that regulation and development of mines should in public interest be under the control of the Union, to the extent of such declaration the jurisdiction of the State Legislature is excluded.** In other words, if a Central Act has been passed which contains a declaration by Parliament as required by Entry 54, and if the said declaration covers the field occupied by the impugned Act the impugned Act would be ultra vires, not because of any repugnance between the two statutes but because **the State Legislature had no**

> **jurisdiction to pass the law.** The limitation imposed by the latter part of Entry 23 is a limitation on the legislative competence of the State Legislature itself. **This position is not in dispute.**"
>
> [Emphasis added]

A48. In ***M.A. Tulloch*** (*supra*) this was directly in issue, and was accordingly addressed as follows [***5JJ***, para. 15 **@ Pg. 278 at 290, Vol. V**]:

> "15.…It is, no doubt, true that technically speaking the power to levy a fee is under the entries in the three lists treated as a subject-matter of an independent grant of legislative power, but whether it is an incidental power related to a legislative head or an independent legislative power it is beyond dispute that in order that a fee may validly be imposed the subject-matter or the main head of legislation in connection with which the fee is imposed is within legislative power. The material words of the Entries are: "Fees in respect of any of the matters in this List." It is, therefore, a prerequisite for the valid imposition of a fee that it is in respect of "a matter in the list". If by reason of the declaration by Parliament the entire subject-matter of "conservation and development of minerals" has been taken over, for being dealt with by Parliament, thus depriving the State of the power which it theretofore possessed, it would follow that the "matter" in the State List is, to the extent of the declaration, subtracted from the scope and ambit of Entry 23 of the State List. **There would, therefore, after the Central Act of 1957, be "no matter in the List" to which the fee could be related in order to render it valid**."
>
> [Emphasis added]

A49. On the consequence flowing from the above, with respect to the power to impose fees, the comments of H.M. Seervai at Para 2.82 of CONSTITUTIONAL LAW OF INDIA (4th Ed., Universal) are instructive [**@Pg. 43 at 46, Vol. IV(K)**]:

> "On a plain reading of the Act, the Sup. Ct rightly held that the Central Act had evinced an intention to cover the total field and therefore the State Legislature lacked legislative competence and executive authority in respect of mines and minerals **or of any fees charged in respect of mining and mineral rights** from the time the Central Act came into force."
>
> [Emphasis added]

A50. In other words, since the States' power with respect to Entry 23, List II stands denuded by the invocation of Entry 54, List II (by virtue of the enactment of the MMDR Act and the declaration contained in Sec. 2 thereof), the State cannot press into service Entry 66, List II to impose a fee on mines, minerals or mineral rights.

ISSUE B

[RE: Q. NOS. 1 & 4]

WHAT IS THE NATURE AND CHARACTER OF ROYALTY [AND DEAD RENT] UNDER THE MMDR ACT, 1957 AND WHETHER IT IS TAX?

The Applicant submits that both royalty and dead rent are "tax" or "imposts"

a. What is a tax?

B1. That the definition of 'tax', well-accepted in Indian jurisprudence, is that provided by Latham, C.J. of the High Court of Australia in ***Matthews v. Chicory Marketing Board***, 60 CLR 263, where he stated that a tax:

> "is a **compulsory** exaction of money by **public authority** for **public purposes** **enforceable by law**, and is not for payment of services rendered"
>
> [Emphasis added]

B2. This has been consistently followed by this Hon'ble Court starting from ***Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindra Thirtha Swamiar of Shirur Mutt***, (1954) SCR 1005 [***7JJ***, para. 45 **@Pg. 32 at 56, Vol. V**] to ***Hingir-Rampur Coal Co. v. State of Orissa***, AIR 1961 SC 459 [***5JJ***, Gajendragadkar, J. majority opinion, para. 9 **@Pg. 142 at 145, Vol. V**], all the way up to the decision of the 9-judge bench in the entry-tax matter in ***Jindal Stainless Limited & Anr. v. State of Haryana & Ors.***, (2017) 12 SCC 1 [***9JJ***, para. 469 **@Pg. 2937 at 3292, Vol. V**].

B3. Art. 366(28) of the Constitution defines both "taxation" and "tax". It reads as follows:

> "(28) "taxation" includes the imposition of any tax **or impost, whether general or local or special, and "tax" shall be construed accordingly**;"
>
> [Emphasis added]

B4. This Hon'ble Court has, in ***D.G. Gose & Co. (Agents) Pvt. Ltd. v. State of Kerala & Anr.***, (1980) 2 SCC 410 [***5JJ***, para. 5 **@Pg. 68 at 78, Vol. V-A**] interpreted 'tax' under Art. 366(28) in the widest sense.

B5. Subsequently, in ***Jindal Stainless*** (*supra*), this Hon'ble Court had quoted with approval the decision in ***CIT v. McDowell & Co. Ltd.***, (2009) 10 SCC 755 [***2JJ***, para. 21 **@Pg. 328 at 336, Vol. V-C**], for the proposition that tax is a specie of the genus 'impost', which is the expression found in Art. 366(28) of the Constitution. This Hon'ble Court in ***McDowell*** (*supra*) had held:

> "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:
>
> 1. The power to tax is an incident of sovereignty.
> 2. "Law" in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.
> 3. The term "tax" under Article 265 read with Article 366(28) **includes imposts of every kind viz. tax, duty, cess or fees.**
> 4. 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 added]

B6. This principle that 'taxes' and 'fees' qualify as a class of 'imposts' has also subsequently found approval in the decision of this Hon'ble Court in ***Tata Iron & Steel Company Limited v. State of Bihar & Ors.***, (2018) 12 SCC 107 [***2JJ***. para. 18-20 **@Pg. 72 at 77, 78, Vol. V(G)]**

B7. Hence, to conclude, a 'tax' is a kind of an 'impost' which is an incident of sovereignty, which is compulsory by nature, is required to be imposed by law, used for general public revenue, and is capable of *being enforced*.

b. What is the nature of royalty (and dead rent) under the MMDR Act, 1957

B8. The concepts of both 'royalty' and 'dead rent' in a mining lease arising under Sec. 9 and Sec. 9A of the MMDR Act, 1957, respectively, have been best explained by this Hon'ble Court in ***D.K. Trivedi & Sons v. State of Gujarat***, 1986 (Supp) SCC 20 [***2JJ***, para. 39 **@Pg. 995 at 1029, Vol. V**]:

> "39. In a mining lease the consideration usually moving from the lessee to the lessor is the rent for the area leased (often called surface rent), dead rent and royalty. **Since the mining lease confers upon the lessee the right not merely to enjoy the property as under an ordinary lease but also to extract minerals from the land and to appropriate them for his own use or benefit, in addition to the usual rent for the area demised, the lessee is required to pay a certain amount in respect of the minerals extracted proportionate to the quantity so extracted. Such payment is called "royalty".** It may, however, be that the mine is not worked properly so as not to yield enough return to the lessor in the shape of royalty. **In order to ensure for the lessor a regular income, whether the mine is worked or not, a fixed amount is provided to be paid to him by the lessee. This is called "dead rent". "Dead rent" is calculated on the basis of the area leased while royalty is calculated on the quantity of minerals extracted or removed.** Thus, while dead rent is a fixed return to the lessor, royalty is a return which varies with the quantity of minerals extracted or removed. Since dead rent and royalty are both a return to the lessor in respect of the area leased, looked at from one point of view dead rent can be described as the minimum guaranteed amount of royalty payable to the lessor but calculated on the basis of the area leased and not on the quantity of minerals extracted or removed."
>
> [Emphasis added]

B9. Thus, royalty is a payment imposed under Sec. 9 on the 'extracted' minerals, whereas dead-rent is a payment imposed under Sec. 9A for merely holding the mining lease area. In other words, royalty is an exaction on 'minerals' since it is dependent on the quantity of extraction of minerals, whereas dead rent is an exaction on 'mineral rights', since it is dependent on the very grant of the concession/the right to mine, i.e., the lease itself.

B10. Notably, under the MMDR Act, 1957, both royalty and dead rent are capable of being enforced / recovered as arrears of land revenue in terms of Sec. 25 i.e., by use of coercive measures under law. Such enforcement squarely brings these imposts within the scope of Art. 366(28).

B11. It is also worth pointing out that the ***rate*** of royalty is also fixed by Parliament in the Second Schedule of MMDR Act, 1957, and is not subject to any negotiation or consultation between the lessor and the lessee.

B12. Similarly, the ***rate*** of dead rent is also fixed by Parliament in the Third Schedule of the MMDR Act, 1957 based on the size (acreage) of the lease, and is also not subject to any negotiation or consultation between the lessor and lessee.

B13. Hence, it is clear that:

i. Royalty (and dead rent) is a compulsory impost under a statute, and not a result of negotiations leading to a contractual agreement.
ii. It is unilateral – the mining lessee has no say in its determination.
iii. The rate of royalty is fixed by the Parliament in the Second Schedule to the MMDR Act, 1957 and can be varied or amended by the Central Government (subject to limitations imposed by Sec. 9(3) of the MMDR Act, 1957), by a mere amendment to the Second Schedule of the MMDR Act, 1957.
iv. The rate of dead rent is also fixed by the Parliament in the Third Schedule to the MMDR Act, 1957 and can be varied or amended by the Central Government (subject to the limitations imposed by Sec. 9A(2) of the MMDR Act, 1957.
v. Their recovery is capable of being enforced by coercive methods under law (*See Sec. 25 and 21(5) of MMDR Act, 1957*).

m. Hence, it is submitted that royalty (as well as dead rent) meet all the requirements of a "tax" or at least an "impost", as laid down by Latham, CJ in ***Chicory Marketing Board*** (*supra*), and is well accepted in Indian law.

B14. Seen in this light, royalty under Sec. 9(1) of the MMDR Act, 1957 and dead rent under Sec. 9A of the MMDR Act, 1957 both qualify as a special tax (or a special impost) under Art. 366(28) of the Constitution (as held by Sinha, J. in his dissent in ***Kesoram*** (*supra*) [***5JJ***, para. 430 **@Pg. 2020 at 2217, Vol. V**).

c. *Incorrect to characterise royalty as consideration or share in income*

B15. Royalty imposed under Sec. 9(1) of the MMDR Act, 1957 ought not to be conflated with the concept of royalty as consideration/share of income such as in the case of use of intellectual property such as music, artworks etc. Such royalty would be determined through negotiations between contracting parties, which is clearly not the case for reasons already enumerated above.

B16. Royalty in its very essence, as per Sec. 9, is based on "removal" or "consumption" of minerals. Although the terms "removal" and "consumption" are not defined in the MMDR Act, 1957, they are linked closely to the terms "production" and "dispatch" defined in Section 3(aa) and 3(fa) of the MMDR Act, 1957:

> "(aa) "dispatch" means the **removal** of minerals or mineral **products** from the leased area and **includes the consumption** of minerals and mineral **products** within such leased area"
> (fa) "production" or **any derivative of the word "production"** means the winning or raising of mineral within the leased area **for the purpose** of processing or **dispatch**"
>
> [Emphasis added]

B17. Therefore, royalty clearly is a tax (being an impost) levied on extraction or production of minerals, which makes it akin to an excise duty. A 9-judge bench of this Hon'ble Court in ***Re: S. 20(2), Sea Customs Act***, AIR 1963 SC 1760 [**9*JJ***, para. 22-23 **@Pg. 2 at 17, Vol. V(G)]**] held in the context of a duty of excise:

> "22. It is next urged on behalf of the States that even if Art. 289(1) only exempts the property of the States from tax directly on property, the levy of excise on goods under item 84 of List I is a tax on property and therefore no excise can be levied on goods belonging to States and manufactured by them. It is further urged that duties of customs including export duties under item 83 of List I are equally duties on the goods imported or exported and therefore the property of the State must be

exempt under Art. 289(1), both from excise duties and from duties of customs including export duties. This raises the question of the nature of duties of excise and customs. This question with respect to excise duties was considered by this Court in the case of *Amalgamated Coalfields Ltd. v. Union of India*. After considering the previous decisions of the Federal Court *In re. The Central Provinces and Berar Sales of Motor and Lubricant Taxation Act* (1939 F.C.R. 18); *The Province of Madras v. M/s. Budhu Paidanna* (1942 F.C.R. 90) and of the Judicial Committee of the Privy Council in *Governor General in Council v. Province of Madras* (1945 F.C.R. 179), this Court observed as follows at p. 1287:-

> With great respect, we accept the principles laid down by the said three decisions in the matter of levy of an excise duty and the machinery for collection thereof. **Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country**. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience."

23. This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. **Therefore, though both excise duty and sales-tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale**. In neither case therefore can it be said that the excise duty or sales tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on - economics and are to be distinguished from direct taxes like taxes on property and income."

[Emphasis added]

B18. The nature of royalty is therefore akin to that of an excise duty inasmuch as the taxable event is "production" of minerals. In this sense, royalty is very much an impost on minerals directly and not a tax or an impost on "mineral rights". Wanchoo J. in his dissent ***Hingir-Rampur*** (*supra*) [***5JJ***, para. 53, **@Pg. 142 at 172, Vol. V**] has also, on this basis, noted that royalty is akin to an excise duty:

> "53. The next contention on behalf of the State of Orissa is that if the cess is not justified as a fee, it is a tax under Item 50 of List II of the Seventh Schedule. Item 50 provides for taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development. This raises a question as to what are taxes on mineral rights. Obviously, taxes on mineral rights must be different from taxes on goods produced in the nature of duties of excise. If taxes on mineral rights also include taxes on minerals produced, there would be no difference between taxes on mineral rights and duties of excise under Item 84 of List I. A comparison of Lists I and II of the Seventh Schedule shows that the same tax is not put in both the Lists. Therefore, taxes on mineral rights must be different from duties of excise which are taxes on minerals produced. The difference can be understood if one sees that before minerals are extracted and become liable to duties of excise somebody has got to work the mines. The usual method of working them is for the owner of the mine to grant mining leases to those who have got the capital to work the mines. There should therefore be no difficulty in holding that taxes on mineral rights are taxes on the right to extract minerals and not taxes on the minerals actually extracted. Thus 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.** It is said that there may be cases where the owner himself extracts minerals and does not give any right of extraction to somebody else and that in such cases in the absence of mining leases or sub-leases there would be no way of levying tax on mineral rights. It is enough to say that these cases also, rare though they are, present no difficulty. […] There would be no difficulty where an owner himself works the mine to value the mineral rights on the same principles on which leases of mineral rights are made and then to tax the royalty which, for example, the owner might have got if instead of working the mine himself he had leased it out to somebody else. There can be no doubt therefore that taxes on mineral rights are taxes of this nature and not taxes on minerals actually produced. Therefore the present cess is not a tax on mineral rights; it is a tax on the minerals actually produced and can be no different in pith and substance from a tax on goods produced which comes under Item 84 of List I, as duty of excise."
>
> [Emphasis added]

B19. That royalty is a "share" in the value of the minerals was a view propounded by the Gujarat High Court in ***Saurashtra Cement & Chemical Industries Ltd. v. Union of India***, AIR 1979 Guj 180 [***2JJ***. **@Pg. 119, Vol. V(B)**], and the same came to be approved in ***Kesoram*** (*supra*) [***5JJ***, para. 63, **@Pg. 2020 at 2114, Vol. V**] in the following terms:

> "63. A Division Bench of the Gujarat High Court in *Saurashtra Cement & Chemical Industries Ltd. v. Union of India* emphatically said: (AIR p. 184, para 7): 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 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. It is not compulsory because anyone who consumed must pay its price. If he does not want to pay the price, he may not apply for a mining lease.** Royalty which is a share of the owner of the a minerals - the Union - won by the lessee from the soil with the authority of the Union can never be said to be an imposition on the holder of a mining lease.
>
> [Emphasis added]

B20. However, the underlying logic of this reasoning is, it is respectfully submitted, patently erroneous, inasmuch as, the choice of whether or not to undertake mining operations by obtaining a mining lease cannot possibly take away the character of royalty as a tax, for the reason that this 'choice' is available with respect to all indirect taxes. One may or may not buy goods, and may or may not avail services, but that cannot possibly make the indirect taxes that would otherwise follow, something other than a tax.

B21. With respect to royalty, the INDIAN BUREAU OF MINES' REPORT ON MINERAL Royalties dated January, 2011, itself acknowledges that royalty is a tax [**@ Pg. 4109 Vol. IV**]:

> "Royalty in strict sense and in common parlance may not be a tax… **royalty can be viewed as a kind of tax** linked either directly or indirectly to the intrinsic economic value of a mineral realised through sale by the lessee. [Chapter 2 **@ Pg. 4117-4118 Vol. IV**]
>
> "'Royalty' on mines and minerals **cannot be a fee but a levy of the nature of a tax**. Royalty on minerals should be taken as an imposition of a tax or impost and would come under the definition given in Art. 366, C1.(28) of the Constitution. [Chapter 2 **@ Pg. 4119 Vol. IV**]

> […] Royalty is the payment of tax to the Government for the (owner) mineral right for the privilege granted by him for mining and producing/dispatching of minerals." [Chapter 5 **@ Pg. 4133 Vol. IV**]
>
> "In terms of Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 the holder of mining lease shall pay royalty in respect of any mineral removed/consumed. The Central Government can enhance or reduce the rate at which the royalty shall be payable provided the rate cannot be enhanced more than once in a period of 3 years. **Thus the royalty on coal is a tax** which is imposed by the Central Government but collected and appropriated by the State Government where coal production takes place." [Chapter 6 **@ Pg. 4140 Vol. IV**]
>
> [Emphasis added]

B22. In ***K.P. Varghese v. ITO***, (1981) 4 SCC 173, it was held that the views of an authority charged with administering a statute is relevant for the purposes of interpretation. In this case, the views of the IBM, which is charged with the task of ensuring systematic, orderly and scientific mining under Sec. 5 of the MMDR Act, would thus be a valid aid to interpretation.

B23. The status of 'royalty' as a special kind of indirect tax is also acknowledged in the Working Paper No. WP/01/139 dated September 2001, published by the International Monetary Fund, titled 'A Primer on Mineral Taxation' [**@ Pg. 8 at 10, Vol. IV(K)**]:

> "**Indirect tax instruments**
> **Royalties**
> Royalties have historically been the most important instrument for **taxing mineral extraction**. These are attractive to the government, because they ensure an up-front revenue stream as soon as production starts. A royalty can also be regarded as a factor payment for the extraction of the mineral resource similar to factor payments on capital and labour inputs (Comad et al, 1 990)."
>
> [Emphasis added]

B24. It is well-settled that the view normally taken by the experts, authorities or persons usually concerned by a term can be used as an external aid to interpretation. See ***CIT v. Punjab Stainless Industries***, (2014) 15 SCC 129, [***2JJ***, para 8].

B25. Describing royalty as consideration or share in income, as sought to be argued by the various State Governments is, therefore, incorrect. In fact, a correct example of a levy in the nature of consideration / share in income under the MMDR Act, 1957 is the concept of Applicable Amount / Bid Premium introduced in the MINERAL (AUCTION) RULES, 2015 after the 2015 Amendment to the MMDR Act, 1957, which introduced the auction regime in the mines and minerals sector. The relevant provisions of the MINERAL (AUCTION) RULES, 2015 are as follows: [**@ Pg. 2176 at 2183, Vol. IV**]

> "**8. Bidding parameters**
>
> ***
>
> "(3) Bidders shall **quote**, as per the bidding parameter, for the purpose of payment to the State Government, a percentage of value of mineral despatched equal to or above the reserve price and the successful bidder shall pay to the State Government, an amount equal to the product of, -
>
> I. percentage so quoted; and
>
> II. value of mineral despatched"
>
> ***
>
> **13. Payments under mining lease.**
>
> ***
>
> "(2) The lessee shall pay the applicable amount quoted under rule 8 to the State Government on a monthly basis"
>
> [Emphasis added]

B26. The aforesaid payment, now paid by all leases acquired under auction, is referred to as Bid Premium / Applicable Amount, and is a payment the lessees make in addition to royalty and dead-rent under the MMDR Act, 1957. The said payment is consensual, based on the bidders own quotation and is enforced in terms of a Mine Development and Production Agreement signed with the State Government under Rule 10(4) of the MINERAL (AUCTION) RULES, 2015. The said payment is a clear example of consideration / share in revenue, as opposed to royalty (and dead rent), which is a compulsory impost.

B27. Another argument taken by the States is that since royalty would also be payable to private owners of mineral bearing land, it can't be characterised as tax. This contention of the States is based on the judgment of ***Threesiama Jacob v. Geologist, Department of Mining & Geology***, (2013) 9 SCC 725 [***3JJ***, para. 55-

58, **@Pg. 831 at 857-858, Vol. V-A**], which rendered such a finding only after noticing the absence of any provision in the applicable Kerala land revenue law (the Board Standing Resolution No. 10 of 1888) declaring the ownership of minerals underneath to vest with the State [***3JJ.***, para 35-36, **@Pg. 831 at 849-850, Vol. V-A**]. That in this regard, it is pertinent to point out that while it is true that the MMDR Act, 1957 contemplates cases of mineral-bearing land vested with private persons, the same is a relic of the pre-Constitutional position. This situation has changed with the land reforms legislations passed by the vast majority of States after Independence, which have resulted in abolition of ex-intermediaries' estates, and vesting of such estates with the Government. The exception cannot be permitted to define the character of the levy.

B28. It is further submitted that cases of royalty payable to private lessors (limited as they may be) would in any case have to be treated differently for two very strong reasons:

a. Sec. 25 [(and also Sec. 21(5)] i.e., the recovery provisions would not be available to private lessors (thereby changing the very character of royalty payable, as being incapable of enforced by law) [**@Pg. 910 at 974, 975, 978, 979, Vol. IV**].

b. The grant of mining leases /concessions by private persons is not unqualified, and subject to prior authorisation by the Government under Rule 27 of the MINERALS (OTHER THAN ATOMIC & HYDRO CARBONS ENERGY MINERALS) CONCESSION RULES, 2016.

d. *Even if royalty a tax on minerals, dead-rent is undoubtedly a tax on mineral rights*

B29. All of the levies imposed under the MMDR Act, 1957, i.e., royalty (Sec. 9), dead-rent (Sec. 9A), and DMF (Sec. 9B) qualify as an impost under Art. 366(28). However, even on a restrictive meaning of the word 'tax', Sec. 9A would squarely occupy the field of tax on mineral rights.

B30. Dead-rent is imposed for merely holding a mining lease, whether or not mining operations are actually undertaken, and it is, hence, a tax on mineral rights. Dead-rent is akin to what is called an 'idling charge' in the context of works contracts involving expensive machinery. Here, it is the natural resource i.e., the minerals, which cannot be left idle. Thus, the legislative intendment is that a lessee must endeavour to continuously undertake mineral development.

B31. The meaning of mineral development can be best discerned (apart from Sec. 18) from the Statement of Objects and Reasons of the 1972 Amendment to the MMDR Act, 1957 [para. 3 **@Pg. 910 at 916, Vol. IV**], which introduced the concept of 'dead-rent' into the statute, which was until then a mere covenant in the lease deed i.e., Form K of MINERAL CONCESSION RULES, 1960 [**@Pg. 1586 at 1644, Vol. IV**]. This amendment also introduced Sec. 4A, giving the Central and State Governments the power to terminate a lease and take over the operations of a lease that is not being worked upon. The SOR noted that Sec. 4A was being introduced "*so as to enable mineral development of that area by a government company or corporation*".

B32. Hence there can be no manner of doubt that Sec. 9A was introduced to further mineral development and is in the nature of a tax on mineral rights, thus qualifying as the limitation contemplated in Entry 50, List II, even in its narrowest sense.

e. Royalty obviously not a fee

B33. For clarity and abundant caution, it is necessary to also state that royalty cannot be characterised as a fee. Two factors that would necessarily lead to the conclusion that a royalty is not a fee but a tax are that:

1. It is not employed for any specific purpose, and
2. Is for most minerals (like iron ore) imposed *ad valorem*.

B34. Both these aspects, i.e., (i) is not employed for a specific purpose; and (ii) is imposed *ad valorem*, have been held by a constitution bench of this Hon'ble

Court in ***Corp. of Calcutta v. Liberty Cinema***, AIR 1965 SC 1107 [***5JJ***, para. 49, **@Pg. 311 at 335, Vol. V**] to be indicators of an impost being a tax rather than a fee.

B35. In fact, levies imposed to augment 'general public revenue' and applied towards public welfare schemes have been expressly held to not qualify as a fee and are instead considered to be taxes *vide* ***P.M. Ashwathanarayana Setty v. State of Karnataka***, 1989 Supp (1) SCC 696 [***3JJ***, para. 35 **@Pg. 1117 at 1133, Vol. V**], and ***Secretary, Govt. of Madras v. Zenith Lamp*** (1973) 1 SCC 162 [***5JJ***, para. 31, **@Pg. 550 at 558, Vol. V**].

B36. Further, although the conception of *quid pro quo* as a *sine qua non* for characterisation as a fee has been watered down, two requirements continue to subsist as held by this Hon'ble Court in ***Jalkal Vibhag Nagar Nigam v. Pradeshiya Industrial and Investment Corporation & Anr.***, (2021) 20 SCC 657 [***3JJ***, para. 61-66 **@Pg. 82 at 113-117, Vol. V(G)**]

1. The payers of a fee must receive some special benefit, even if not individually, but at least as part of a class, and
2. There must be a broad correlation between the levy of fee and the services rendered.

B37. Clearly, assessees of royalty do not receive any special benefit or as members of a definable class. Rather, the proceeds of royalty are used by the States towards general augmentation of revenue. Hence, it is clear that royalty cannot be characterised as a fee.

B38. Lastly, at the cost of repetition, it is of immense significance that all (Sec. 9, 9A, 9B) but one (Sec. 9C) of the levies under the MMDR Act, 1957 are to be paid by lessees to the State Government. Hence, any suggestion that the States would be deprived of revenue if this Hon'ble Court were to hold that the field in Entry 50, List II, now rests with the Centre, is wholly misplaced.

C. Submissions as to why *Kesoram Industries* is wrongly decided; erroneously distinguishes and/or treats *India Cement* as erroneous; could not have even decided the case in hand at *Kesoram Industries* but ought to have referred to a larger bench and, finally, deserves to be overruled and *India Cement* restored:

C.1 The discussion hereafter will cover Issue No.5 and to some extent Issue No.1 as framed by the referring bench to the 9 judge bench.

C.1.1 Admittedly, since ***Kesoram Industries*** was a bench of 5 judges, it could not depart from the holding in ***India Cement***, which was the bench of 7 judges, even if the ***Kesoram Industries*** bench was of the view that ***India Cement*** has been erroneously decided.

C.1.2 It is axiomatic that smaller benches of the Hon'ble Supreme Court, when they differ with larger benches, must necessarily refer the issue to a larger bench and not decide itself as a smaller bench.

Ironically, this principle has been elaborated by a Constitution Bench speaking through Lahoti, CJ. the author of the ***Kesoram Industries*** constitution bench judgment.

In ***Central Board of Dawoodi Bohra Community v. State of Maharashtra***, (2005) 2 SCC 673, in *Para 12*, the constitution bench expressly held that the decision of the larger bench of this Hon'ble Court is binding on subsequent benches of this Court which have a co-equal or smaller forum. The relevant extract from the said para reads as below:

> *"12. [...] (1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.*
>
> *(2)* ***A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum****. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted."*

[Emphasis added]

C.1.3 Admittedly, ***Kesoram Industries*** did not in any manner refer the issue and directly decided the issue itself and, what is worse, with so by attributing error to the 7 judge

India Cement bench *(see paras 56 to 71 of* ***Kesoram Industries****)*. This is the **first** and the substantial error of ***Kesoram Industries***.

C.2 The **second** error of ***Kesoram Industries*** is that, astonishingly, but effectively, ***Kesoram Industries*** has said in Para 71 (whole *Para* but especially the second half of the said *Para*) that while ***India Cement*** meant and intended to hold that "royalty is not a tax", the 7 judge bench in ***India Cement*** held that "royalty is a tax", due to an inadvertent "typographical error", due, according to the ***Kesoram Industries*** constitution bench.

C.2.1 This supposed error attributed to ***India Cement*** by ***Kesoram Industries*** is found in *Para 34* of ***India Cement***, which para in its entirety is reproduced below:

> *"34. In the aforesaid view of the matter, we are of the opinion that* ***royalty is a tax****, and as such a cess on royalty being a tax on royalty, is beyond the competence of the State legislature because Section 9 of the Central Act covers the field and the State legislature is denuded of its competence under Entry 23 of List II. In any event, we are of the opinion that cess on royalty cannot be sustained under Entry 49 of List II as being a tax on land. Royalty on mineral rights is* ***not a tax on land*** *but a payment for the user of land."*
>
> [Emphasis added]

Without further elaboration and investigation, it is at least textually clear that *Para 34* of *India Cement* as quoted above is unequivocal, unambiguous and does not, at least facially, reflect any such error including no "typographical error".

C.2.2. Furthermore, a fuller reading of *Para 34*, in particular the last sentence would show that if it was not the intention of the bench in ***India Cement*** to hold that royalty is a tax, there was no occasion for it to clarify that it is not a tax on land.

C.2.3. That this was not a typographical error is also evident from para 26 of ***India Cement***, [**@Pg. 1151 at 1166, Vol. V**] and in particular the following passage, which would be pointless unless royalty was being regarded as a tax:

> *"26.….Here also the extent to which regulation of mines and mineral development under the control of the Union is declared by Parliament by law to be expedient in the public interest, to the extent such legislation makes provisions* ***will denude the State legislature of its power to override the provision under Entry 50 of List II****. In view of the Parliamentary legislation under Entry 54, List I and the declaration made under Section 2 and provisions of Section 9 of the Act, the State legislature would be overridden to that extent. Section 2 declares that it is expedient in the public interest that Union should take under its control the regulation of mines and the development of minerals to the extent provided therein."*
>
> [Emphasis added]

C.3 The **third** error of ***Kesoram Industries*** is that, on its own terms, it is internally contradictory and therefore erroneous.

C.3.1 The reason for this is that ***Kesoram Industries*** itself accepts in Para 54 that the judgment of Mysore[2] High Court was approved in ***India Cement***.

C.3.2 In actual fact, two judgments with almost identical ratio were cited and approved specifically by ***India Cement*** in Paras 27 and 28, the former approving the Mysore judgment[1] as rightly quoted by ***Kesoram Industries*** and also approving another judgment of the Patna High Court[3]. Both, Mysore and Patna, in essence, held that "royalty is a tax" as is evident in Para 27 and 28 of the ***India Cement***. However, the Patna judgment was not even mentioned to the ***Kesoram Industries*** constitution bench.

C.3.3 Consequently, it is self-evident that once ***Kesoram Industries*** in Para 54 finds that a High Court judgment (Mysore High Court) holds that "royalty is a tax" and also finds that it is approved by a 7 judge bench, it could not and should not have held as it did in Para 71 that ***India Cement*** actually intended to hold that "royalty is not a tax" but by inadvertent error held that "royalty is a tax". Clearly, ***Kesoram Industries*** is erroneous on this conclusion because ***India Cement*** at great length was citing two High Courts in consecutive Paras in Para 27 and 28 both of which held that "royalty is a tax" and approving both High Courts. No question of inadvertent or "typographical error" or any other error could arise in the context of the unambiguous language found in Paras 27 and 28 of ***India Cement***.

C.4 The **fourth** error of ***Kesoram Industries*** is to refer to and rely upon four other High Court judgments[4], listed in the Footnote below, arising from the High Courts of Rajasthan, Punjab & Haryana, Gujarat and Orissa, all of which undoubtedly held that "royalty is not a tax". They are noted in Para 69 of ***Kesoram Industries***.

C.4.1 Equally and incontrovertibly, these same four High Court judgments have been cited in Para 31 of ***India Cement***.

C.4.2 The fundament error of ***Kesoram Industries*** is to treat the mere citation of these four judgments in Para 31 of ***India Cement*** as approval of the ratio of these four judgments.

[2] ***Laxminarayana Mining Co. v. Taluk Development Board***, AIR 1972 Mys 299.

[3] ***L. Mal v. State of Bihar***, AIR 1965 Pat 491.

[4] ***Bherulal v. State of Rajasthan***, AIR 1956 Raj 161; ***Dr. S.S. Sharma v. State of Punjab***, AIR 1969 P&H 79; ***Saurashtra Cement and Chemical Industries Ltd. v. Union of India***, AIR 1979 Guj 180; ***L.N. Agarwalla v. State of Orissa***, AIR 1983 Ori 210.

C.4.3 This is far from true and yet this clear error is found in Para 69 of ***Kesoram Industries***. The reason that the latter is patently erroneous is because a bare reading of Para 31 of ***India Cement followed after a couple of Paras in Para 34 of India Cement, makes it unambiguously clear that India Cement was barely noting a contrary line of divergent authority arising from four High Courts and was in fact overruling these four High Court as is unambiguously reflected in Para 34 of India Cement.***

C.4.4 In a nutshell therefore, ***Kesoram Industries*** followed a principle directly contrary to ***India Cement***, in that ***India Cement*** approved two High Courts (Mysore and Patna) in footnotes 1 & 2 of this note as laying down correct law to the effect that "royalty is a tax" which ***Kesoram Industries*** ignored. Conversely, while ***India Cement*** (in Para 31 and 34) specifically overruled the principle of the four High Courts that "royalty is not a tax", ***Kesoram Industries*** adopted it (in Para 69).

C.5 The **fifth** fundamental error of ***Kesoram Industries*** is to hold that the entire ratio of 7 judges in ***India Cement*** to the effect that "royalty is a tax" is erroneous for the simple reason that the only issue arising in ***India Cement*** was an issue of cess on royalty and no issue of royalty being or not being a tax arose in ***India Cement*** and hence ***India Cement*** should be restricted only to cases of cess on royalty (see: Para 57 of ***Kesoram Industries***).

C.5.1 Unfortunately, this conclusion generates the core error of the ***Kesoram Industries*** constitution bench. No doubt the issue as formulated in ***India Cement***, *inter alia,* in Para 1, 3 and 11 was one of levy of cess on royalty and whether the same is within the competence of State Legislatures under Entries 49 and 50 of List II.

C.5.2 The matter does not end there and in fact it is misleading to limit ***India Cement*** to the mere reference to cess found in these Paras. As early as Para 11 of ***India Cement***, it is clear that the 7 judge bench is fully cognizant of the core issue being whether cess so-called amounts to additional royalty, thereby making it royalty on royalty which, ***India Cement*** ultimately holds amounts to tax on royalty. Hence the reference to cess in ***India Cement*** in no manner changes the nature of the issue of the disputes which arose because the cess on royalty was held by ***India Cement*** to constitute a tax on royalty and hence all the subsequent Paras of ***India Cement*** lay down the correct ratio to the effect that tax on royalty cannot fall under Entries 49 and 50 of List II and would be covered by the Union List.

C.5.3 Further, evidence of the established jurisprudence that cess is nothing but another form of tax and is indeed synonymous with tax is found in Para 19 of ***India Cement*** which quotes the well-known constitution bench judgment in ***Guruswamy*** [5], which is reproduced below from ***India Cement***:

> *"19. Here, we are concerned with cess on royalty. One can have an idea as to what cess is, from the observations of Hidayatullah, J., as the learned Chief Justice then was, in Guruswamy & Co. v. State of Mysore [(1967) 1 SCR 548 : AIR 1967 SC 1512] where at page 571, the learned Judge observed :*
>
> > *"The word 'cess' is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess etc.) indicates. When levied as an increment to an existing tax, the name matters not for the validity of the cess must be judged of in the same way as the validity of the tax to which it is an increment."***
>
> [Emphasis added]

It is crystal clear both from ***Guruswamy*** quoted above and from ***India Cement*** which approves ***Guruswamy*** that cess is nothing but a tax and if cess is nothing but a tax then cess on royalty becomes a tax on royalty, which is precisely what ***India Cement*** held to be beyond the legislative competence of the State Legislature. **It may be clarified that the aforesaid quoted observation was made by Hidayatullah, J. (as his Lordship then was) in his dissenting judgment, but there was no dissent on this aspect of the matter, as noted in Para 20 of *India Cement*.**

C.5.4 Further evidence of the foregoing is available when the equation between the parties as drawn in ***India Cement*** is understood by reference to Para 29 and 30 of ***India Cement***. In these two Paras, in a nutshell, the 7 judges of ***India Cement***:

a. Overruled an old constitution bench judgment in ***H.R.S. Murthy***[6];

b. Noted the ratio of ***HRS Murthy*** as follows "it is clear that the land cess is in truth a "tax on lands" within Entry 49 of the State List" and

c. ***India Cement*** in Para 30 went on to hold that, *inter alia*, in view of the bar in the MMDR Act against repeated, periodic enhancement of royalty, the cess on royalty constituted a tax and such tax on royalty would be *ultra-virus* the competence of the State Legislature.

[5] ***Guruswamy & Co. v. State of Mysore***, (1967) 1 SCR 548.
[6] ***H.R.S. Murthy v. Collector of Chittoor***, AIR 1965 SC 177.

C.5.5 Furthermore, the ***Kesoram Industries*** assumption that ***India Cement*** brought in tax on royalty inadvertently whereas the real case before ***India Cement*** was one of cess on royalty is completely demolished by the clear findings in ***India Cement*** in Para 34 which reads as follows:

> *"34. In the aforesaid view of the matter, we are of the opinion that royalty is a tax, and as such a cess on royalty being a tax on royalty, is beyond the competence of the State legislature because Section 9 of the Central Act covers the field and the State legislature is denuded of its competence under Entry 23 of List II. In any event, we are of the opinion that cess on royalty cannot be sustained under Entry 49 of List II as being a tax on land. Royalty on mineral rights is not a tax on land but a payment for the user of land."*
>
> [Emphasis added]

The first five lines underlined above makes it clear that there was no inadvertence, omission, ignorance, error or typographical error by ***India Cement*** for the simple reason that they mention both cess on royalty and tax on royalty in the same Paragraph and proceeds to hold that since cess is nothing but a tax it amounts to a tax on royalty and it is not within State legislative competence. This Para by itself would show ***Kesoram Industries*** to reflect a patent error apparent on the face of the record.

C.5.6 The aforesaid ratio of ***India Cement*** as reflected in Para 34 (being the judgment of 6 Judges), is similarly unequivocally affirmed and elaborated in the concurring judgment of Justice Oza in Para 41 of ***India Cement***, the few relevant lines of which are quoted below:

> *"41. It is not in dispute that the cess which the Madras Village Panchayat Act proposes to levy is nothing but an additional tax and originally it was levied only on land revenue, apparently land revenue would fall within the scope of Entry 49 but it could not be doubted that royalty which is a levy or tax on the extracted mineral is not a tax or a levy on land alone and if cess is charged on the royalty it could not be said to be a levy or tax on land and therefore it could not be upheld as imposed in exercise of jurisdiction under Entry 49 List II by the State legislature."*
>
> [Emphasis added]

C.5.7 The reasoning of Oza J., quoted in Para A.9.7 above of this note, strongly endorsing and reinforcing the main judgment of Sabyasachi Mukherjee, J. in ***India Cement*** is neither dealt with nor analysed by ***Kesoram Industries*** except to recognize the existence of the concurring judgment in Para 53 of ***Kesoram Industries***.

C.6 The **sixth** error of ***Kesoram Industries*** arises from its absence of reference in Para 30 of ***Kesoram Industries*** to Entry 5 of List II, eventually invoked by the ***Kesoram***

Industries constitution bench as an additional reason to uphold the impugned legislations[7] in ***Kesoram Industries***, listed in the footnote below, as being within States' competence, when no arguments were heard and recorded in respect of said Entry 5 of List II. (Para 143 & 146 of ***Kesoram Industries***)

C.6.1 It is submitted that Entry 5 of List II would, with greatest respect, be completely irrelevant to the issues arising whether in ***India Cement*** or in ***Kesoram Industries*** or in the entire present reference to 9 judges. Entry 5 merely entrusts competence to the State Legislatures regarding various governing issues arising from local Government. Indeed, it is inconceivable that Entry 5 could exist anywhere other than the State List since it talks of local government or municipal corporations, district boards, mining settlement authorities and local authorities to promote self-governance issues qua local self-government and village administration.

C.6.2 The issues arising in Entry 5 are in fact similarly fortified by the later amendments to Part IX (dealing with Panchayats) and Part IX-A (dealing with Municipalities) introduced by the 73rd amendment of the Constitution w.e.f. 24.04.1993.

C.6.3 If the State Legislature is lacking competence under Entry 49 and/or denuded/constrained under Entry 50 of List II, it is inconceivable that it could get any field of legislation qua taxation in any manner from Entry 5, *inter alia,* by the mere reference therein "to mining settlement authorities".

C.6.4 That is the reason that Entry 5 was nowhere raised nor argued nor found mention in ***India Cement***.

C.6.5 Non-mention of Entry 5 of List II in ***India Cement*** cannot, it is respectfully submitted, in any manner whatsoever, either render ***India Cement*** *per incuriam* nor entitle anyone to say that ***India Cement*** should be ignored as being hit by an Entry 5 of List II of the Seventh Schedule.

C.7 An obvious patent error apparent on the face of the record in ***Kesoram Industries*** judgment is a statement in Para 38 to the effect that ***Hingir Rampur***[8] relied upon the ***Bombay Tyre International*** judgment[9]. This finding of ***Kesoram Industries*** in Para 38 is *ex facie* erroneous and unsustainable since ***Hingir Rampur*** was decided by a constitution bench in 1961 whereas the ***Bombay Tyre*** judgment was born in 1983.

[7] U.P. SPECIAL AREA DEVELOPMENT AUTHORITIES ACT, 1986 read with SHAKTI NAGAR SPECIAL AREA DEVELOPMENT AUTHORITY (CESS ON MINERAL RIGHTS) RULES, 1997.
[8] ***Hingir Rampur Coal Co. Ltd. v. State of Orissa***, AIR 1961 SC 459.
[9] ***Union of India v. Bombay Tyre International Ltd.***, (1983) 4 SCC 210.

C.8 In Para 58 of ***Kesoram Industries***, it has been strangely held that, "*Until the pronouncement of this court in India Cement, it has been the uniform and unanimous judicial opinion that royalty is not a tax*". This reasoning is *per se* erroneous and unsustainable because even assuming without conceding that this is true, it is not open in any manner to a 5 judge bench to refuse to follow a 7 judges bench for the reason that the 7 judge bench lays down some law for the first time, unless and until the 5 judges are able to demonstrate that law laid down by 9 judges prior to the 7 judges or after the 7 judges is to the contrary of what is held by the 7 judges. Absent such conflict which is nowhere pointed by ***Kesoram Industries*** and in fact, is nobody's case, the conclusion in Para 58 of ***Kesoram Industries*** is, *ex facie*, erroneous.

C.8.1 The same mistake is once again repeated by *Kesoram Industries* in Para 64, by reiterating that "*Suffice it to say that until the pronouncement in India Cement, nobody doubted the correctness of "royalty" not being a tax*".

C.8.2 In fact, apart from Mysore and Patna High Court, there was also a judgment of Calcutta High Court in *Ajit Kumar Gurey v. State of West Bengal*, (1964) 80 CWN 891, holding that royalty is a tax for the purposes of Art. 366(28).

C.9 ***Kesoram Industries*** is also erroneous when it partially quotes Para 34 of the Supreme Court judgment in ***Quarry Owners Association***[10]. However even this partial quotation from the ***Quarry Owners*** case relied upon by the ***Kesoram Industries*** (majority) accepts that royalty is a tax even though it may be unusual or a unique or a non-conventional tax.

C.9.1 What is worse is that the full Para 34 of ***Quarry Owners Association***[9], when quoted in Para 428 by the dissenting judgment of Sinha J. in ***Kesoram Industries*** makes it unequivocally clear that both ***Quarry Owners Association***[9] and Justice Sinha relying upon it, treated royalty as a tax. The Para 428 of ***Kesoram Industries*** is quoted herein:

> *"428. In Quarry Owners' Assn. v. State of Bihar [(2000) 8 SCC 655] it was submitted that royalty is a tax. While agreeing thereto, it was observed: (SCC pp. 683-84, Para 34)*
>
> > *"34. In considering this submission we have to keep in mind, tax on this royalty is distinct from other forms of taxes. This is not like a tax on income, wealth, sale or production of goods (excise) etc. This royalty includes the price for the consideration of parting with the right and privilege of the owner, namely, the State Government who owns the mineral. In other words, the royalty/dead rent, which a lessee or licensee pays, includes the price of the minerals which are the property of the State. Both royalty and dead rent are integral parts of a lease.*

[10] Quarry Owners Association v. State of Bihar [(2000) 8 SCC 655]

> *Thus, it does not constitute usual tax as commonly understood but includes return for the consideration for parting with its property. In view of this special nature of the subject under consideration, namely, the minerals, it would be too harsh to insist for a strict interpretation with reference to minerals while considering the guidelines to a delegatee who is also the owner of its minerals. In the present case, we are not considering any liability of tax on the assessee but whether delegation to the State by Parliament with reference to minor minerals is unbridled."*"
>
> [Emphasis added]

C.10 Additionally, the majority in ***Kesoram Industries***, at para 63 of the judgment, relies on the decision of a Division Bench of the Gujarat High Court in ***Saurashtra Cement & Chemical Industries v. Union of India***, AIR 1979 Guj 180 (AIR p. 184, para 7) to discredit the finding in ***India Cement*** to the effect that royalty is a tax. The basis of the finding in ***Saurashtra Cement*** however, need only be stated to be rejected:

> *"63. ...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 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****. **It is not compulsory** because anyone who applies for a mining lease to win minerals for being removed or consumed must pay its price.* ***If he does not want to pay the price, he may not apply for a mining lease***."
>
> [Emphasis added]

The argument that a levy loses its character as a compulsory exaction since it is only payable by those 'opting' to undertake the activity on which the levy is imposed, is patently absurd since virtually every indirect tax is only payable by the class of individuals opting for the service/ product/ activity on which such tax is levied. Simply put, the fact that a levy is only payable by those choosing to mine, does not make the levy any less of a compulsory exaction, since the act of mining automatically, mandatorily, and indiscriminately, attracts the levy - thus making it compulsory.

C. 11 It may be noted that in the process of taking a path different than ***India Cement***, ***Kesoram Industries*** in Para 70 also overruled two detailed, reasoned and well considered judgments of the Supreme Court in ***Mahalaxmi Fabric***[11] (3 judges) and another in ***Saurashtra Cement***[12] (2 judges), **one of which i.e. former, unequivocally and after detailed analysis held in Para 12 as below:**

[11] ***State of M.P. v. Mahalaxmi Fabric Mills Ltd.***, 1995 Supp (1) SCC 642.
[12] ***Saurashtra Cement and Chemical Industries Ltd. v. Union of India***, (2001) 1 SCC 91.

"12. It is true that in para 13 of the report the Constitution Bench noted the judgments of Rajasthan, Punjab and Gujarat High Courts which had taken the view that royalty was not a tax and it is equally true that it is not expressly mentioned in the judgment of the Constitution Bench that these judgments were erroneous or were required to be overruled. ***However on a conjoint reading of paras 31 and 34 of the report, it becomes obvious that the view that royalty is not a tax as expressed by these High Courts did not find favour with the Constitution Bench of this Court which took a contrary view.*** *Therefore, these judgments necessarily stood overruled, on this aspect. It is true that in the last line of para 34 it is mentioned that royalty on mineral rights is not a tax on land but a payment for use of land but these observations are in connection with Entry 49 List II which deals with a tax on land.* ***But so far as nature of royalty is concerned it is clearly ruled to be a tax by the Constitution Bench and that is the reason why the Constitution Bench reached the conclusion that any cess on the royalty would be a tax.*** *It would be beyond legislative competence of the State Legislature as Entry 50 in List II would be of no avail once Parliament has occupied the field by enacting the Act, especially Section 9 thereof.* ***The view of the Constitution Bench that royalty is a tax as found in para 34 of the report can also be supported from other paragraphs of the report. In para 23 of the report while agreeing with Mr Nariman that royalty which is indirectly connected with land cannot be said to be a tax directly on land as a unit, it has been observed that no tax can be levied or leviable if no mining activities are carried on.*** *Hence it is manifest that it is not related to land as a unit which is the only method of valuation of land under Entry 49 of List II but is relatable to minerals extracted. Royalty is payable on a proportion of the minerals extracted.* ***These observations in para 23 clearly indicate that in view of the Constitution Bench, royalty was a tax which had a nexus with mining activities meaning thereby it was a tax on mineral rights.*** *Similarly in para 27 of the report, the Constitution Bench noted with approval the decision of the Division Bench of the High Court of Mysore in Laxminarayana Mining Co. v. Taluk Development Board [AIR 1972 Mys 299 : (1972) 2 Mys LJ 362] . In that case the Court was concerned with the Mysore Village Panchayats and Local Boards Act, 1959. Under the said Act the Board had sought to levy tax on mining activities carried on by the persons holding mineral concessions. The Mysore Court had observed that once Parliament made a declaration by law that it is expedient in the public interest to make regulation of mines and minerals development under the control of the Union to the extent to which such regulation and development is undertaken by the law made by Parliament, the power of the State Legislature under Entries 23 and 50 of List II got denuded. It would, therefore, be not said that even after passing of the Central Act, the State Legislature by enacting Section 143 of the Act could confer power on the Taluk Board to levy tax on the mining activities carried on by the persons holding mineral concessions.* ***The Constitution Bench then noted that at page 306 of the report of Mysore case it was held that royalty fixed under Section 9 of the Mines and Minerals Act was really a tax. It must be kept in view that this decision of the Mysore High Court was noticed by the Constitution Bench and was not dissented from.*** *On the other hand it got approved by it. It must, therefore, be held that royalty imposed has to be treated as tax as ruled by the Constitution Bench of this Court in India Cement case [India Cement Ltd. v.*

State of T.N., (1990) 1 SCC 12] . It is no doubt true that in the later decision of this Court in Orissa Cement Ltd. v. State of Orissa [1991 Supp (1) SCC 430 : AIR 1991 SC 1676 : (1991) 2 SCR 105] a three-Judge Bench of this Court did not go into the ***question whether there was any typographical error in the judgment of the Constitution Bench as found in para 34 of its report when it held that royalty is a tax. But in view of what we have discussed above it becomes absolutely clear that there was no typographical error but on the contrary the said conclusion logically flew from the earlier paragraphs of the judgment referred to by us hereinabove.***"

[Emphasis added]

C.12 ***Kesoram Industries*** **in Para 103 quotes jurist H. M. Seervai that under Entry 54 of the Union List, Parliament can only deal with major minerals; minor minerals would remain with States. This is expressly contrary to *India Cement*, Para 32 of which observes that the full filed is covered; also contrary to Section 14 and 15 of the MMDR Act, which deals with minor minerals, which define in Section 3 of the MMDR Act. It is to be noted that minor mineral is that mineral, which the Central Government by notification declare to be a minor mineral, apart from defined minor minerals.**

C.12.1 Howsoever respected and authoritative a publication like Seervai may be, it cannot be invoked to disapply a 7 judge bench like ***India Cement*** nor to come to a conclusion directly contrary to the mandate of the MMDR Act.

C.13 Another example of patent error is Para 123 of ***Kesoram Industries***, which treats the judgment in ***Chanan Mal***[13] as that of a Constitution Bench, whereas that judgment was decided by a bench of 4 judges.

[13] ***State of Haryana v. Chanan Mal***, (1977) 1 SCC 340.